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# Investment in Subsidiaries and Equities

Comptroller's Licensing Manual

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# Investment in Subsidiaries and Equities

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# Investment in Subsidiaries and Equities

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## Introduction

Banks develop, and offer through various subsidiaries and other business entities, a wide range of products and services designed to increase profitability, improve service to customers, and respond to technological innovations and competition. These subsidiaries and other business entities include operating subsidiaries, financial subsidiaries, bank service companies, and noncontrolling interests in business entities performing bank permissible activities (subsidiaries or noncontrolling investments). This booklet describes various types of subsidiaries or noncontrolling investments that banks can establish and provides detailed guidance on permissible and incidental activities.

The Comptroller of the Currency (OCC) has created procedures and conditions for the establishment and operations of subsidiaries or noncontrolling investments. This booklet outlines these procedures and conditions.

To establish a subsidiary or make a noncontrolling investment, the OCC generally requires banks to submit an application and obtain prior approval. In some cases, banks can submit to the OCC an after-the-fact notice, when establishing or commencing new activities in subsidiaries or noncontrolling investments. This booklet contains policies and procedures to guide banks in filing these applications and notices and outlines exceptions to these requirements. It also provides information on the regulatory and statutory factors the OCC considers in making a decision; the application process (including the pre-filing process, filing the application, and processing time frames); application issues; specific requirements for insurance, electronic, and fiduciary activities; and the post approval process.

This booklet also provides a step-by-step procedures section for the applicant and the OCC to follow and a glossary of terms used. Throughout this booklet there are hyperlinks to filing samples and other booklets in the *Comptroller's Licensing Manual* series, as well as other information applicants may use to file to establish various subsidiaries or noncontrolling investments.

## Key Policies

### Applications and Notices

In most cases, a national bank is required to submit an application or notice and obtain OCC approval or "no objection" prior to establishing, acquiring, or investing in an operating or financial subsidiary, or performing a new activity in an existing operating or financial subsidiary. Banks must generally file a notice with the OCC to make an investment in a bank service company or a noncontrolling equity investment in an entity that performs bank permissible activities.

A national bank that is "well capitalized" and "well managed" (see Glossary) may file an after-the-fact notice if it is planning to engage in certain qualifying activities. If the activity does not qualify, or if the bank is not eligible to file an after-the-fact notice, the bank must file an application. The qualifying criteria to establish a subsidiary and the pre-approved activities that subsidiaries may perform are

discussed in detail in this booklet. Applicants should contact the Director for District Licensing, to determine the eligibility of the bank and the activity for the after-the-fact notice, or to determine if the OCC will require an application.

The OCC reviews a bank's filing to determine whether the proposed activities and location are legally permissible, the activities comply with OCC policy, and the activities will not endanger the safety and soundness of the bank.

The OCC will conduct a detailed analysis of the new activity, taking into consideration the inherent risk characteristics of the activity, the condition of the institution seeking to conduct the activity, and the proposed volume of the new activity. The OCC will determine whether the proposed activity can be regulated and supervised appropriately to address safety and soundness risks and to otherwise serve the public interest. Protection of consumers and prevention of financial crimes are examples of how the public interest is served.

The OCC will consider the applicant's efforts to identify, plan for, and manage systems risks for those activities heavily reliant upon technology. These risks could include software incompatibility, systems integration problems, or hardware system failures. These systems risks are present, for example, when a bank's operating subsidiary performs data processing activities or provides electronic banking services, such as stored value, remote banking, or electronic authentication activities.

Any application that does not adequately address these risks could require additional processing time, be subject to special enforceable conditions, or result in an OCC decision to deny.

## Special Conditions

The OCC may conditionally approve an application after reviewing the filing and considering the relevant factors, and impose special conditions for the activities of subsidiaries or noncontrolling investments. Special conditions are considered "conditions imposed in writing" within the meaning of 12 USC 1818. The OCC uses special conditions to protect the safety and soundness of the bank, prevent conflicts of interest, provide customer protection, or provide for other supervisory or policy considerations.

## Undercapitalized Banks

The OCC may approve an application from an undercapitalized bank to establish or invest in subsidiaries or noncontrolling investments, or approve the entity to engage in a new activity, if the OCC determines that:

- The bank has submitted an acceptable capital restoration plan.
- The bank is implementing the plan.
- The proposed filing is consistent with and will further the plan's achievement.

## Publication

Generally, the OCC does not require public notice for filings covered by this booklet, unless the application presents significant and novel policy, supervisory, or legal issues and a public notice is beneficial. (See the "Public Notice and Comments" booklet, "Additional Public Notice by Applicant," for more information.)

## Consolidated Financial Statements

Consolidated financial statements combine the assets, liabilities, revenues, and expenses of the subsidiary with those of the reporting bank. Ownership interests should be accounted for in accordance with generally accepted accounting procedures (GAAP). Refer to Accounting, Related Organizations Handbook, for a specific discussion and additional guidance.

The bank will combine pertinent financial data of the parent bank and its subsidiaries to conform to applicable statutory limitations, unless otherwise provided by statute or regulation. For example, the combined exposure of the parent bank and all of its operating subsidiaries to a single borrower may not exceed the bank's lending limit.

## Multiple Transactions

The OCC does not require a separate application for subsidiaries or noncontrolling investments when the entity is:

- Retained in a merging or converting institution.
- Established together with an application for a new national bank charter. (See the "Charters" booklet for additional information.)

In these situations, the OCC will consider the subsidiaries or noncontrolling investments with the primary filing and, if appropriate, may request a legal opinion on the subsidiary's activities or the activities of the entity in which the bank has a noncontrolling investment. The review period will run concurrently with the OCC's processing and decision on the merger, conversion, or charter application. The OCC will include its decision on the filing and any appropriate conditions in the decision letter for the merger, conversion, or charter.

## Mergers and Acquisitions

Generally, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) requires that prior notice of certain proposed mergers and acquisitions be provided to the Federal Trade Commission (FTC) and Department of Justice (DOJ). The HSR established pre-merger notification and waiting-period requirements for certain merger and acquisition transactions exceeding certain threshold tests.

The threshold tests relate to the size of the parties to the transaction and to the size of the ownership interest being acquired. Exceptions exist for acquisitions subject to federal agency antitrust review and approval, such as applications under the Bank Merger Act (BMA) and sections 3 and 4 of the Bank Holding Company Act (BHCA).

Frequently, however, the acquisition of operating and financial subsidiaries will be done outside of the scope of the BMA or BHCA. In such cases, applicants should carefully consider the thresholds and waiting periods established under the HSR.

Based on interpretations of the FTC and DOJ, transactions subject to the HSR include acquisitions of financial subsidiaries, whether on a stand-alone basis or as part of a BMA application. Transactions involving operating subsidiary acquisitions as part of a BMA application are exempt from the HSR provided the assets or subsidiaries acquired are held by the target of the BMA application. An acquisition of an operating subsidiary triggering the threshold tests will be subject to the HSR unless it is exempt under any of the relevant statutes specified in the HSR. The FTC will not grant an exception for any portion of a bank transaction that may fall outside of the BMA. The FTC refers to these types of acquisitions as "mixed transactions" and requires HSR filing for any part of the transaction not acquired pursuant to a BMA filing.

The acquirer and the target must determine the applicability of HSR to the proposed transaction, and, if required, file a copy of the filing with the FTC and DOJ at least 30 days before planned consummation. The HSR authorizes the assessment of civil money penalties for failure to comply with its provisions.

## Offshore Subsidiaries

Foreign law may limit OCC supervisory authority over offshore subsidiaries of national banks. As a result, national banks that establish or acquire an offshore subsidiary either through the application process or an after-the-fact notice, must make certain representations to assure OCC access to the books and records of those subsidiaries and the authority to examine, supervise, and regulate those subsidiaries. An offshore subsidiary is a subsidiary that will maintain records offshore, or that is organized under laws other than those of the 50 United States, the District of Columbia, or any other Territory or possession of the United States. The representations are:

- The books and records of the subsidiary (or duplicate copies of any books and records the originals of which are required to be maintained in [name of country] under applicable law) will be maintained at facilities of the bank in the United States, and the bank and the subsidiary will ensure prompt OCC access to all books and records; and
- Should the OCC be unable to access the subsidiary's books and records, or examine, supervise, or regulate the subsidiary to its satisfaction, resulting in an OCC bank directive to cease operations through the subsidiary, the bank will do so within the time period specified by the OCC.

If the applicant is unable make any of the above representations, contact the Director for District Licensing for further guidance.

## Examination and Supervision

Subsidiaries are subject to OCC examination and supervision exclusively, to the same extent as the parent national bank, except when federal law specifically provides otherwise, such as when the activity is subject to functional regulation limitations and requirements. The Gramm-Leach-Bliley Act (GLBA) codified the concept of "functional regulation," which recognizes the roles of the Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission (CFTC), and state insurance commissioners as the regulators of certain securities, commodities, and insurance activities, respectively.

Bank service companies are subject to examination and supervision by the federal banking agency that supervises the insured depository institution that is the principal investor in the company. Additionally, its services are subject to examination and supervision to the same extent as if the depository institution itself performed the services on its own premises. The services may be subject to functional regulation limitations and requirements to the extent that the bank service company performing the services meets the GLBA definition of a functionally regulated affiliate or subsidiary.

While the GLBA established new standards limiting the OCC's ability to examine and seek reports on functionally regulated activities from the bank's subsidiaries and affiliates, the activities may be subject to OCC supervision for bank safety and soundness reasons or based on separate statutory authority. The OCC may direct the bank or subsidiary to take appropriate remedial action if it determines that the creation or operation of the subsidiary violates a law, regulation, or written condition, or is unsafe or unsound, or threatens the safety and soundness of the bank. Such action may include disposing of, or liquidating all or part of, the subsidiary or discontinuing specific activities. Refer to Related Organizations Handbook for further discussion of the OCC's examination and supervision of subsidiaries and other related organizations.

## Operating Subsidiaries

An operating subsidiary is a corporation, limited liability company (LLC), or similar entity a bank owns or controls in which it may conduct activities that the bank could engage in directly, either as part of, or incidental to, the business of banking, as determined by the OCC.

To determine if an activity is part of the business of banking, the OCC considers if it:

- Is the functional equivalent to, or a logical out-growth of, a recognized banking activity.
- Strengthens the bank by benefiting its customers or its business.
- Involves risks similar in nature to those already assumed by banks.
- Is authorized for state-chartered banks.



To determine if an activity is incidental to the business of banking, the OCC considers whether it is convenient or useful to the bank in conducting its banking business.

## Ownership

A bank may invest in an operating subsidiary if the bank owns and maintains more than 50 percent of the operating subsidiary's voting stock or similar interest, or otherwise controls the entity.

A bank may own 50 percent or less of the voting interest of an operating subsidiary if it controls the subsidiary and no other party controls more than 50 percent (or a percentage greater than the bank's interest) of the voting interest in the subsidiary. A bank must file an application for OCC approval when proposing to own this type of interest in an operating subsidiary.

The OCC will evaluate a bank's control mechanisms in the review process to ensure the bank has effective control over the operating subsidiary. The OCC will review carefully the risks inherent in any proposal to ensure the bank is not exposed to undue risks. The OCC also will consider if generally accepted accounting principles or consolidated report of condition and income (Call Report) instructions require consolidated financial statements for the bank and its operating subsidiary. If the bank is required to consolidate its ownership of the subsidiary solely because of the Financial Accounting Standards Board's Interpretation No. 46, *Consolidation of Variable Interest Entities*, the bank should contact the district accountant or Director for District Licensing to determine the filing and approval requirements prior to any filing.

## Partnership or Joint Venture

A bank's operating subsidiary may be a general or limited partner in a partnership or a member of a joint venture. If a bank proposes to enter such an arrangement through an operating subsidiary, with the subsidiary being either a limited or a general partner or member, the bank must file with the OCC and receive approval for the subsidiary's activity. The operating subsidiary must be "adequately capitalized" (refer to Glossary for definition) and operated appropriately to minimize the risk of liability passing through the subsidiary to the bank.

Whenever an operating subsidiary joins a partnership or joint venture, it must either control the conduct of the business, possess a veto power, or be able to withdraw from the transaction to ensure the partnership or joint venture will perform only activities that are part of, or incidental to, the business of banking, or are otherwise authorized for a national bank.

## Noncontrolling Interest

A bank proposing to own less than 50 percent of the voting (or similar) interest of a business entity and not exercise control of it may be eligible to do so as an "other equity investment" (12 CFR 5.36). In addition, the OCC may determine that ownership of a noncontrolling interest in an entity (for example, an LLC) by an operating subsidiary is permissible. Additional information and guidance may be found in the "Other Equity Investments" section of this booklet.

## Decision Criteria

The OCC generally will grant approval for the investment in an operating subsidiary, provided that:

- The subsidiary's proposed activity is legally permissible.
- The activity of the bank and its subsidiary is consistent with safe and sound banking practices.
- The bank's performance of the activity through the subsidiary is not in contravention of OCC policy.

## Filing Process

The bank's condition and the subsidiary's activity will determine the way a bank files with the Director for District Licensing. Depending on these factors, the OCC will permit the bank to submit an after-the-fact notice (notice process), will require a standard application, or, in limited circumstances, will not require that an application be filed (see below for specifics or 12 CFR 5.34).

Only "well capitalized" and "well managed" (see Glossary) banks may file under the notice process, and the subsidiary's activities must be among those listed in the regulation (12 CFR 5.34(e)(5)(v)). In addition to being listed in the regulation, the activity must be conducted in a manner that does not raise OCC policy issues or supervisory concerns. Making loans and other extensions of credit is an example of a well-established activity previously approved by the OCC for operating subsidiaries. This activity is listed in the regulation and is eligible for the notice process. However, when the activity is conducted on terms other than those considered standard by policy or guidelines, as in certain types of subprime lending, there is a potential to create a policy issue or supervisory concern, and the activity thereby becomes ineligible for the notice process.

For banks that do not qualify, or when activities proposed are not among those eligible for the notice process, the bank must follow the standard filing process.

The OCC does not require an application or notice for a bank to acquire or establish an operating subsidiary, provided that the bank is "adequately" or "well capitalized" (see Glossary) and all of the following requirements are met:

- Activities of the new operating subsidiary are limited to those activities previously reported by the bank in connection with the prior establishment or acquisition of an operating subsidiary.
- Establishment or acquisition of the prior operating subsidiary was deemed permissible by the OCC.
- Activities in which the new subsidiary will engage continue to be legally permissible.

- Activities of the new operating subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank and according to the OCC's published guidelines for operating subsidiaries (see Appendix A).

### **After-the-Fact Notice**

A bank meeting certain criteria may file an after-the-fact notice for specific activities listed in the "activities eligible for notice" section of 12 CFR 5.34(e)(5)(v). The after-the-fact notice category contains commonly accepted banking-related activities the OCC has approved previously for operating subsidiaries. Under this process, a bank files a written notice with the OCC within 10 days after establishing or acquiring the operating subsidiary, or commencing a new activity in an existing operating subsidiary, and need not seek prior OCC approval. The OCC's Operating Subsidiary Guidelines (see Appendix A) describe the requirements or limitations for activities eligible for the notice process.

To qualify for the notice process, the bank owning the subsidiary must be "well capitalized" and "well managed" (see Glossary). Any bank filing an after-the-fact notice under this section is deemed to have represented that the subsidiary will conduct the activity in a manner consistent with OCC's guidance and under the same terms and conditions as applicable if the activity were conducted directly by the bank.

12 CFR 5.34 (e)(5)(v) lists those activities which qualify for the notice process. The list includes, but is not limited to:

- Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.
- Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting.
- Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks.
- Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein.
- Providing courier services between financial institutions.
- Providing management consulting, operational advice, and services for other financial institutions.
- Providing check guaranty, verification, and payment services.
- Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates.

- Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling.
- Providing tax planning and preparation services.
- Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings.
- Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA.
- Leasing of personal property and acting as an agent or adviser in leases for others.
- Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services.
- Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations.
- Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA.
- Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer.
- Acting as a finder to the extent permitted by published OCC precedent.
- Offering correspondent services to the extent permitted by published OCC precedent.
- Acting as agent or broker in the sale of fixed or variable annuities.
- Offering debt cancellation or debt suspension agreements.
- Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions.

- Acting as a transfer or fiscal agent.
- Acting as a digital certification authority to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.
- Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.

For published precedents, see OCC's monthly publication "Interpretations and Actions," annual publication "Activities Permissible for A National Bank," or the Commerce Clearing House "Federal Banking Law Reporter."

When filing an after-the-fact notice, the bank must:

- Certify the bank and activity or activities are eligible for the after-the-fact notice process.
- Describe in detail the activity or activities to be conducted in the operating subsidiary. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- Describe the investment amount and the percentage of the bank's capital the investment represents.
- Represent that the proposed activity is being conducted and will be conducted according to the OCC policies contained in the guidance issued for this activity and subject to all terms, conditions, and restrictions applicable to national banks.

### **Standard Review**

The OCC's standard review process is applicable when the activity of the operating subsidiary that the bank intends to acquire or establish (or a new activity in an existing operating subsidiary) does not qualify for an after-the-fact notice or when the bank is not eligible for an after-the fact notice. The OCC also will use the standard review process when the bank will control, but own 50 percent or less of, an operating subsidiary. A bank must submit an application to the OCC for the standard review process.

The OCC also may require the applicant to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In such cases, the OCC encourages applicants to arrange a pre-filing meeting with the Director for District Licensing. Additionally, any bank subject to supervisory concerns should provide financial information to support the proposed transaction (for example, capital or strategic plan, cost projections, or pro forma financial projections).

Any bank filing under the standard operating subsidiary process must receive OCC's decision prior to establishing or acquiring the operating subsidiary or commencing any new activity in an existing operating subsidiary.

In an application, the bank must:

- Describe in detail the activity or activities to be conducted in the operating subsidiary. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- Certify that the bank owns more than 50 percent of the voting (or similar) interest of the subsidiary or describe how the bank controls or will control the subsidiary and its activities.
- Describe the investment amount and the percentage of the bank's capital that the investment represents.
- Represent that the proposed activity will be conducted according to the OCC policies contained in the guidance issued for this activity and subject to all terms, conditions, and restrictions applicable to national banks.

## Specific Requirements

### Insurance

Banks may conduct certain insurance activities in the bank or through an operating subsidiary. They may engage in certain title insurance activities, sell credit related insurance as an agent, and provide as principal (underwrite or reinsure) credit related insurance. An operating subsidiary may reinsure private mortgage insurance on loans originated, purchased, or serviced by the bank or its affiliates. Additionally, an operating subsidiary may underwrite municipal bond insurance, as well as safe deposit box insurance and business risk insurance of the bank and its affiliates. (See Appendix A for further discussion).

In addition, national banks located in a place with a population of less than 5,000 inhabitants (as shown by the preceding decennial census) are authorized expressly under 12 USC 92 to act "as the agent for any fire, life, or other insurance company." The OCC provided guidance on how bank insurance agents may conduct their insurance business under this authority in Interpretive Letter 753 (November 4, 1996).

Any subsidiary filing from a bank requesting to sell insurance from a "place of 5,000" under 12 USC 92 should include a representation that the bank's proposal to sell insurance will be consistent with Section 92 and the OCC's interpretation in Interpretive Letter 753 (November 4, 1996). Insurance sales activities also should be conducted in accordance with the operational standards and customer safeguards described in OCC issuances (see the Insurance Activities Handbook).

The applicant must describe the type of insurance activity in which the company is engaged and has plans to conduct, to the extent the application or notice relates to the initial affiliation of the bank with a particular company engaged in insurance activities (including a broker dealer selling annuities considered insurance products

under state law). The bank also must list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.

### **Electronic Activities**

A bank or its subsidiary may conduct certain activities using electronic technologies, provided the activities are part of, or incidental to, the business of banking. To determine if an electronic activity is part of the business of banking, the OCC considers whether it:

- Is the functional equivalent to, or a logical outgrowth of, a recognized banking activity.
- Strengthens the bank by benefiting its customers or its business.
- Involves the types of risk similar to those already assumed by banks.
- Is authorized for state-chartered banks.

To determine if an electronic activity is incidental to the business of banking, the OCC considers whether it:

- 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.
- 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.
- Enables the bank to use capacity acquired for its banking operations or otherwise avoid economic waste or loss.

The bank, or its subsidiary, must conduct these electronic activities in a manner consistent with safety and soundness standards and OCC guidance. In addition, the OCC may require the bank or its operating subsidiary to notify all potential technology-related vendors in writing of the OCC's examination and regulatory authority. The OCC also may require that all final technology-related vendor contracts stipulate that the performance of services provided by the vendors to the operating subsidiary is subject to the OCC's examination and regulatory authority.

### **Fiduciary Powers**

If a subsidiary proposes to accept traditional fiduciary appointments for which fiduciary powers are needed, as in acting as a trustee or an executor, then both the bank and the subsidiary should have fiduciary powers. Fiduciary powers for the subsidiary generally are accomplished by using a national bank limited to the activities of a trust company or a state trust company as the subsidiary. If a limited purpose national bank is proposed, the OCC processes the charter application together with the operating subsidiary application.

If a subsidiary proposes only to exercise investment discretion on behalf of its customers or to provide investment advice for a fee, but not accept traditional fiduciary appointment, the subsidiary does not have to have fiduciary powers, but the bank must have OCC approval to exercise fiduciary powers, unless the subsidiary:

- Is registered under the Investment Advisers Act of 1940, or
- Is registered or has filed a notice under the applicable provisions of the Securities Exchange Act of 1934 as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer; and the subsidiary's performance of investment advisory services is solely incidental to the conduct of its business as broker or dealer, and no special compensation is made to the subsidiary for those advisory services. To determine whether the subsidiary's performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer, and no special compensation is made to the subsidiary for those advisory services, the OCC will consider the commission structure and other specific facts. See OCC Interpretive Letter 769 (January 28, 1997).

## Locations

A bank proposing to establish, acquire, or operate an operating subsidiary at a location at which it will perform branching functions (deposits received, checks paid, or money lent) will need approval for a branch office at that location, if it has not already been authorized as a branch. A separate application is not necessary, but a request for branch authorization should accompany the operating subsidiary application. There are no geographical restrictions for operating subsidiaries performing permissible activities other than core branching functions of receiving deposits, paying checks, or lending money.

## Annual Reporting Requirement

The OCC requires that a bank file an annual report to identify its operating subsidiaries that do business directly with consumers in the United States and are not functionally regulated as defined in section 5(c)(5) of the BHCA, as amended (12 USC 1844(c)(5)). Specifically, an operating subsidiary does business directly with consumers if it provides products or services to individuals to be used primarily for personal, family, or household purposes.

The bank submits an annual report on its operating subsidiaries to the OCC on or before January 31 each year, containing information as of December 31 for the prior year. This report may be filed electronically via the National BankNet secure mailbox or by attaching the report to an e-mail. For specific guidance on filing this report, refer to OCC Bulletin 2004-55.

## Applicability of Law

All laws and regulations, including state laws, apply to national bank operating subsidiaries to the same extent that they apply to the parent national bank, unless otherwise addressed in federal law or OCC regulation.



## Holding Company Dissolution

A bank may elect to use a shell operating subsidiary to merge with a holding company to facilitate the liquidation or dissolution of the holding company. The application for the shell subsidiary formation must be filed along with the related business combination filing.

Generally, when filing, the holding company must represent that it has no outstanding liabilities, including contingent liabilities. Prior to transferring its assets to the operating subsidiary, it must divest of all assets ineligible for investment by a national bank and assume the merger cost prior to its dissolution, including all necessary payments to dissenting shareholders. All other regulatory approvals must still be obtained (for example, FRB approval or waiver of the application). (See the "Business Combinations" booklet for further details.)

## Financial Subsidiaries

As authorized by the GLBA, a financial subsidiary is a corporation, limited liability company, or similar entity, controlled by one or more insured depository institutions. A financial subsidiary may conduct activities that are permissible for national banks in addition to those that are "financial in nature" or incidental to financial activities. Financial subsidiaries are bank subsidiaries that are not operating subsidiaries (that is, operating subsidiaries engage only in activities the bank may engage in directly under the same terms and conditions applicable to national banks) or subsidiaries that national banks otherwise are specifically authorized to control by the express terms of a federal statute. For a bank to own an interest in a financial subsidiary, the bank and the subsidiary must meet certain requirements and comply with specified safeguards.

## Qualifications

A bank may control, directly or indirectly, a financial subsidiary or hold an interest in a financial subsidiary only if:

- The bank and each depository institution affiliate of the bank, which includes any uninsured national trust bank, are "well capitalized" and "well managed" (see Glossary for definitions).
- The bank and each depository institution affiliate must have received a rating of "satisfactory" or better at its most recent Community Reinvestment Act (CRA) examination. A bank may not apply to commence any additional expanded financial activity, or to directly or indirectly acquire control of a company engaged in such activity, if it or any of its insured depository institution affiliates received a less than "satisfactory" CRA rating on its most recent CRA exam prior to when the bank would file its notice.

Banks that have not yet received a CRA rating, or special purpose banks which are not CRA rated, may submit a notice if they meet all of the other qualifications and safeguards.

- The aggregate consolidated total assets of all financial subsidiaries of the bank do not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or \$50 billion [or such greater amount as is determined according to an indexing mechanism jointly established by regulation by the Secretary of the Treasury and the Federal Reserve Board (Federal Reserve)].
- The bank has at least one issue of outstanding eligible debt (see Glossary) currently rated in one of the three highest investment grade ratings categories by a nationally recognized statistical rating organization if the bank is one of the 100 largest insured banks, determined on the basis of the bank's consolidated total assets at the end of the calendar year.

If the national bank is one of the second 50 of the 100 largest insured banks, the bank may satisfy the eligible debt requirement either by having outstanding eligible debt or by satisfying alternative criteria the Secretary of the Treasury and the Federal Reserve may establish jointly by regulations. Refer to the discussion in Related Organizations Handbook or 12 CFR 1501.3.

If the financial subsidiary is engaged solely in activities in an agency capacity, the eligible debt requirements do not apply.

## Activities

A financial subsidiary may engage in:

- Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
- Engaging as agent or broker in any state to insure, guarantee, or indemnify against loss, harm, damage, illness, disability, death, defects in title, or provide annuities as agent or broker.
- Providing financial, investment, or economic advisory services, including advising an investment company as defined in section 3 of the Investment Company Act, 15 USC 80a-3.
- Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
- Underwriting, dealing in, or making a market in securities.
- Engaging in any activity the Federal Reserve has determined, by order or regulation in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in the order or regulation, unless the order or regulation is modified by the Federal Reserve).
- Engaging, in the United States, in any activity a bank holding company may engage in outside the United States and the Federal Reserve has determined, under regulations prescribed or interpretations issued pursuant to the BHCA as in effect on November 11, 1999, to be usual for the transaction of banking or other financial operations abroad.

## Exceptions

There are certain activities a financial subsidiary cannot engage in as principal:

- Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death, or defects in title, except to the extent permitted under the GLBA (certain types of insurance underwriting and reinsurance the OCC permitted prior to January 1, 1999, are grandfathered) or providing or issuing annuities the income of which is subject to tax treatment under section 72 of the Internal Revenue Code.
- Real estate development or real estate investment, unless otherwise expressly authorized by law.
- Activities authorized for bank holding companies by section 4(k)(4)(H) or (I) of the BHCA (certain merchant banking investments), 12 USC 1843(k)(4)(H) or (I).

## Safeguards

A bank is required to meet certain safety and soundness requirements when engaging in activities through a financial subsidiary. Specifically, a bank establishing a financial subsidiary must:

- For regulatory capital purposes, deduct the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from its total assets and tangible equity and deduct such investment from its total risk-based capital (this deduction must be made equally from Tier 1 and Tier 2 capital).
- Not consolidate its assets and liabilities with those of its financial subsidiary or subsidiaries.
- Ensure that any published financial statements of the bank, in addition to providing information prepared in accordance with generally accepted accounting principles, separately present financial information for the bank in a manner reflecting the capital adjustments previously described.
- Have reasonable policies and procedures to preserve the separate corporate identity and limited liability of the bank and its financial subsidiaries.
- Have procedures for identifying and managing operational and financial risk within the bank and the financial subsidiary that adequately protect the bank from those risks.
- Apply sections 23A and 23B of the Federal Reserve Act, as implemented by Regulation W (12 CFR 223), to transactions with a financial subsidiary in the following manner:
  - A financial subsidiary shall be deemed to be an affiliate and shall not be deemed to be a subsidiary of the bank. A subsidiary that is a financial

subsidiary solely because it performs insurance or insurance brokerage activities is not an affiliate for purposes of Regulation W.

- The quantitative limitations on covered transactions with any individual affiliate shall not apply to covered transactions between a bank and its financial subsidiary.
  - The bank's investment in the financial subsidiary shall not include earnings retained or losses incurred by the financial subsidiary.
  - Any purchase of, or investment in, the securities of a financial subsidiary of a bank by an affiliate of the bank will be considered to be a purchase of, or investment in, such securities by the bank.
  - Any extension of credit by an affiliate of a bank to a financial subsidiary of the bank is considered an extension of credit by the bank to the financial subsidiary if the extension of credit is treated as capital of the financial subsidiary under applicable law.
  - Any other extension of credit by an affiliate of the bank to its financial subsidiary is considered an extension of credit by the bank to the financial subsidiary if the Federal Reserve determines that such treatment is necessary or appropriate to prevent evasions of the Federal Reserve Act or the GLBA.
- Deem the financial subsidiary a subsidiary of a bank holding company and not a subsidiary of the bank for purposes of the anti-tying prohibitions.

## Filing Process

The GLBA requires OCC approval of financial subsidiaries to be based only on specific statutory factors. The OCC considers financial subsidiary notices to be approved upon receipt of the bank's submission of a notice with the appropriate certifications that it meets the required criteria. There are two options for filing a notice to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary.

Under the first option, the bank files a "Financial Subsidiary Certification" at any time with the Director for District Licensing and files the subsequent notice for OCC approval whenever it is ready to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary.

Under the second method, the bank files a combined "Certification and Notice" five business days before it acquires control of, or holds an interest in, a financial subsidiary, or commences a new activity in an existing financial subsidiary.

### **Certification with Subsequent Notice**

When filing a "Financial Subsidiary Certification," the bank must provide:

- A list of the bank's depository institution affiliates.

- Certification that the bank and each depository institution affiliate is “well capitalized,” “well managed,” and has not received a rating of less than “satisfactory” at its most recent CRA examination.

After completing the formal certification, whenever the bank seeks OCC approval to acquire or hold an interest in any financial subsidiary, the bank must file a written “Financial Subsidiary Notice” with the Director for District Licensing when it commences operations. This notice must:

- State that the bank’s certification remains valid.
- Describe in detail the activity or activities to be conducted in the financial subsidiary. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- Cite the specific authority permitting the activity to be conducted within a financial subsidiary. (Include a copy of the order or interpretation if the authority relied upon is an agency order or interpretation under Sections 4(c)(8) or 4(c)(13) of the BHCA.)
- Certify that the bank will remain “well capitalized” after deducting the aggregate amount of the bank’s outstanding equity investment, including retained earnings, in its financial subsidiaries from its assets and tangible equity and deducting such investment from its total risk-based capital (this deduction is made equally from Tier 1 and Tier 2 capital).
- Demonstrate that the aggregate consolidated total assets of all the financial subsidiaries of the bank do not exceed the lesser of 45 percent of the bank’s consolidated total assets or \$50 billion (or the increased level established by the Federal Reserve or the Secretary of Treasury).
- Certify that the bank meets the eligible debt requirement, if applicable. If the financial subsidiary is acting solely as agent, this certification is not necessary.

### **Combined Certification and Notice**

As a second option, a bank may file a combined “Financial Subsidiary Certification and Notice” with the Director for District Licensing at least five business days before acquiring control of, or an interest in, a financial subsidiary, or before starting a new activity in an existing financial subsidiary. This certification and notice must provide all the information and certifications as outlined previously for a certification with subsequent notice.

### **Failure to Continue to Meet Qualifications**

The bank and its affiliated depository institutions must continue to satisfy the qualification requirements and safeguards following its acquisition of, control of, or an interest in, a financial subsidiary. A bank failing to continue to satisfy these requirements will be subject to the following procedures and requirements:

- The OCC must give written notice to the bank (and, in the case of an affiliated depository institution, to that depository institution's appropriate federal banking agency) outlining how or why the bank or its affiliated depository institution does not continue to meet the qualification requirements. The bank shall be deemed to have received the notice three business days after the OCC mails the letter.
- The bank must execute an agreement, no later than 45 days after the receipt of the notice, with the OCC to comply with the qualification requirements, unless the OCC grants the bank additional time.
- The OCC may impose limitations on the conduct or activities of the bank or any subsidiary of the bank as the OCC determines appropriate under the circumstances.
- The OCC may require the bank to divest control of a financial subsidiary if the bank does not correct the conditions within 180 days after receipt of the letter.

A bank no longer meeting the eligible debt qualification, if applicable, may not directly or through a subsidiary purchase or acquire any additional equity capital of any financial subsidiary until the bank again meets the qualification.

## **Bank Service Company**

A bank service company is a corporation, whose capital stock is owned by one or more insured depository institutions, or a limited liability company, whose members are insured depository institutions. Banks and savings associations specifically are authorized to invest in bank service companies by the express terms of the Bank Service Company Act. If the bank service company has both national and state-chartered insured depository institution shareholders or members, the activities conducted must be permissible for each institution. When two or more national banks wish to invest in the same bank service company, one filing on behalf of all of the individual investors may be made as long as the other national banks are identified. A bank may not invest more than 10 percent of its capital and surplus in any bank service company, and the bank's total investment in all bank service companies may not exceed 5 percent of the bank's total assets.

A bank seeking to establish a bank service company may do so without giving notice to the OCC if it only provides certain clerical or data processing services to depository institutions. Otherwise, the bank will be required to provide an application or an after-the-fact notice, depending on the activity being performed. The bank will need to determine if the activity or geographic locations where services are provided would require a filing with the OCC. The OCC does not require a filing if a bank invests in the capital stock or equity of a bank service company performing any service (other than deposit taking) at any geographical location the Federal Reserve has determined by regulation to be permissible for a bank holding company. In such cases, however, the bank must obtain the approval of the Federal Reserve.

## Filing Process

A bank intending to make an investment in a bank service company, or to perform a new activity in a bank service company, generally must submit an application and receive prior approval from the OCC. The application must include:

- The name and location of the bank service company.
- A detailed description of the activity or activities to be conducted in the bank service company. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- Information demonstrating that the bank will comply with investment limitations.
- Information demonstrating that the bank service company will perform only those services that each insured depository institution shareholder or member is authorized to perform and will perform such services only at locations in a state in which each such shareholder or member is authorized to perform the activities directly, unless the Federal Reserve has approved an exception to this requirement under the authority of 12 USC 1865(b).

If there is more than one investing bank, the bank with the largest dollar amount invested is deemed to be the principal investor (see Glossary).

## Decision Criteria

The OCC generally will grant approval for the investment in a bank service company, provided that:

- The proposed activity is legally permissible.
- The activity is consistent with safe and sound banking practices.
- The bank's performance of the activity is not in contravention of OCC policy.

The OCC will consider a bank's request to invest in a bank service company and make a final decision within 60 days of the date it receives the filing. If the OCC fails to make a decision within that time, the investment is deemed to be approved, unless the OCC notifies the bank of significant supervisory or compliance concerns or legal or policy issues.

## After-the-Fact Notice

No prior OCC approval is required if the bank service company engages only in those activities eligible for an after-the-fact notice under 12 CFR 5.34(e)(5)(v), and the bank is "well capitalized" as defined in 12 CFR 6.4(b) and "well managed" (see Glossary for definitions). A bank may invest in a bank service company, or perform a new activity in an existing bank service company, by providing the Director for

District Licensing written notice within 10 days of making the investment. The written notice must include:

- A complete description of the bank's investment in the bank service company.
- A detailed description of the activity or activities to be conducted in the bank service company. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- A representation and undertaking that the activity will be conducted in accordance with OCC published guidance. (Any bank filing a notice is deemed to have agreed the bank service company will conduct the activity in a manner consistent with published OCC guidance.)

## No Filing Required

No filing is required for a bank service company that provides the following services only for depository institutions:

- Check and deposit posting and sorting.
- Computation and posting of interest and other credits and charges.
- Preparation and mailing of checks, statements, notices, and similar items.
- Any other clerical, bookkeeping, accounting, statistical, or similar function.

Additionally, the OCC does not require a filing if a bank invests in the capital stock or equity of a bank service company performing any service (other than deposit taking) at any geographical location the Federal Reserve has determined by regulation to be permissible for a bank holding company. In such cases, however, the bank must obtain the approval of the Federal Reserve.

## Other Equity Investments

A national bank is permitted to make equity investments in various types of corporations, partnerships, trusts, or similar types of entities pursuant to 12 USC 24(Seventh) and other statutes. These investments may be in statutory subsidiaries or noncontrolling investments in entities, when the investment is part of or incidental to the business of banking. These investments are in addition to operating subsidiaries, financial subsidiaries, and bank service companies.

Pursuant to 12 CFR 24, a national bank may create a subsidiary corporation to promote public welfare, including the welfare of low- and moderate-income communities and families, such as providing housing, services, or jobs (see Community Development Investments, Related Organizations Handbook for specific discussion).



## Statutory Subsidiaries

A bank may make a controlling and noncontrolling equity investment in the following statutory subsidiaries without prior approval of the OCC:

- An agricultural credit corporation. A bank may purchase stock of a corporation organized to make loans to farmers and ranchers for agricultural purposes for its own account. Such equity investments in agricultural credit corporations are authorized under 12 USC 24(Seventh) and are limited to 20 percent of the unimpaired capital and surplus of the bank, unless it owns at least 80 percent of the stock of the agricultural credit corporation. This requires an after-the-fact notice.
- A banker's bank. A bank may invest up to 10 percent of its capital and surplus in an insured banker's bank or in the holding company of such a bank, provided that it does not own more than 5 percent of any class of voting securities.
- A safe deposit corporation. Investment in a safe deposit corporation organized under state law may not exceed 15 percent of the bank's unimpaired, paid-in capital and 15 percent of its unimpaired surplus.
- A state housing corporation. A bank may make an equity investment in any state housing corporation incorporated in the state in which the bank is located, provided that its investments do not exceed 5 percent of its unimpaired, paid-in capital stock plus 5 percent of its unimpaired surplus fund.
- A small business investment company (SBIC). A bank may purchase SBIC stock provided that the aggregate amount of such investments does not exceed 5 percent of the bank's capital and surplus.
- A community development corporation. A bank may invest in or conduct activities in such an entity that primarily benefit low- and moderate-income individuals, low- and moderate-income areas, or other areas targeted by a governmental entity for redevelopment. If an eligible bank, this requires an after-the-fact notice to the Director, Community Development Division (12 CFR 24).
- A savings association. A savings association will be eligible to be acquired because it is in default, experiencing severe financial difficulty, or is otherwise determined by the FDIC to need financial assistance, at a time when severe financial conditions threaten the stability of a significant number of savings associations, or of savings associations possessing significant financial resources. The OCC will consider a savings association acquired under this authority (12 USC 1823(k)) to be a "statutory subsidiary." For a bank to otherwise own or control a federal savings association (FSA), the FSA must be a financial subsidiary unless the FSA undertakes to limit its activities to those permissible for a national bank. Additional information and guidance may be found in the "Financial Subsidiaries" section of this booklet. This requires an after-the-fact notice.

- A bank premises corporation. A bank may invest in its bank premises or in a corporation holding the bank's premises. Such equity investments in bank premises corporations have been characterized as statutory subsidiaries, and not operating subsidiaries. These equity investments do not require prior approval unless the investment exceeds the limitation for investing in bank premises. (See "Investment in Bank Premises" booklet).
- Any other equity investment that may be authorized by statute after February 12, 1990, if not covered by other applicable OCC regulation. This requires an after-the-fact notice.

*Filing Process:* Generally, a bank must provide a written notice to the Director for District Licensing within 10 days of making an equity investment in a statutory subsidiary. The written notice must include a description and the amount of the bank's investment. The OCC reserves the right to require additional information as necessary.

## Noncontrolling Investments

Banks also may make noncontrolling equity investments in certain types of entities when the investment is part of, or incidental to, the business of banking. Investments of this type are permitted under a national bank's powers under 12 USC 24 (Seventh) and 12 CFR 5.36(e). Refer to Appendix B for a summary of noncontrolling investments.

A noncontrolling investment may be made directly by the bank or through its operating subsidiary. The bank must satisfy the following standards to make such an investment:

- The activities of the entity or enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking, or are otherwise authorized for a national bank.
- The bank must be able to prevent the enterprise from engaging in activities not meeting the foregoing standard or be able to withdraw its investment.
- The bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise.
- The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to the banking business.

To use the after-the-fact notice, the investments must be in an enterprise whose activity is listed under 12 CFR 5.34(e)(5)(v) or in activities that are substantively the same as those contained in a published OCC precedent approving a noncontrolling investment, provided the activities will be conducted under the same terms and conditions as stated in the precedent. For published precedents, see OCC's monthly publication "Interpretations and Actions," "Activities Permissible For A National Bank," or the Commerce Clearing House *Federal Banking Law Reporter*.

If the bank is not eligible to file a notice or wishes to make other types of equity investments, it may request a legal opinion from the OCC about whether the proposed investment is permissible.

*Filing Process:* A qualifying bank making a noncontrolling investment, directly or through an operating subsidiary, may file a written notice with the Director for District Licensing no later than 10 days after making the investment. The OCC considers these notices to be approved upon receipt of the bank's submission. The bank must certify in the notice that it meets the required criteria. The written notice must:

- Describe the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing. (Refer to Specific Requirements for Insurance if this represents the initial affiliation of the bank with a particular insurance company.)
- State which paragraphs of 12 CFR 5.34(e)(5)(v) describe the activity or activities, or state and describe how the activity is substantially the same as that contained in a published OCC precedent approving a noncontrolling investment by a bank or its operating subsidiary. If the activity or activities are substantially the same as in a published OCC precedent, certify that the activity will be conducted in accordance with the same terms and conditions applicable to the activity covered by the precedent, and provide the citation to the applicable precedent.
- Certify that the bank is "well capitalized" and "well managed" at the time of the investment (refer to Glossary for definitions).
- Describe how the bank can prevent the enterprise from engaging in activities not included in 12 CFR 5.34(e)(5)(v) or in a published OCC precedent approving a noncontrolling investment by a bank or its operating subsidiary, or how the bank otherwise can withdraw its investment.
- Certify that the bank will account for its investment under the equity or cost method of accounting. For investments that may be subject to the Financial Accounting Standards Board's Interpretation No. 46, *Consolidation of Variable Interest Entities*, the bank should consult with its accountant to determine how the bank should account for its investment and contact the Director for District Licensing to determine how to comply with this certification.
- Describe how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment unrelated to the banking business.
- Certify that the bank's loss exposure is limited, as a legal and accounting matter, and that the bank does not have open-ended liability for the obligations of the enterprise.
- Certify that the enterprise in which the bank is investing agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of 12 USC 1820a and 1831v.

The OCC reserves the right to require additional information as necessary.

# Procedures: Operating Subsidiary and Bank Service Company

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## After-the-fact Notice

### Prefiling

#### Licensing Staff

1. Refers a bank requesting instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.

### Filing the Notice

#### Bank

2. Submits a complete "after-the-fact notice" (notice) to the Director for District Licensing.

The operating subsidiary or bank service company notice must provide:

- A certification that the bank is "well capitalized" and "well managed," (see Glossary) and that the bank and activity or activities are eligible for the notice process.
- A complete description of the investment in the operating subsidiary or bank service company, including the amount of the investment and the percent of bank's capital the investment represents.
- A complete description of the activity, including the paragraph(s) of 12 CFR 5.34(e)(5)(v) that are applicable. To the extent the notice relates to the initial affiliation of the bank with a particular company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance products under state law), provide a description of the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.
- The date the activity commenced or the investment was made.
- A representation and undertaking stating that the activity or activities are conducted and will continue to be conducted in a manner consistent with published OCC guidance and under the same terms and conditions as applicable if the activity were conducted directly by the bank.

## Review

### Licensing Staff

3. Initiates and enters information into the Corporate Activities Information System (CAIS).
4. Establishes the official file to maintain all original documents.
5. Reviews the notice and verifies that:
  - The bank is "well capitalized" and "well managed" (see Glossary).
  - The description of the activity meets the regulatory criteria under 12 CFR 5.34(e)(5)(v) and the Operating Subsidiary Guidelines.
  - It contains the required notice criteria in step 2.

6. If the notice is sufficient, sends an acknowledgment letter to the bank, providing a copy to the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst. Proceeds to step 9.

If the notice relates to an investment in a company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance under state law), prepares a cover letter and forwards a copy of the notice to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.

Proceeds to step 9.

7. If the notice is insufficient or filed incorrectly, contacts the bank for clarification or the missing information.
8. Reviews any additional information. If the notice is sufficient, sends an acknowledgment letter to the bank, providing a copy to the ADC or large bank EIC and supervisory analyst.

If the notice relates to an investment in a company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance under state law), prepares a cover letter and forwards a copy of the notice to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.

### Close Out

9. Makes CAIS entries.
10. Reviews the file for completeness and forwards the file to Central Records.

# Procedures: Operating Subsidiary and Bank Service Company

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## Application

### Prefiling

#### Licensing Staff

1. Refers a bank that requests instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.
2. Arranges a prefiling meeting with the applicant, if appropriate. Attendees should include the appropriate OCC staff (for example, headquarters Licensing (HQ LIC), legal, supervision, compliance, community development, economics).
3. If any prefiling discussions or meetings reveal policy, legal, supervisory, or other novel issues, contacts HQ LIC to decide:
  - If the application should be filed with HQ LIC (broad policy or legal issues),
  - If specific issues should be separated from the application to be handled by HQ LIC, while the application continues to be processed by the district licensing staff, or
  - When the filing should be forwarded to HQ LIC.
4. Prepares a summary memorandum of policy or legal issues identified and retains all pertinent information in the pending file.

## Filing the Application

### Bank

5. Submits a complete operating subsidiary or bank service company application (filing) to the Director for District Licensing.

### Operating Subsidiary

The standard operating subsidiary filing must provide:

- A complete description of:
  - The bank's investment in the subsidiary.

- The investment amount and the percentage of the bank’s capital the investment represents.
- The proposed activities of the subsidiary. To the extent the notice relates to the initial affiliation of the bank with a particular company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance products under state law), provide a description of the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.
- The organizational structure and management of the subsidiary.
- The relationship between the bank and the subsidiary.
- Any other information necessary to describe the proposal adequately.
- The location(s) of the proposed activity, stating if any activity will be conducted at a location other than the main office or a previously approved branch of the bank.
- A representation that the proposed activity will be conducted according to the OCC policies contained in guidance issued for this activity.

For offshore operating subsidiaries, the bank further represents that:

- The books and records of the subsidiary (or duplicate copies of any books and records the originals of which are required to be maintained in [name of country] under applicable law) will be maintained at facilities of the bank in the United States, and the bank and the subsidiary will ensure prompt OCC access to all books and records; and
- Should the OCC be unable to access the subsidiary’s books and records, or examine, supervise, or regulate the subsidiary to its satisfaction, resulting in an OCC bank directive to cease operations through the subsidiary, the bank will do so within the time period specified by the OCC.
- An opinion of counsel or a legal analysis supporting the proposal if it is novel, unusually complex, or raises substantial unresolved legal issues.
- If the activity involves investment discretion:
  - Request approval to exercise fiduciary powers and include the additional information required by 12 CFR 5.26.
  - State that the bank has approval to exercise fiduciary powers.
  - State that the subsidiary is registered or will be registered as an investment adviser with the Securities and Exchange Commission

under the Investment Advisers Act of 1940 or as a broker dealer under the Securities Exchange Act of 1934.

### **Bank Service Company**

The standard bank service company filing must provide:

- The name and location of the bank service company.
- A complete description of the activities that the bank service company will conduct. To the extent the notice relates to the initial affiliation of the bank with a particular company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance products under state law), provide a description of the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.
- Information demonstrating that the bank will comply with the regulatory investment limitations.
- Information demonstrating that the bank service company will perform only those services that each insured depository institution shareholder or member is authorized to perform and will perform such services only at locations in a state in which each such shareholder or member is authorized to perform the activities directly, unless the Federal Reserve has approved an exception to this requirement under the authority of 12 USC 1865(b).

## **Review**

### **Licensing Staff**

6. Initiates and enters information into the Corporate Activities Information System (CAIS).
7. Establishes the official file to maintain all original documents.
8. Sends a letter within five business days of receipt, notifying the bank that its filing will be processed under the standard review process and that the activity cannot begin until the OCC provides written approval for the operating subsidiary (or within 60 days of receipt for a bank service company).
9. Reviews the filing and any other relevant information about the bank. If the filing presents novel, legal or policy issues, repeats step 3 and forwards a memo to HQ LIC.
10. Within five business days of receipt, notifies the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst of the filing and solicits comments, as appropriate, from district counsel, supervision,



and other OCC divisions with a preliminary response required by the 15th day after the filing date. For undercapitalized banks, contacts the supervisory office for capital plan status.

11. Requires the bank to submit additional information or legal analysis, including a specific date for reply, if the activity of the proposed subsidiary or bank service company is unclear, the legality is in doubt, or if additional information is necessary to make a decision about the permissibility of the proposed investment.

## **Decision**

### **Licensing Staff**

12. Prepares the confidential memorandum and decision letter, recommending a decision to the delegated official.
13. Decides application under delegated authority or forwards the official file to HQ LIC for decision. If referred to HQ LIC, proceeds to step 17.
14. Notifies the bank by telephone after the decision and sends the bank a decision letter, with a copy to the ADC or large bank EIC and supervisory analyst. (Decision letter, if applicable, will include any written conditions or supervisory concerns.)
15. If the notice relates to an investment in a company engaging in insurance activities, including a broker or dealer selling annuities that are considered insurance under state law, forwards a copy of the notice with a brief cover letter to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.
16. Makes CAIS entries. Proceeds to step 23.

### **HQ LIC**

17. Reviews the file and solicits comments from other OCC divisions, as appropriate.
18. Prepares and sends the confidential memorandum and decision letter, recommending a decision to the delegated official.
19. After decision, notifies the licensing manager and the bank by telephone of the decision and sends the bank a decision letter, with a copy to the ADC or large bank EIC and supervisory analyst. (Decision letter, if applicable, will include any written conditions or supervisory concerns.)
20. Makes CAIS entries.
21. For approved and conditionally approved filings, returns the official file to the district for additional processing.

22. If denied, proceeds to step 23.

## **Close Out**

### Licensing Staff

23. Makes CAIS entries to close filing

24. Reviews the file for completeness and forwards it to Central Records

# Procedures: Financial Subsidiary–Certification

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## Prefiling

### Licensing Staff

1. Refers a bank that requests instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.

## Filing the Certification

### Bank

2. Submits a Financial Subsidiary Certification to the Director for District Licensing.

The financial subsidiary certification must:

- Be labeled "Financial Subsidiary Certification."
- Provide a complete listing of the bank's affiliated depository institutions.
- Include a certification that the bank and each affiliated depository institution:
  - Is "well capitalized."
  - Is "well managed."
  - Has not received a less than "Satisfactory" CRA rating.

## Review

### Licensing Staff

3. Makes CAIS entries.
4. Establishes the official file to maintain all original documents.
5. Determines that the financial subsidiary certification is complete. (To be complete the certification must include the items listed in step 2.)
6. Verifies that the bank and each depository affiliate is "well capitalized," "well managed," and has not received less than a "satisfactory" CRA rating.
7. If the financial subsidiary certification contains the required information, sends an acknowledgment letter to the bank, with a copy to the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst. Proceeds to step 10.

8. If the financial subsidiary certification is not complete, contacts the bank for missing information.
9. Reviews any additional information to determine completeness. Goes back to step 5.

## **Close Out**

### **Licensing Staff**

10. Maintains a copy of the financial subsidiary certification in the district office files to be used as reference for subsequent notice filings.
11. Makes CAIS entries.
12. Reviews the file for completeness and forwards the file to Central Records.

# Procedures: Financial Subsidiary–Notice

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## Prefiling

### Licensing Staff

1. Refers a bank that requests instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.

## Filing the Notice

### Bank

2. Submits a Financial Subsidiary Notice (notice) to the Director for District Licensing.

The financial subsidiary notice must:

- Be labeled "Financial Subsidiary Notice."
- Attest that the bank's financial subsidiary certification remains valid.
- Describe the activity or activities to be performed in the financial subsidiary.
- If a notice relates to the initial affiliation of the bank with a particular company involved in insurance activities (including a broker or dealer selling annuities that are considered insurance products under state law), describe the type of insurance activity that the company is engaged in and has present plans to conduct and list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.
- Cite the specific authority permitting the activity to be conducted within a financial subsidiary. Include a copy of the order or interpretation if the authority relied upon is an agency order or interpretation under sections 4(c)(8) or 4(c)(13) of the Bank Holding Company Act, 12 USC 1843(c)(8) or (c)(13).
- Certify that the bank will remain "well capitalized" after deducting the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from the assets and tangible equity of the bank and deducting such investment from its total risk-based capital (this deduction shall be made equally from Tier 1 and Tier 2 capital).
- Demonstrate that the aggregate consolidated total assets of all the financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the bank's consolidated total assets or \$50 billion (this \$50 billion limit is subject to adjustment according to an indexing mechanism established jointly by the Secretary of the Treasury and the Federal Reserve).

- Certify that the bank meets the eligible debt requirement of 12 CFR 5.39(g)(3), if applicable. If the financial subsidiary is acting solely as agent, this certification is not necessary.

## **Review**

### **Licensing Staff**

3. Initiates and enters information into CAIS.
4. Establishes the official file to maintain all original documents.
5. Forwards a copy of the Financial Subsidiary Notice and any CAIS comments to the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst.
6. Determines that a financial subsidiary certification is on file and that the information outlined in step 2 is included with the notice.
7. If the notice relates to an investment in a company engaging in insurance activities, including a broker dealer selling annuities that are considered insurance under state law, forwards a copy of the notice with a brief cover letter to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.
8. If the notice contains the information previously outlined, sends an acknowledgement letter to the bank with a copy to the ADC or large bank EIC and supervisory analyst. Proceeds to step 11.
9. If the notice is not complete, contacts the bank for submission of missing information.
10. Reviews any additional information to determine the notice is complete. Goes to step 8.

## **Close Out**

### **Licensing Staff**

11. Makes CAIS entries.
12. Reviews the file for completeness and forwards the file to Central Records.

# Procedures: Financial Subsidiary—Combined Certification and Notice

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## Prefiling

### Licensing Staff

1. Refers a bank that requests instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.

## Filing

### Bank

2. Submits a Financial Subsidiary Certification and Notice to the Director for District Licensing.

The financial subsidiary certification and notice must:

- Be labeled "Financial Subsidiary Certification and Notice."
- List each of the bank's affiliated depository institutions.
- Include a certification that the bank and each affiliated depository institution:
  - Is "well capitalized."
  - Is "well managed."
  - Has not received a less than "Satisfactory" CRA rating.
- Describe the activity or activities to be performed in the financial subsidiary.
- Cite the specific authority permitting the activity to be conducted within a financial subsidiary. Include a copy of the order or interpretation if the authority relied upon is an agency order or interpretation under Section 4(c)(8) or 4(c)(13) of the Bank Holding Company Act, 12 USC 1843(c)(8), (c)(13).
- If a notice relates to the initial affiliation of a bank with a particular company involved in insurance activities (including a broker dealer selling annuities that are considered insurance products under state law), describe the type of insurance activity that the company is engaged in and has present plans to conduct and list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.

- Certify that the bank will remain “well capitalized” after deducting the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from the assets and tangible equity of the bank and deducting such investment from its total risk-based capital (this deduction shall be made equally from Tier 1 and Tier 2 capital).
- Demonstrate that the aggregate consolidated total assets of all the financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the bank’s consolidated total assets or \$50 billion (this \$50 billion limit is subject to adjustment according to an indexing mechanism established jointly by the Secretary of the Treasury and the Federal Reserve).
- Certify that the bank meets the eligible debt requirement of 12 CFR 5.39(g)(3), if applicable. If the financial subsidiary is acting solely as agent, this certification is not necessary.

## Review

### Licensing Staff

3. Initiates and enters information into CAIS.
4. Establishes the official file to maintain all original documents.
5. Forwards a copy of the financial subsidiary certification and notice and any CAIS comments to the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst.
6. Determines the financial subsidiary certification and notice contains the information outlined in step 2.
7. Determines the bank and each affiliated depository institution are “well capitalized,” “well managed,” and has not received less than a “Satisfactory” CRA rating.
8. If the notice relates to an investment in a company engaging in insurance activities, including a broker dealer selling annuities that are considered insurance under state law, forwards a copy of the notice with a brief cover letter to the insurance commissioner of the state in which the company holds a resident license, or charter, as applicable.
9. If the financial subsidiary certification and notice contains the information outlined in step 2, sends an acknowledgement letter to the bank with a copy to the ADC or large bank EIC and supervisory analyst. Proceed to step 12.
10. If the financial subsidiary certification or notice is not complete, contacts the bank for submission of missing information.
11. Reviews any additional information to determine that financial subsidiary certification and notice is complete. Proceed to step 9.



## **Close Out**

### Licensing Staff

12. Makes CAIS entries.
13. Makes a copy of financial subsidiary certification and notice and retains it in the district office files for future reference.
14. Reviews the file for completeness and forwards the file to Central Records.

# Procedures: Noncontrolling Investments

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## After-the-fact Notice

### Prefiling

#### Licensing Staff

1. Refers a bank requesting instructions to the "General Policies and Procedures" booklet and this booklet of the *Comptroller's Licensing Manual*.

### Filing the Notice

#### Bank

2. Submits a complete after-the-fact notice (notice) to the Director for District Licensing.

The noncontrolling investment notice must provide:

- A certification that the bank is "well capitalized" and "well managed."
- A complete description of the investment in the enterprise, including the amount of the investment and the percent of the bank's capital the investment represents.
- A complete description of the activities conducted by the enterprise in which the bank is investing. To the extent the notice relates to the initial affiliation of the bank with a particular company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance products under state law), provide a description of the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.
- A statement as to:
  - Which paragraph(s) of 12 CFR 5.34(e)(5)(v) describes the activities, or
  - How the activities are substantively the same as that contained in a published OCC precedent (with citations provided), approving a noncontrolling investment by a bank or its operating subsidiary, with a statement that such activity will be conducted under the same terms and conditions applicable to the activity covered by the precedent.

- A description of how the bank can prevent the enterprise from engaging in activities not contained in 12 CFR 5.34(e)(5)(v) or in a published OCC precedent approving a noncontrolling investment by a national bank or its operating subsidiary, or how the bank can withdraw its investment.
- A description of how the investment is convenient and useful to the bank in carrying out its business and not merely a passive investment unrelated to the bank's banking business.
- A statement certifying that:
  - The bank will account for its investment under the equity or cost method of accounting.
  - The bank's loss exposure is limited, as a legal and accounting matter, and the bank does not have open-ended liability for the obligations of the enterprise.
  - The enterprise in which the bank is investing agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of 12 USC 1820a and 1831v.

## Review

### Licensing Staff

3. Initiates and enters information into the Corporate Activities Information System (CAIS).
4. Establishes the official file to maintain all original documents.
5. Reviews the notice and verifies that:
  - The bank is at least "well capitalized" and "well managed."
  - The description of the activity meets the regulatory criteria of 12 CFR 5.34(e)(5)(v) and 5.36(e).
  - The notice contains all the required information as outlined in step 2.
  - Forwards copy of the notice to district counsel if the activity raises any questions of permissibility.
6. If the notice is sufficient, sends an acknowledgment letter to the bank, providing a copy to the Assistant Deputy Comptroller (ADC) or large bank Examiner-in-Charge (EIC) and supervisory analyst.

If the notice relates to an investment in a company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance under state law), prepares a cover letter and forwards a copy of the

notice to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.

Proceeds to step 9.

7. If the notice is insufficient, contacts the bank for clarification or the missing information.
8. Reviews any additional information. If the notice is sufficient, sends an acknowledgment letter to the bank, providing a copy to the ADC or large bank EIC and supervisory analyst.

If the notice relates to an investment in a company engaged in insurance activities (including a broker dealer selling annuities that are considered insurance under state law), prepares a cover letter and forwards a copy of the notice to the insurance commissioner of the state in which the company holds a resident license or charter, as applicable.

## **Close Out**

### **Licensing Staff**

9. Makes CAIS entries.
10. Reviews the file for completeness and forwards the file to Central Records.

# Appendix A: Operating Subsidiary Guidelines

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## Introduction

These guidelines describe those activities of national banks that the Comptroller of the Currency (OCC) has determined may be performed in an operating subsidiary under the after-the-fact notice procedure available in the OCC's operating subsidiary regulation.<sup>1</sup> The citations given in the guidelines for each of the activities listed provide examples of OCC approvals.<sup>2</sup>

## ***Operating Subsidiary Activities [5.34(e)(5)(v)]***

**(A) Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.**

National banks and their operating subsidiaries may hold and manage assets acquired by the parent bank or the operating subsidiary, including investment assets and property acquired in satisfaction of debts previously contracted (DPC).

### *Investment Assets*

National banks and their operating subsidiaries may own, hold, and manage all or part of the parent bank's investment securities portfolio in accordance with the bank's investment guidelines. Such activity is permissible as part of, or incidental to, the business of banking. Moreover, a national bank or its operating subsidiary "may purchase for its own account investment securities under such limitations and restrictions as the OCC may by regulation prescribe."<sup>3</sup> The OCC's Investment Securities Regulations at 12 CFR 1 prescribe limitations and restrictions on the purchase of an investment security by a national bank for its own account. These restrictions similarly apply to a national bank's operating subsidiary. Limits on securities activities in Part 1 generally are applied to the bank and the operating subsidiary combined.

### *DPC Property*

Title 12 USC 29 governs the treatment of real property taken DPC. Banks should consult 12 CFR 34, Subpart E, "Other Real Estate Owned," for specific information on the treatment of DPC real estate. In addition, banks are authorized to take other property DPC under 12 USC 24 (Seventh), for sale to reduce the bank's losses on the underlying debts. A bank may take appropriate steps to preserve the property's value for sale. For example, if a national bank takes corporate stock DPC, it has the implied power to operate the corporation's business, particularly when the resale

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<sup>1</sup>12 CFR 5.34(e)(5)(iv) and (v).

<sup>2</sup> The narrative section of this Investment in Subsidiaries and Equities booklet (booklet) provides further information on the requirements governing the use of the after-the-fact notice procedure. In addition, with respect to offshore subsidiaries, see page 4 under "Key Policies, Offshore Subsidiaries."

<sup>3</sup> 12 USC 24(Seventh).

value depends on its uninterrupted operation, provided that the purpose of operating the corporation's business is not to speculate on its future value.

Generally, real property must be disposed of within five years and cannot be used for speculation. Transfer of the DPC assets to the operating subsidiary does not alter the limitations on the bank's holding period for that asset. The property need not have been collateral for the loan in question. The OCC may extend that period up to five additional years if the bank has made a good faith attempt to dispose of the real estate within the five-year period or its disposal within that period would be detrimental to the bank.

A national bank also may hold securities in satisfaction of DPC for five years. This holding period also may be extended up to an additional five years upon a clearly convincing demonstration of why an additional holding period is needed.<sup>4</sup> An operating subsidiary that acquires stock of the parent bank must dispose of it within six months.<sup>5</sup>

Operating subsidiaries established by the notice procedure to engage in DPC activity also may enter into arrangements as a general or limited partner with depository or nondepository co-lenders to engage in the orderly acquisition, management, and disposition of DPC assets stemming from the parent bank's loans.<sup>6</sup> DPC partnership activity must be conducted as follows: (1) the partnership must be limited to the acquisition, management, and disposition of the DPC assets; (2) partners will be limited to co-lenders and their agents; (3) the DPC assets must be disposed of promptly within the previously described guidelines; and (4) the bank must maintain at its headquarters office and make available to OCC examiners current information on all DPC assets activities of its operating subsidiary, including the name and location of each operating subsidiary, each partnership and relevant agreement, and each DPC asset being held pending disposition.

National banks establishing operating subsidiaries that will engage in debt-equity swap transactions<sup>7</sup> must follow the standard processing procedures in section 5.34.

**(B) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting.**

National banks and their operating subsidiaries may provide internal operation services for the parent bank, its holding company, and their subsidiaries.<sup>8</sup> These services generally relate to the day-to-day operations of those entities.<sup>9</sup> Real estate appraisal services are covered at 12 CFR 5.34(e)(5)(v)(V).

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<sup>4</sup> 12 CFR 1.7 clarifies how a bank must treat securities held in satisfaction of DPC and provides for the five-year holding period with limited extensions. It also requires banks to account for those holdings in accordance with GAAP and states that they may not be taken for speculative purposes.

<sup>5</sup> 12 USC 83.

<sup>6</sup> Interpretive Letter No. 397 (September 15, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,621.

<sup>7</sup> No Objection Letter No. 87-10 (November 27, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,039; No Objection Letter No. 88-7 (May 20, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,047.

<sup>8</sup> Interpretive Letter No. 811, *supra*; Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Federal Banking L. Rep. (CCH) ¶ 83,215.

<sup>9</sup> Letter from Robert Bloom, Deputy Comptroller for Policy (August 26, 1975).

National banks and their operating subsidiaries may provide advice, opinions, research, analyses, reports and other information and opinion on any financial matter to any affiliate of the operating subsidiary. Banks typically develop financial information and analysis internally.

**(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks.**

*Making loans or other extensions of credit*

National banks and their operating subsidiaries possess broad authority to engage in lending and lending-related activities. Subject to safety and soundness guidelines, they may originate (including asset-based lending) loans or other extensions of credit for the bank's or subsidiary's account, or for the account of others. These activities are permitted for any type of loan, or interest therein, including, among other things, consumer loans, accounts receivable, credit card loans, commercial loans, residential mortgage loans, and commercial real estate loans. For purposes of this section, however, only lending activities that: (1) are well-established activities previously approved by the OCC; and (2) do not raise significant policy or supervisory issues, qualify for after-the-fact notice filings under 12 CFR Part 5. For example, derivatives transactions are not considered lending transactions for purposes of this section. Also, operating subsidiaries structured as real estate investment trusts do not qualify for after-the-fact notice filings if the size of the minority interest to be created is greater than the lesser of 1 percent of the bank's Tier 1 capital or \$1 million. Any bank that considers establishing a REIT as an operating subsidiary is strongly encouraged to consult first with the OCC.

Except for lending limit, affiliate-transaction, and insider-transaction restrictions, lending is generally permitted without a quantitative limit, but when performed for the bank's or subsidiary's own account, may be subject to geographic restrictions under the McFadden Act.

Real estate loans and certain other types of loans are also subject to certain additional restrictions discussed as follows.

*Personal and Commercial Loans*

National banks and their operating subsidiaries are authorized expressly to lend money on personal security.<sup>10</sup> They may also discount, purchase, and negotiate drafts, bills of exchange, and other evidences of debt. The general power to make personal and commercial loans essentially is unrestricted.

*Real Estate Loans and Related Activities*

A national bank may make real estate loans pursuant to 12 USC 371 and 12 USC 24(Seventh). A national bank will find the standards for real estate-related lending and associated activities at 12 CFR 34. Real estate lending may be performed for the account of the bank, the operating subsidiary, or for third parties.<sup>11</sup> National banks and their operating subsidiaries may make (or participate in), arrange,

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<sup>10</sup> 12 USC 24(Seventh).

<sup>11</sup> Interpretive Letter No. 389 (July 7, 1987), reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,613.

purchase, or sell loans or extensions of credit (or interests therein) secured by liens or interests in residential or commercial real estate (including acquisition, development, and construction loans) without any special quantitative limit aside from the general lending limit, but subject to applicable restrictions and requirements of the OCC's regulations in 12 CFR 34 and accompanying Interagency Guidelines for Real Estate Lending Policies. They may also perform various activities that are closely related to the lending function, such as gathering census tract information, auditing loan portfolios, preparing loan documentation, performing flood insurance services, and inspecting real property.<sup>12</sup>

The authority to make such loans includes structuring them as "participating loans," when a portion of the interest, but not the principal, is contingent upon the success of the borrower's enterprise. However, the lender may not take an ownership interest in the underlying real estate.<sup>13</sup>

Certain permissible services (including lending, functions involved in loan brokerage, preparation of loan documentation, performing flood insurance services, inspecting real property, and others) qualify as "settlement services" under the Real Estate Settlement Procedures Act (RESPA). As such, referrals of these services among the bank and its lending affiliates are subject to the restrictions relating to "affiliated business arrangements" (ABAs) as defined in RESPA. For additional information and guidance, refer to (V) "Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions" of this appendix.

#### *Other Lending-Related Activities*

In addition to direct lending activities, national banks and their operating subsidiaries also may engage in lending-related activities on behalf of third parties, that are part of or incidental to banking, such as conducting a general mortgage banking business and providing loan brokerage services. For example, national banks and their operating subsidiaries may provide real estate asset management and advisory services, furnish debt collection services, set fees, offer credit reporting services, arrange for the placement of equity interests in commercial real estate between borrowers and investors,<sup>14</sup> market and sell mortgage loans in the secondary market, provide customer service support for a credit card business, negotiate and close loans for third-party lenders, arrange loan commitments from third parties, act as document custodians of residential mortgage loan documents for third parties, assist state and local governments in placing funds made available through mortgage revenue bonds, and engage in merchant processing activities.<sup>15</sup>

<sup>12</sup> See, for example, Conditional Approval No. 322 (July 30, 1999); Conditional Approval No. 276 (May 8, 1998).

<sup>13</sup> 12 CFR 7.1006; Interpretive Letter No. 620 (July 15, 1992), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,502; Interpretive Letter No. 389, *supra*; Interpretive Letter No. 244 (Jan. 26, 1982), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,408; and Interpretive Letter No. 204 (June 17, 1981), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,285.

<sup>14</sup> Subject to the conditions in Interpretive Letter No. 271, *supra*.

<sup>15</sup> Interpretive Letter No. 389, *supra*; Interpretive Letter 387, *supra*; Interpretive Letter No. 271, *supra*; S. rep. No. 536, 97th Cong., 2d Sess. 60 (1982); Interpretive Letter No. 944 (Aug. 12, 2002) [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-469. See also Letter from J. Michael Shepherd, Senior Deputy Comptroller (Nov. 19, 1990); Letter from Karen J. Wilson, Deputy Comptroller (Mar. 13, 1990); Letter from Karen J. Wilson, Deputy Comptroller (Nov. 29, 1989) and Letter from Emory W. Rushton, Acting Deputy Comptroller (Dec. 19, 1986).



Activities undertaken for third parties, such as brokerage or servicing activities, may be conducted at any location without regard to branching restrictions.

*Selling money orders, savings bonds, or travelers checks.*

National banks and their operating subsidiaries generally may sell these instruments without regard to where the bank's branch offices are or could be located. In addition, the OCC's interpretive ruling, "Sale of money orders at nonbanking outlets," 12 CFR 7.1014, allows bonded agents to sell money orders on behalf of the bank or its operating subsidiary at nonbanking locations. See section (Y) below.

**(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein.**

National banks and their operating subsidiaries may, subject to safety and soundness considerations, engage in purchasing (including factoring), selling, servicing, or warehousing loans or other extensions of credit for the bank's or subsidiary's account or for the account of others. These activities are permitted for any type of loan, or interest therein, including, among other things, consumer loans, accounts receivable, credit card loans, commercial loans, residential mortgage loans, and commercial real estate loans. Most such loans and activities are subject to the same general authorities and limitations as apply to the origination of loans (see section (C) above).

The OCC interprets the general lending authority of section 24(Seventh) as permitting national banks and their operating subsidiaries to act as agent in selling, warehousing or servicing mortgage and other loans.<sup>16</sup> Warehousing loans generally involves holding loans that are closed and awaiting sale or delivery to an investor. National banks and their operating subsidiaries may engage in mortgage collateral warehousing for third parties, which involves the receipt, verification, and storage of loan documentation for lenders.<sup>17</sup> In addition, they may provide warehousing services to extend credit to the loan originator in exchange for an assignment of the loans.

**(E) Providing courier services between financial institutions.**

National banks and their operating subsidiaries may transport items pertaining to banking operations between the offices of the bank, the bank and its affiliated financial institutions; the bank and nonaffiliated financial institutions; offices of nonaffiliated financial institutions; offices of noncustomers of the bank; and between noncustomers of the bank and their financial institutions.<sup>18</sup> National banks may provide courier services for financial institutions under the following circumstances:

- For the bank itself: transportation of items related solely to the internal operations of the bank.<sup>19</sup> This includes transportation of cash between bank offices or for the restocking of the bank's ATMs.<sup>20</sup>

<sup>16</sup> Conditional Approval No. 338 (Nov.10, 1999); Conditional Approval No. 264 (Dec.29, 1997); Conditional Approval No. 243 (May 9, 1997); Interpretive Letter No. 187, *supra*.

<sup>17</sup> Letter from Michael Patriarca, Deputy Comptroller (May 28, 1986).

<sup>18</sup> Corp. Dec. 2003-9 (June 25, 2003).

<sup>19</sup> Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (March 7, 1983).

<sup>20</sup> 12 CFR 5.34(e)(v)(E); Corp. Dec. 2003-9 (June 25, 2003); Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,215; No-

- For the bank itself and for its affiliated financial institutions: transportation of items related to banking transactions, such as checks, data processing materials, and interoffice mail.<sup>21</sup>
- For the bank and affiliated and nonaffiliated financial institutions: transportation of cash and documents related to banking, such as checks, commercial paper, non-negotiable instruments, audit and accounting media, and other business records.<sup>22</sup>

A courier service performing the previously mentioned functions pursuant to the after-the-fact notice procedure must not constitute a branch of any bank—that is, the service must not constitute branching transactions (the receipt of deposits, payment of withdrawals, or disbursement of loan proceeds) with its customers. If the service does constitute a branch, branching approval must be sought under the procedures set forth in 12 CFR 5.30.

**(F) Providing management consulting, operational advice, and services for other financial institutions.**

National banks and their operating subsidiaries may gather information and provide advice to any unaffiliated depository institution, in the form of information or opinion about its management and operation, and provide other services tailored to the management and operational needs of a depository institution customer. Banks traditionally have performed those activities in their correspondent relationships, under which they act on behalf of other banks in conducting the banking business. See also subsection (S), *infra*, “Offering correspondent services to the extent permitted by published OCC precedent.” Operating subsidiaries may provide a broad range of services to other depository institutions under this authority.<sup>23</sup> Services offered pursuant to this authority must be those that reflect and incorporate the unique nature of the banking business.<sup>24</sup>

Any actions taken or decisions made by a depository institution customer, based on services provided by the operating subsidiary, must be a function of the management or board of directors of the customer, with the operating subsidiary refraining from engaging in a management role or exercising any form of operating control over the customer.<sup>25</sup>

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Objection No. 89-04 (July 11, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,061; Letter from Richard V. Fitzgerald, Director, Legal Advisory Services Division (May 22, 1981).

<sup>21</sup> Letter from Thomas G. DeShazo, Deputy Comptroller (April 26, 1974).

<sup>22</sup> Corp. Dec. 2003-9 (June 25, 2003); Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,215; No-Objection Letter No. 89-04 (July 11, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,061; Letter from Richard V. Fitzgerald, Director, Legal Advisory Services Division (May 22, 1981).

<sup>23</sup> Interpretive Letter No. 811, *supra*; Letter from Emory Rushton, Deputy Comptroller (February 16, 1988) Interpretive Letter No. 137 (December 27, 1979), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,218; Letter from John Shockey, Deputy Chief Counsel (April 12, 1976); Letter from H. Joe Shelby, Deputy Comptroller (October 2, 1975); Letter from Thomas G. DeShazo, Deputy Comptroller (August 22, 1975).

<sup>24</sup> Interpretive Letter No. 137, *supra*.

<sup>25</sup> Letter from Emory Rushton, Deputy Comptroller (February 16, 1988).

**(G) Providing check guaranty, verification, and payment services.**

National banks and their operating subsidiaries may agree to “guarantee” or “verify” the checks that will be drawn upon the bank by its customers.<sup>26</sup> In essence, the bank or the operating subsidiary agrees with its customers to extend credit, if necessary, to honor the checks. They may also provide check-cashing services to the general public without regard to where the bank’s branch offices are or could be located.

**(H) For the bank or its affiliates, providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology.**

National banks and their operating subsidiaries may collect, process, transcribe, analyze, and store banking, financial, and economic data for themselves and their customers as part of the business of banking.<sup>27</sup> Permissible processing of eligible data includes provision of data processing services, data transmission services, facilities – including equipment, technology, and personnel – databases, and advice. It also includes providing access to such services, facilities, databases, and advice. Economic data includes anything of value in banking and financial decisions.<sup>28</sup>

In addition to the processing of banking, financial, or economic data, national banks and their subsidiaries may, as activities incidental to the business of banking, provide limited amounts of non-financial information processing to their customers to enhance marketability or use of a banking service.<sup>29</sup> For example, a national bank selling home banking services can also provide customers with access to non-banking services “to increase the customer base for and the usage of” the home banking service.<sup>30</sup>

Banks and their subsidiaries that engage in financial or non-financial data processing will be expected to comply with all applicable supervisory requirements and guidance.<sup>31</sup>

**(I) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and**

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<sup>26</sup> 12 USC 24(Seventh).

<sup>27</sup> 12 CFR 7.5006; Interpretive Letter No. 928, (Dec. 24, 2001), *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-453; Corporate Decision No. 2000-08 (Jun. 1, 2000); Interpretive Letter No. 811, *supra*; Letter from Emory Rushton, Deputy Comptroller (February 16, 1988); Interpretive Letter No. 137, *supra*

<sup>28</sup> Interpretive Letter No. 928, *supra*; Corporate Decision No. 2000-08, *supra*; Conditional Approval No. 361 (Mar. 3, 2000); Interpretive Letter No. 856 (Mar. 5, 1999), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81-313.

<sup>29</sup> Conditional Approval No. 369 (Feb. 25, 2000); Interpretive Letter No. 742, (Aug. 19, 1996). *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106.

<sup>30</sup> Interpretive Letter No. 611, (Nov. 23, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449.

<sup>31</sup> For example, OCC Alert No. 2001-04 (Apr. 24, 2001) (Network Security Vulnerabilities); OCC Advisory Letter No. 2000-12 (Nov. 28, 2000) (Risk Management of Outsourcing Technology); OCC Bulletin No. 2000-14 (May 15, 2000) (Infrastructure Threats-Intrusion Risks—Message to Bankers and Examiners); Federal Financial Institutions Examination Council, Information Systems Examination Handbook (1996 ed.), available at <http://www.ncaa.gov/ref/ffiec/ffiechandbook.html>.

**mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling.**

### *General Description*

National banks and their operating subsidiaries may provide investment and financial advisory services and financial counseling as part of banking powers authorized under 12 USC 24(Seventh), or, in the case of activities that are fiduciary in nature, pursuant to their fiduciary powers under 12 USC 92a.<sup>32</sup>

Advisory activities may be provided to individuals, corporations, institutional investors, correspondent financial institutions, pension and other retirement plans, and others.<sup>33</sup> Those activities include individualized investment advice, business advisory services, financial advice, financial planning, investment recommendations, and analyses of economic trends.<sup>34</sup> Various administrative and shareholder functions also are incidental to the provision of advisory services including, but not limited to, recordkeeping, accounting, and other services.<sup>35</sup> Operating subsidiaries seeking to engage in different advisory activities should consult other sections of these guidelines, as applicable, for the scope of permissible activities. Any bank with an operating subsidiary engaging in these activities must comply with applicable provisions of the Interagency Statement on Retail Sales of Nondeposit Investment Products, February 15, 1994.

Depending on the advisory services offered, the operating subsidiary may need to register with the Securities and Exchange Commission (SEC) as an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) and comply with any applicable state laws.<sup>36</sup> Banks are excluded specifically from the definition of investment adviser under the Advisers Act, unless they advise registered investment companies. Bank operating subsidiaries are fully subject to the Advisers Act.<sup>37</sup>

### *Adviser with Investment Discretion*

Investment discretion means, with respect to an account, the sole or shared authority (whether or not that authority is exercised) to determine what securities or

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<sup>32</sup> 12 CFR 9.2(e); Interpretive Letter No. 769 (January 28, 1997), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-133; Interpretive Letter No. 648 (May 4, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,557; Interpretive Letter No. 367 (August 19, 1986), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,537; Interpretive Letter No. 329 (March 4, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,499; *Decision of the Comptroller of the Currency Concerning an Application by American National Bank of Austin, Texas, to Establish an Operating Subsidiary to Provide Investment Advice (American National Decision)* (September 23, 1983), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,732.

<sup>33</sup> Interpretive Letter No. 298 (July 23, 1984), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,468; *American National Decision, supra*.

<sup>34</sup> Interpretive Letter No. 516 (July 12, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220; Interpretive Letter No. 367, *supra*; Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, dated July 17, 1986; *American National Decision, supra*.

<sup>35</sup> Interpretive Letter No. 647 (April 15, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,558; Interpretive Letter No. 386 (June 19, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,610.

<sup>36</sup> Interpretive Letter No. 403 (December 9, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,627; Interpretive Letter No. 367, *supra*.

<sup>37</sup> 15 USC 80b-2(a)(11).

other assets to purchase or sell on behalf of the account. A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.<sup>38</sup> If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to 12 CFR 5.26, unless the subsidiary is required to be registered with the SEC. 12 CFR 5.34(e)(5)(vii).

*Financial adviser or counselor to governmental entities or instrumentalities, businesses or individuals*

*to governmental entities or instrumentalities*

National banks and their operating subsidiaries may advise state, local, and foreign governments on financing projects and assist them in the marketing of their securities. National banks may provide such advice pursuant to their incidental powers.<sup>39</sup>

*to businesses or individuals*

Banks may provide financial advice, financial planning, and counseling to businesses and consumers in a variety of contexts,<sup>40</sup> including advice and counseling on employee benefits and human resources<sup>41</sup> and financial planning.<sup>42</sup>

Financial planning services generally include collecting and analyzing a customer's financial data; identifying a customer's financial goals and objectives; preparing a comprehensive financial plan consisting of recommendations on how to achieve the identified financial goals and objectives; evaluating personal, banking, financial, and related economic data and implementation of the financial plan, that is, purchasing the relevant products or services.<sup>43</sup> A comprehensive financial plan may contain tax planning and financial advice, and may recommend the purchase or sale of specific investments or securities.<sup>44</sup> A national bank financial planner may also use financial plans to make other recommendations, such as the consolidation of loans and purchase of life insurance.<sup>45</sup>

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<sup>38</sup> 12 CFR 9.2(i); Interpretive Letter No. 850 (January 27, 1999), *reprinted in* [1998-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-307; Corporate Decision No. 2000-07 (May 10, 2000).

<sup>39</sup> 12 USC 24(Seventh); Interpretive Letter No. 122 (August 1, 1979), *reprinted in* [1981 - 1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,203. See also *The Bank of Tokyo, Ltd.*, 76 Fed. Reserve Bull. 654 (1990); *The Bank of Nova Scotia*, 74 Fed. Reserve Bull. 249 (1988).

<sup>40</sup> Interpretive Letter No. 769, *supra*.

<sup>41</sup> Conditional Approval No. 384 (April 25, 2000); Corporate Decision No. 99-43; Corporate Decision No. 98-51 (November 30, 1998); Corporate Decision 98-13 (February 9, 1998).

<sup>42</sup> Interpretive Letter No. 677 (June 28, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625; Interpretive Letter No. 611, *supra*; Interpretive Letter No. 403, *supra*; Interpretive Letter No. 386, *supra*; No-Action Letter No. 85-1 (July 30, 1985), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,001.

<sup>43</sup> See Interpretive Letter No. 653 (December 22, 1994), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601; Interpretive Letter No. 516, *supra*; No-Objection Letter No. 90-1 (February 16 1990), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,095; Interpretive Letter No. 386, *supra*; Letter from Justin T. Watson, Deputy Comptroller of the Currency (January 15, 1975).

<sup>44</sup> Interpretive Letter No. 367, *supra*; *American National Decision*, *supra*; Letter from David H. Baris, Regional Counsel (February 11, 1980); Interpretive Letter No. 137, *supra*; Letter from Justin T. Watson, Deputy Comptroller of the Currency (January 15, 1975).

<sup>45</sup> See for example, Interpretive Letter No. 386, *supra*; Interpretive Letter No. 367, *supra*.

### *Advising Registered Investment Companies*

National banks and their operating subsidiaries may act as an investment adviser to an investment company as part of banking powers authorized under 12 USC 24(Seventh), or pursuant to their fiduciary powers under 12 USC 92a.<sup>46</sup> Various administrative and shareholder functions may be provided in connection with the provision of investment advisory services, including, but not limited to, recordkeeping, accounting, and other services.<sup>47</sup> Further, operating subsidiaries may sponsor, organize, manage, and act as investment advisers to closed-end investment companies.<sup>48</sup> Banks and their operating subsidiaries advising registered investment companies must comply with the restrictions in sections 23A and 23B of the Federal Reserve Act, 12 USC 371c and 371c-1.<sup>49</sup>

The Investment Company Act of 1940 governs the formation, operation, and registration with the Securities and Exchange Commission (SEC) of investment companies.<sup>50</sup> Serving as an investment adviser to an investment company is defined in section 2(a)(20) of the Investment Company Act of 1940 and includes furnishing advice to the investment company on the desirability of investing in, purchasing, or selling securities.<sup>51</sup>

Investment advisers to investment companies must register with the SEC under the Investment Advisers Act of 1940 (Advisers Act), unless an exemption is available.<sup>52</sup> Banks specifically are excluded from the definition of investment adviser under the Advisers Act, unless they advise registered investment companies. Bank operating subsidiaries are fully subject to the Advisers Act.<sup>53</sup> Operating subsidiaries also must comply with any applicable state laws.

### *Advising Mortgage or Real Estate Investment Trusts*

National banks and their operating subsidiaries may provide investment advice and manage a portfolio of real estate loans and equity investments held or proposed to be held by a mortgage or real estate investment trust. Furnishing real estate asset management and advisory services, including servicing, advice, and recommendations for loan participations and mortgages and for real estate held, falls under the financial and investment advisory authority of banks in 12 USC 24(Seventh), and a national bank may act as an advisory company for a mortgage or real estate investment trust.<sup>54</sup>

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<sup>46</sup> Conditional Approval No. 270 (Jan 21, 1998); Conditional Approval Letter No. 164 (December 9, 1994); Interpretive Letter No. 648, *supra*; Interpretive Letter No. 647, *supra*; Interpretive Letter No. 622 (April 9, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,504; Interpretive Letter No. 403, *supra*; *Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46 (1981); *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 821 F.2d 810 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

<sup>47</sup> Interpretive Letter No. 647, *supra*; Interpretive Letter No. 386, *supra*; Interpretive Letter No. 332 (March 8, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,502.

<sup>48</sup> Conditional Approval Letter No. 164 (December 9, 1994); 12 CFR 225.28(b)(6)(i).

<sup>49</sup> 12 CFR 223 (67 Fed. Reg. 76560) (Dec. 12, 2002) (Regulation W). *See also* FRS, Transactions Between Banks and their Affiliates, 66 Fed. Reg. 24186 (May 11, 2001) (proposed rule).

<sup>50</sup> 15 USC 80a-1 *et seq.*

<sup>51</sup> 15 USC 80a-2(a)(20).

<sup>52</sup> 15 USC 80b-1 *et seq.*

<sup>53</sup> 15 USC 80b-2(a)(11).

<sup>54</sup> Interpretive Letter No. 389, *supra*.

### *Furnishing Economic Information*

National banks and their operating subsidiaries may provide advisory services about financial and investment planning and advice on general economic, business, and financial outlooks, and general trends in the stock and bond markets.<sup>55</sup>

### *Providing Investment Advice Related to Futures and Options*

National banks and their operating subsidiaries may advise customers in transactions involving financial and commodity futures.<sup>56</sup> Operating subsidiaries also may provide advice on futures and options on futures contracts as an introducing broker (IB) or a commodity-trading advisor (CTA). An operating subsidiary, acting as an IB, is engaged in soliciting or in accepting orders (in more than a clerical capacity) to purchase and sell any commodities futures or options. An IB does not extend credit or accept any money, securities, or property to margin, guarantee, or secure any trades or contracts that result or may result from the solicitation or acceptance of orders. Alternatively, an operating subsidiary, acting as a CTA, advises others, through publications, writings, electronic media, or other direct communication or by the regular issuance of analyses and reports, on the value or advisability of trading in any contract on commodities futures or options on commodities futures.<sup>57</sup> An operating subsidiary, acting as a futures commission merchant (FCM), also may provide advice in connection with its FCM activities.

### *Providing Consumer Financial Counseling*

National banks and their operating subsidiaries may provide financial advice to individuals directly or through the use of written materials, computer programs, seminars, or other methods. Providing financial advice includes advising persons on financial matters and marketing by-products of the bank's financial advisory capabilities.<sup>58</sup>

### **(j) Providing tax planning and preparation services.**

National banks and their operating subsidiaries may assist customers in tax planning and preparing and filing their tax returns, including by electronic means, either gratuitously or for a reasonable fee.<sup>59</sup> They are not restricted to serving only their

<sup>55</sup> Letter from Michael A. Mancusi, Senior Deputy Comptroller (May 30, 1985); Letter from David L. Chew, Senior Deputy Comptroller (August 7, 1984); *American National Decision, supra*.

<sup>56</sup> "Financial futures" include those futures contracts and options on futures contracts relating to assets that a national bank may purchase for its own account; that is, United States securities and United States government agency securities; domestic and Eurodollar money market instruments; bank certificates of deposit, foreign currencies; and gold, silver, platinum and palladium. "Commodity futures" include futures contracts and options on futures contracts for all other financial equities and non-financial (agricultural, petroleum, and metals) assets.

<sup>57</sup> Interpretive Letter No. 507 (May 5, 1990), *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,205; Interpretive Letter No. 494 (December 20, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083; Interpretive Letter No. 422 (April 11, 1988), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,646; Interpretive Letter No. 380 (December 29, 1986), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604; Interpretive Letter No. 365 (August 11, 1986), *reprinted in* [1985-87 Transfer Binder] (CCH) ¶ 85,535.

<sup>58</sup> See "Activities Permissible For A National Bank, Consulting and Financial Advice, p. 3 (April 2003); Letter from Wallace Nathan, District Counsel (June 11, 1985).

<sup>59</sup> 12 CFR 5.34(e)(5)(v)(j); *id.* 7.1008; Interpretive Letter No. 545 (March 6, 1991), [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,257; Interpretive Letter No. 611, *supra*.

existing customers for other services.<sup>60</sup> As a logical extension of these activities, national banks and their operating subsidiaries may refer customers to a service that represents taxpayers before the Internal Revenue Service.<sup>61</sup> They may also provide tax-planning services to other banks as a correspondent service.<sup>62</sup> However, they may not engage in the practice of law.<sup>63</sup>

**(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings.**

*Mergers, Acquisitions, Divestitures, Joint Ventures, Leveraged Buyouts, and Capital Restructurings*

National banks and their operating subsidiaries may furnish advice on financing the sale, acquisition, or capitalization of a business and other merchant banking transactions and the related activity of acting as an intermediary to arrange third-party financing through loans or the private placement of debt or equity interests. Acting as agent for a customer in the private placement of the customer's securities is permitted under 12 USC 24(Seventh). In conducting private placement activity, the subsidiary must comply with applicable securities laws.<sup>64</sup> See Gramm-Leach-Bliley Act, P.L. 106-102, Section 201 (Nov. 12, 1999) (amending, effective May 2001, the brokerage exemption in 15 USC 78c(a)(4) by limiting permissible private placement activities).

*Providing Advice and Assistance in Structuring, Arranging, and Executing Exchange, Coin and Bullion Transactions, and Derivatives*

(i) Exchange, Coin and Bullion Transactions

National banks are expressly authorized to engage in the business of "buying and selling exchange, coin, and bullion."<sup>65</sup> Pursuant to this authority, a national bank and its operating subsidiary may buy and sell gold, silver, platinum, palladium, and copper, coins, and bullion.<sup>66</sup> The express power to buy and sell exchange, coin, and bullion includes the authority to buy and sell foreign currency, because it is a form of exchange.<sup>67</sup> National banks and their operating subsidiaries may also provide customers advice and

<sup>60</sup> Letter from Alan Priest, Senior Attorney, Legal Advisory Services Division (October 24, 1984).

<sup>61</sup> Interpretive Letter No. 437 (July 27, 1988), [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,661.

<sup>62</sup> Letter from David H. Baris, Regional Counsel (February 11, 1980).

<sup>63</sup> Letter from David H. Baris, *supra*.

<sup>64</sup> Corporate Decision No. 2000-02 (Feb. 25, 2000); Trust Interpretation No. 256 (July 9, 1990), reprinted in [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,227; Letter from J. Michael Shepherd, Senior Deputy Comptroller (June 20, 1988); No-objection letter No. 87-4 (May 19, 1987), reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,033; *Securities Industry Assn. v. Board of Governors of the Federal Reserve System*, 807 F.2d 1052 (D.C. Cir 1987), cert. denied, 483 U.S. 1005 (1987).

<sup>65</sup> 12 U.S.C. 24(Seventh).

<sup>66</sup> Interpretive Letter No. 693 (Nov. 14, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-008.

<sup>67</sup> Interpretive Letter No. 414 (Feb. 11, 1988), reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,638.



assistance in structuring, arranging, and executing exchange, coin, and bullion transactions.<sup>68</sup>

(ii) Derivatives

National banks may engage in a wide variety of derivative transactions. However, the range of operating subsidiary derivative activities that are eligible for notice procedures (rather than application procedures) is limited to advisory and assistance activities, as explained below.

Generally, national banks may trade, deal in, and purchase and sell for their own accounts derivative instruments whose reference rates, instruments, and commodities are themselves permissible investments for national banks.<sup>69</sup> Bank permissible derivatives may reference, for example, interest rates, United States Treasury securities, mortgage-backed securities guaranteed by the United States government, domestic and Eurodollar money market instruments, bank certificates of deposit, foreign currencies, and various metals.<sup>70</sup>

National banks may also engage in customer-driven derivative transactions (e.g., perfectly matched swaps) as part of a financial intermediation business provided they meet certain standards and the bank's examiner-in-charge or supervisory office is satisfied the bank has adequate risk management and measurement systems to conduct the activity on a safe and sound basis.<sup>71</sup>

Under notice procedures, operating subsidiary Subsection (K) derivative activities are limited to providing advice and assistance to customers in connection with structuring, arranging, and executing such derivative transactions.<sup>72</sup> To conduct broader derivative activities in an operating subsidiary, a national bank generally must file an application under 5.34. However, national banks should consult with the OCC to determine whether a notice procedure may still be available when a proposed subsidiary will engage in derivative activities only as an incident to activities conducted by the proposed subsidiary that are eligible for notice procedures under 5.34 (e.g., hedging risk in connection with mortgage operations otherwise eligible for notice procedures).

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<sup>68</sup> See, e.g., Interpretive Letter No. 494 (Dec. 20, 1989) *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083.

<sup>69</sup> See, e.g., Interpretive Letter No. 693 (Nov. 14, 1995) *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-008; Interpretive Letter No. 494, *supra*.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Interpretive Letter No. 1081 (May 15, 2007) *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-613 (property indices); Interpretive Letter No. 1079 (Apr. 19, 2007) *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-611 (inflation indices); Interpretive Letter No. 1073 (Oct. 19, 2006), *reprinted in* [2006 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-605 (metals); Interpretive Letter No. 1065 (July 24, 2006), *reprinted in* [2005-2006 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-594 (petroleum products, agricultural oils, grains and grain derivatives, seeds, fibers, foodstuffs, livestock and meat products, metals, wood products, plastics and fertilizer).

<sup>72</sup> See, e.g., Interpretive Letter No. 365 (Aug. 11, 1986), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85-535.

## *Arranging Commercial Real Estate Equity Financing*

National banks and their operating subsidiaries may act as an intermediary to arrange for the placement of equity interests in commercial or investment real estate, generally on behalf of owners and developers, to finance the development of the property under the lending and financing authority of national banks in 12 USC 371 and 24(Seventh) and their authority to arrange for private placements of all types of investments pursuant to the incidental powers of a national bank to carry on the business of banking granted in 12 USC 24(Seventh).<sup>73</sup>

Neither the operating subsidiary nor any affiliate should expect to acquire an equity interest in any project financed by the private placement or to have a role in the development, management, or syndication of the project. The fee received by the subsidiary may not be based on the profits earned from the project. The subsidiary may not intend to become a general real estate broker, nor will it list or advertise properties for sale. The subsidiary should deal solely with sophisticated institutional investors. If the subsidiary or the parent bank engages in any lending for this activity, it should be limited to traditional debt financing, but may include taking interests as permitted by 12 CFR 7.1006.

### **(L) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA (15 USC 6712).**

National banks and their operating subsidiaries may continue to underwrite and reinsure any credit related insurance products being provided by national banks as of 1/1/99 or that were authorized in writing by the OCC as of that date.<sup>74</sup>

Credit-related insurance products guarantee or secure payment of an outstanding obligation in a credit transaction in the event that the borrower is unable to pay. Credit-related insurance products often are sold in conjunction with installment loans, automobile loans, credit cards, and residential mortgages. There are various types of credit-related products, including credit life insurance, credit disability insurance (also known as credit accident and health insurance), and mortgage life and disability insurance.<sup>75</sup> For example, a credit life insurance product on a relatively small decreasing balance installment loan typically will pay off the balance due on the loan if the borrower should die before the loan is repaid. Similarly, if an insured debtor becomes disabled or is killed accidentally, a credit accident and health insurance product policy may pay the policy premiums during the period of disability or pay off the loan or both. The precise terms of credit-related insurance products may vary based on the terms and conditions of a particular loan.<sup>76</sup>

Credit-related insurance products provide benefits for both the borrower and the lender by easing the financial burden on each in the event of unforeseen circumstances, such as death, disability, or unemployment. Credit-related insurance

<sup>73</sup> Interpretive Letter No. 271, *supra*; Interpretive Letter No. 387, *supra*.

<sup>74</sup> See 15 USC 6712 (as added by section 302 of GLBA); Corporate Decision No. 2001-10 (April 23, 2001); Corporate Decision No. 2000-16 (August 29, 2000); Interpretive Letter 886 (March 27, 2000), *reprinted in* [2000-01 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-405.

<sup>75</sup> See 12 CFR 2.2(b).

<sup>76</sup> Certain other insurance arrangements could also be considered "credit-related" when the existence of the insurance is integral to the borrower's ability to repay a loan in the event specified events occur.

exists as a unique kind of insurance product that is an integral part of certain credit transactions. Hence, underwriting credit-related insurance products serves as a risk management tool linked to the credit function of lending institutions.

The OCC has established the authority of national banks and their subsidiaries to sell as agent and underwrite credit-related insurance products as part of, or incidental to, the business of banking through a long line of precedents.<sup>77</sup> The OCC has concluded that national banks and their subsidiaries may underwrite credit-related insurance products in connection with loans by the bank itself and by lenders other than the bank.<sup>78</sup>

Prior to January 1, 1999, the OCC had "determined in writing" that national banks and their subsidiaries may provide credit-related insurance products as principal in connection with loans made by a financial institution lender other than the bank itself.<sup>79</sup>

**(M) Leasing of personal property and acting as an agent or adviser in leases for others.**

This activity includes:

- Leases in which the bank may invest pursuant to 12 USC 24(Seventh).
- Leases in which the bank may invest pursuant to 12 USC 24(Tenth).
- Acting as agent, broker, or adviser in leases for others. The notice process for any leasing activity under this paragraph is not available, however, if the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with a transaction subject to this section. For purposes of this paragraph (M), the terms "low-quality asset" and "affiliate" have the same meaning as provided in section 23A of the Federal Reserve Act, 12 USC 371c.

Pursuant to 12 USC 24(Seventh) and 24(Tenth), national banks and their operating subsidiaries may act as lessors and engage in the financing of full-payout, net leases for personal property, subject to the requirements of 12 CFR 23. Section 24(Seventh) leases have long been permitted on the ground that they are the functional equivalent of loans. Section 24(Seventh) leases are authorized for both tangible and intangible personal property and are subject to specific restrictions set forth in Subparts A and C of 12 CFR 23, including a

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<sup>77</sup> See, for example, Corporate Decision No. 98-28 (May 11, 1998); Corporate Decision No. 97-92 (Oct. 17, 1997); Interpretive Letter No. 283 (March 16, 1984), reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447; Interpretive Letter No. 277 (Dec. 21, 1983), reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441; 12 CFR 2; *IBAA v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980). See also, Interpretive Letter No. 338 (May 2, 1985), reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508; *American Insurance Association v. Clarke*, 656 F. Supp. 404 (D.D.C. 1987), aff'd, 865 F.2d 278 (D.C. Cir. 1989).

<sup>78</sup> Corporate Decision No. 97-92 (Oct. 17, 1997).

<sup>79</sup> Prior to January 1, 1999, the OCC had also determined in writing that national banks and their subsidiaries may provide as principal other insurance products, including safe deposit box liability insurance and self insurance of business risks. See Corporate Decision No. 97-92 (October 17, 1997); Interpretive letter No. 845 (October 20, 1998), reprinted in [1998-1999 Transfer Binder Fed. Banking L. Rep. (CCH) ¶ 81-300. However underwriting and reinsuring credit-related insurance are the only insurance underwriting activities that qualify for the notice procedures under 12 CFR 5.34(e)(5)(v)(L).

limitation on reliance of residual value. Part 23 requires national banks and their subsidiaries to receive prior OCC approval for certain activities and should be consulted to determine whether a separate filing under that part is needed.

Section 24(Tenth) leases are authorized pursuant to express statutory authority and are subject to specific restrictions set forth in Subparts A and B of 12 CFR 23, including a 10 percent-of-assets limitation on the aggregate book value of section 24(Tenth) leases and a minimum lease term of 90 days. In addition, the authority conferred by section 24(Tenth) is limited to the leasing of *tangible* personal property. Tangible personal property includes such items as vehicles, manufactured homes, machinery, equipment, and furniture. Unlike section 24(Seventh) leases, section 24(Tenth) leases are *not* viewed as a form of lending. Whether property is considered "personal" property depends on state law. Both types of leases are also subject to lending limits and affiliate-transactions restrictions.

National banks and their subsidiaries generally have not been authorized to engage in the lease financing of real property,<sup>80</sup> but may do so when the real estate lease is incidental to a personal property leasing transaction.<sup>81</sup> They may, however, engage in the "placement of real estate lease transactions, specifically, locating investors as potential lessors to a potential lessee and brokering the debt portion of any such lease."<sup>82</sup>

To establish a leasing relationship with a lessee, banks and subsidiaries may acquire property to be leased by purchasing specific property based on a legally binding commitment to lease or a legally binding written agreement, indemnifying the bank against loss from the acquisition of the leased property. Banks and their subsidiaries may also acquire property to be leased in the absence of a commitment to lease or indemnification agreement if the bank satisfies certain conditions (set forth in 12 CFR 23.4), demonstrating that the acquisition of property is not speculative. Finally, banks may acquire leases by purchasing them from another lessor, but in the case of section 24(Seventh) leases, the residual value requirement must be met at the time of the lease purchase(s). Thus, if a bank or its subsidiary purchases an existing section 24(Seventh) lease, that lease must be a "conforming lease" (as defined in 12 CFR 23) at the time of its acquisition.

Banks and their subsidiaries may also provide certain lease-related services to third parties to the extent that they are incidental to the business of banking. National banks are expressly authorized to act as finder or similar agent or broker.<sup>83</sup> In addition, the OCC has opined that national banks and their operating subsidiaries may provide lease consulting services (including financial advice); management, brokerage, and finder services; and lease servicing for third parties.<sup>84</sup>

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<sup>80</sup> Interpretive Letter No. 556 (Aug. 6, 1991), *reprinted in* [1991-92 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,306; Letter from Frank Maguire, Acting Senior Deputy Comptroller (May 20, 1993).

<sup>81</sup> 12 CFR 23; *see also* Interpretive Letter No. 770 (Feb. 10, 1997), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-134; Conditional Approval No. 295 (Dec. 3, 1998); Corporate Decision No. 98-35 (June 10, 1998)

<sup>82</sup> Letter from Wallace S. Nathan, District Counsel (Oct. 28, 1985).

<sup>83</sup> 12 CFR 7.7200; *see also* Letter from Sue E. Auerbach, Senior Attorney (Aug. 19, 1996).

<sup>84</sup> Interpretive Letter No. 567 (Oct. 29, 1991) *reprinted in* [1991-92 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,337; Letter from Wallace Nathan, District Counsel (Oct. 28, 1985); Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (June 15, 1981).

A special category of leasing activities is permitted by 12 CFR 7.3300. National banks and their operating subsidiaries may purchase or construct municipal buildings, such as schools or similar public facilities, for lease to a municipality or other public authority.<sup>85</sup>

Upon expiration of the lease, the lessee must become the owner of the building or facility. The bank lessor must be repaid entirely by the payments from the lessee.

**(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services.**

*Providing securities brokerage*

National banks and their operating subsidiaries may provide brokerage services, related securities credit, advisory services, and administrative services as part of or incidental to the business of banking. The specific language of 12 USC 24(Seventh) recognizes that banks may purchase and sell "securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account."

Securities brokerage services involve the buying and selling of a wide variety of financial investment products as agent upon the order and for the account of customers. Such investment products include annuities, shares of mutual funds, units in unit investment trusts, equity and fixed income securities, sold on an agency basis. In addition, an integral part of the brokerage business is advertising and marketing services and products to attract customers.<sup>86</sup>

Brokerage services include buying and selling securities in the secondary market as "riskless principal." A riskless principal transaction involves the operating subsidiary purchasing or selling a security upon the order of a customer, while conducting a simultaneous offsetting sale or purchase of a security upon the order of another customer.<sup>87</sup> Operating subsidiaries also may act as agent for a customer in the private placement of the customer's securities as described more fully under Section K of the notice procedures, *supra*.

Related securities credit offered by an operating subsidiary as part of its securities brokerage services involves the extension or maintenance of credit to customers for the purchase or carrying of securities. This activity must be consistent with 12 USC 36 and 12 CFR 7.1004.<sup>88</sup> The Federal Reserve Board's regulations on margin loans are applicable to banks under Regulation U<sup>89</sup> and to brokers under Regulation T.<sup>90</sup>

<sup>85</sup> Interpretive Letter No. 847 (Oct. 28, 1998), *reprinted in* [1998-99 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81-302.

<sup>86</sup> Conditional Approval Letter No. 164 (December 9, 1994); Interpretive Letter No. 648, *supra*; Interpretive Letter No. 647, *supra*; Interpretive Letter No. 622, *supra*; *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984); *Securities Industry Association v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *aff'd per curiam*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) (brokerage issue).

<sup>87</sup> Interpretive Letter No. 626 (July 7, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,508; Interpretive Letter No. 371 (June 13, 1986), *reprinted in* [1985-87 Transfer Binder] ¶ 85,541.

<sup>88</sup> *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) (branching issue); Interpretive Letter No. 403, *supra*; American National Decision, *supra*.

<sup>89</sup> 12 CFR 221.

<sup>90</sup> 12 CFR 220.

Operating subsidiaries providing securities brokerage services may furnish other related activities, including investment advisory and administrative services. Various administrative and shareholder functions are incidental to the provision of the brokerage services, including but, not limited to, recordkeeping, accounting, and other services.<sup>91</sup>

Operating subsidiaries established to engage in these activities may conduct them in a partnership structure. For example, a subsidiary of a national bank may enter into a general partnership arrangement or joint venture with one or more subsidiaries or affiliates of an investment bank, provided that certain conditions relating to partnership issues are met.<sup>92</sup>

Banks with operating subsidiaries that engage in these activities must comply with applicable provisions of the Interagency Statement on Retail Sales of Nondeposit Investment Products, February 15, 1994, and 12 CFR Part 14. Banks and their operating subsidiaries advising registered investment companies must comply with the restrictions in sections 23A and 23B and Regulation W.

*Acting as futures commission merchant.*

National banks and their operating subsidiaries may act as futures commission merchants (FCM). A FCM operating subsidiary typically solicits or accepts orders to purchase or sell financial or agricultural futures contracts and options on such contracts on major exchanges. An FCM may extend credit or accept any money, securities, or property, to margin, guarantee, or secure any trades or contracts, resulting from the solicitation or acceptance of orders.<sup>93</sup> An FCM may act as intermediary between a customer and exchange members that actually execute or clear trades. Alternatively, an FCM may be a member of an exchange and serve as a clearing member. Operating subsidiaries may also offer advisory services, including financial and market analysis, strategy development, research, and discretionary funds management in connection with its FCM activities.<sup>94</sup>

National bank operating subsidiaries that join futures exchanges and clearinghouses may file a notice to engage in these activities if they can comply with certain restrictions.<sup>95</sup> A national bank's FCM may not join any exchange or clearing association that requires the bank or any other of its subsidiaries to guarantee or otherwise become liable for trades executed or cleared by the FCM other than those

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<sup>91</sup> Interpretive Letter No. 647, *supra*; Interpretive Letter No. 386, *supra*; Interpretive Letter No. 332 (March 8, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,502.

<sup>92</sup> Interpretive Letter No. 889 (April 24, 2000), *reprinted in* [2000-01 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-408; Interpretive Letter No. 625 (July 1, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,507; Interpretive Letter No. 622, *supra*; Interpretive Letter No. 516, *supra*; Interpretive Letter No. 411 (January 20, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,635; Interpretive Letter No. 289 (May 15, 1984), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,453.

<sup>93</sup> "Financial futures" include those futures contracts and options on futures contracts relating to assets that a national bank may purchase for its own account; that is, United States securities and United States government agency securities; domestic and Eurodollar money market instruments; bank certificates of deposit, foreign currencies; and gold, silver, platinum and palladium. "Commodity futures" include futures contracts and options on futures contracts for all other financial equities and non-financial (agricultural, petroleum, and metals) assets.

<sup>94</sup> Interpretive Letter No. 507, *supra*; Interpretive Letter No. 494, *supra*; Interpretive Letter No. 422, *supra*; Interpretive Letter No. 380, *supra*; Interpretive Letter No. 365, *supra*.

<sup>95</sup> Interpretive Letter No. 929, *supra*.

trades executed or cleared by the bank and any of its affiliates or other operating subsidiaries. Moreover, a national bank's FCM may not become a clearing member of any exchange or clearing association that requires the bank to also become a member of that exchange or clearing association, unless the bank obtains a waiver of that requirement. Finally, a national bank may not guarantee or assume responsibility for any liability of its FCM other than those trades executed and/or cleared for and on behalf of the bank and any of its affiliates or other operating subsidiaries.

A national bank establishing an operating subsidiary to engage in the activities described in this section may file a notice, only if its loans to, and investments in, its FCM (and its partnership interests) in the aggregate do not exceed its legal lending limit at the time of the loan or investment. A national bank may not make investments of equity capital in its FCM (or its partnership interest) that exceed the lending limit without the OCC's prior written consent. To calculate the lending limit according to this limitation, a national bank's investment in its FCM is deemed unsecured. A national bank may, however, lend its FCM (and its partnership interest) in the aggregate an additional 10 percent of its unimpaired capital and surplus, if secured by readily marketable collateral as provided in 12 USC 84.

**(O) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations.**

National banks and their operating subsidiaries may underwrite and deal in Type I and Type II securities.<sup>96</sup>

Specifically, they may underwrite and deal in Type I securities, which include: (1) obligations of the United States, a department or agency of the United States, general obligations of states and their political subdivisions; (2) obligations of certain quasi-governmental corporations, such as the Federal National Mortgage Association and the Government National Mortgage Association; (3) other obligations (such as qualified Canadian government obligations) specifically listed in 12 USC 24(Seventh); and (4) other securities the OCC determines to be eligible Type I securities under 12 USC 24(Seventh). National banks may underwrite and deal in such obligations without limitation, subject to safety and soundness considerations.<sup>97</sup> A well-capitalized national bank may underwrite and deal in municipal revenue bonds without limit.<sup>98</sup>

National banks and their operating subsidiaries also may underwrite and deal in Type II securities, which include: (1) obligations of certain international and multilateral development banks, such as the International Bank for Reconstruction and Development (World Bank); (2) obligations issued by any state or political subdivision for housing, university, or dormitory purposes; (3) other obligations listed specifically in 12 USC 24(Seventh); and (4) other securities the OCC determines to be eligible as Type II securities, subject to a limitation that the obligations of any single issuer may not exceed 10 percent of the bank's capital and surplus.<sup>99</sup> A national bank's ability to hold Type II securities is subject to a

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<sup>96</sup> See 12 CFR 1.

<sup>97</sup> 12 USC 24 (Seventh); 12 CFR 1.2(l); and 12 CFR 1.3(a).

<sup>98</sup> 12 USC 24(Seventh).

<sup>99</sup> 12 USC 24 (Seventh); 12 CFR 1.2(j); and 12 CFR 1.3(b).

limitation that the obligations of any single issuer may not exceed 10 percent of the bank's capital and surplus.<sup>100</sup>

National banks and their operating subsidiary may securitize and sell assets that they hold as part of their banking business. The amount of securitized loans and obligations that may be sold is not limited to a specific percentage of the bank's capital and surplus.<sup>101</sup>

The operating subsidiary must provide the OCC with evidence that it has developed suitable policies and internal controls to ensure the safe and sound conduct of the proposed activity. The operating subsidiary also should coordinate its trading positions with those of the bank itself.<sup>102</sup>

**(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA (15 USC 6713).**

#### *Sales Pursuant to Section 92*

National banks generally may sell insurance pursuant to section 92 in the same nationwide market as is generally available to licensed insurance agencies in the state where the bank agency operates.<sup>103</sup> National banks may sell insurance to customers wherever the customers are located.<sup>104</sup> National banks may sell insurance directly or through an operating subsidiary if the national bank is located and doing business in a place of 5,000 or less in population.<sup>105</sup> Any area designated by the Census Bureau as a place is a place for purposes of section 92.<sup>106</sup> National banks and their subsidiaries with insurance agencies may rely on OCC opinions to establish satellite offices outside the place of 5,000 (including satellite offices in states outside the state where the insurance business is located) to solicit and sell insurance in the same manner generally permissible for state insurance agencies.<sup>107</sup> National trust companies may sell insurance from a trust office that is located in a place of 5,000 if the office performs core fiduciary functions (accepting fiduciary appointments, executing trust documents, and making decisions regarding the investment and distribution of fiduciary assets).<sup>108</sup>

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<sup>100</sup> 12 CFR 1.3(b).

<sup>101</sup> 12 CFR 1.3(g).

<sup>102</sup> Letter from Jimmy F. Barton, Deputy Comptroller (July 25, 1991).

<sup>103</sup> Interpretive Letter No. 753 (November 4, 1996), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,107.

<sup>104</sup> See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7<sup>th</sup> Cir. 1995); *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *Shawmut Bank Connecticut v. Googins*, 965 F. Supp. 304 (D. Conn. 1997).

<sup>105</sup> 12 USC 92; Conditional Approval No. 384 (April 25, 2000); Corporate Decision 99-44 (Sept. 10, 1999); Corporate Decision No. 97-24 (April 15, 1997). See Interpretive Letter No. 819 (Jan. 20, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-268.

<sup>106</sup> Interpretive Letter No. 823 (February 27, 1998), *reprinted in* [1997-98 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-272.

<sup>107</sup> Interpretive Letter No. 882 (Feb. 22, 2000), *reprinted in* [2000-01 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-401; Interpretive Letter No. 864 (May 19, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-358; Interpretive Letter No. 873 (December 1, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-367; Interpretive Letter No. 844 (October 20, 1998), *reprinted in* [1998-99 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-299.

<sup>108</sup> Interpretive Letter No. 877 (December 13, 1999), *reprinted in* [1999-2000] Fed. Banking L. Rep. (CCH) ¶ 81-371.



### *Sales of Credit-related Insurance as Agent under 12 USC 24(Seventh)*

National banks and their subsidiaries may engage in various credit-related insurance agency activities under 12 USC 24(Seventh). This law authorizes national banks to engage in the "business of banking," and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Although an insurance product sold under this authority could also be sold under 12 USC 92, there are no geographic "place of 5,000" limits under 12 USC 24 (Seventh).

Pursuant to 12 USC 24(Seventh), national banks and their subsidiaries may sell credit-related insurance products, including:

- *Credit life insurance* (as defined in 12 CFR 2.2(b));<sup>109</sup>
- *Involuntary unemployment insurance* (protects the bank if the borrower becomes involuntarily unemployed);<sup>110</sup>
- *Vendors single interest insurance*<sup>111</sup> and *vendors double interest insurance*<sup>112</sup> (insures the bank or the bank and the borrower, respectively, against loss or damage to personal property pledged as loan collateral);
- *Mechanical breakdown insurance* (protects a loan customer against most major mechanical failures of collateral securing a loan during the loan's life);<sup>113</sup> and,
- *Vehicle service contracts* (protects the value of loan collateral from mechanical breakdown for the term of the contract).<sup>114</sup>

### *Title Insurance*

A national bank may not underwrite or sell title insurance unless the national bank falls within an exception:

(1) National banks and their subsidiaries may sell title insurance as agents in a state to the same extent as permitted for state banks;<sup>115</sup> or,

(2) A national bank and its subsidiaries may continue to conduct title insurance activities, including underwriting, in which the national bank or subsidiary were lawfully engaged before November 12, 1999, subject to some exceptions if affiliates are providing insurance as principal.<sup>116</sup>

<sup>109</sup> See Interpretive Letter No. 283 (March 16, 1984), reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447; 12 CFR Part 2; *IBAA v Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).

<sup>110</sup> See Interpretive Letter No. 283 (March 16, 1984), supra.

<sup>111</sup> See interpretive Letter No. 283 (March 16, 1984), supra.

<sup>112</sup> Letter from William B. Glidden, Assistant Director, Legal Advisory Services Division (June 3, 1986).

<sup>113</sup> Letter from William B. Glidden, Assistant Director, Legal Advisory Services Division (June 17, 1993).

<sup>114</sup> Interpretive Letter 724 (April 22, 1996), reprinted in [1995-1996 Transfer binder] Fed. Banking L. Rep. (CCH) ¶ 81,039; Interpretive Letter No. 671 (July 10, 1995) reprinted in [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,619.

<sup>115</sup> 15 USC 6713.

<sup>116</sup> 15 USC 6713.

However, if a state law in effect before November 12, 1999 prohibits all persons in a state from selling or underwriting title insurance, a national bank may not sell title insurance.

**(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer.**

National banks may reinsure mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates.<sup>117</sup> Mortgage insurance protects an investor holding a mortgage loan against default by the mortgagor.

Under an "excess loss" arrangement, the primary insurer pays, and is solely responsible for, claims arising out of a given book of business up to a predetermined percentage, after which the reinsurer is obligated to reimburse the primary insurer's claims up to another predetermined percentage. Thereafter, the primary insurer is solely responsible for claims in excess of the reinsurer's tier of losses on a given book. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer. Quota share arrangements have involved the assumption of less than 50 percent of the aggregate insured risk covered by the quota share agreement.

A national bank's captive mortgage reinsurance subsidiary may enter a mortgage reinsurance agreement with a Cayman Island segregated portfolio company to reinsure private mortgage insurance on loans originated or purchased by the bank or one of its affiliates.<sup>118</sup> National banks may participate in a mortgage reinsurance exchange where the exchange will provide for the reinsurance of private mortgage insurance on loans originated or purchased by participating lenders.<sup>119</sup>

**(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent.**

#### *General*

The OCC has long recognized the finder function as a permissible banking activity that includes identifying potential parties, making inquiries as to interest, introducing or arranging contacts or meetings between interested parties, acting as an intermediary between interested parties, and bringing the parties together for

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<sup>117</sup> 12 CFR 5.34, Corporate Decision No. 99-37 (October 29, 1999); Corporate Decision No. 99-36 (October 29, 1999); Corporate Decision No. 99-32 (Sept. 20, 1999); Corporate Decision No. 99-26 (Sept. 2, 1999).

<sup>118</sup> Interpretive Letter No. 862 (June 7, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-356.

<sup>119</sup> Interpretive Letter No. 828 (April 6, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-277.

transactions that the parties themselves negotiate and consummate.<sup>120</sup> As a finder, national banks and their operating subsidiaries may convey information about available products or services to potential markets for them,<sup>121</sup> arrange for third-party providers to offer reduced rates to those customers referred by the bank,<sup>122</sup> communicate to the seller an offer to purchase or a request for information,<sup>123</sup> provide certain administrative, clerical, and recordkeeping functions,<sup>124</sup> supply financial information to one party about the other, and act as a conduit in conveying information from one party to another.<sup>125</sup>

#### *Acting as a Web Site Host*

The OCC has determined that Web site hosting is a form of finder activity. A national bank may establish, register, and host the commercially enabled Web site in the name of the retailer.<sup>126</sup> The bank may store the data representing the retailer's online catalog and provide periodic reports to the retailer of site-related activities.<sup>127</sup> The bank may also provide associated payments and deposit services resulting from Web-based transactions.<sup>128</sup> A national bank also may host a Web site for a government agency, where the site will allow the public, consumers, and other agencies to access or purchase services, information forums, and products from the agency.<sup>129</sup>

A national bank, in the exercise of the finder authority, may establish hyperlinks between its home page and the Internet home pages of third-party providers so that bank customers will be able to access those nonbank Web sites from the bank site.<sup>130</sup> The OCC also has permitted national banks, as a form of finder activity, to operate a "virtual mall." A virtual mall provides a collection of links to Web sites of third-party vendors. The collection of links, organized by product type and made available to bank customers, enables the customers to shop for a range of financial and nonfinancial products and services via the links.<sup>131</sup>

In addition, the OCC has determined that, as a finder, a national bank may establish an Internet site that will function as an electronic central facility enabling businesses

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<sup>120</sup> 12 CFR 7.1002(b); Conditional Approval No. 221 (Dec. 4, 1996); Interpretive Letter No. 741, *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-105 (Aug. 19, 1996); Interpretive Letter No. 653, *supra*.

<sup>121</sup> Interpretive Letter No. 741, *supra*; Interpretive Letter No. 630 (May 11, 1993) *reprinted in* [1993-1994 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,513.

<sup>122</sup> Conditional Approval No. 347 (Jan. 29, 2000).

<sup>123</sup> Interpretive Letter No. 824, *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-273 (Feb. 27, 1998); Letter from James M. Kane, District Counsel (Oct. 24, 1985); Letter from F.H. Ellis, Chief National Bank Examiner (Oct. 6, 1970).

<sup>124</sup> Interpretive Letter No. 850, *supra*; Corporate Decision No. 98-13 (Feb. 9, 1998); Interpretive Letter No. 607, *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. ¶ 83,445 (Aug. 24, 1992).

<sup>125</sup> Letter from Elizabeth H. Corey, Attorney (May 18, 1989); Letter from John M. Miller, Acting Deputy Chief Counsel (Jul. 26, 1977).

<sup>126</sup> 12 CFR 7.5002(a)(1)(i).

<sup>127</sup> 12 CFR 7.5002(a)(1)(iv)(A).

<sup>128</sup> Interpretive Letter No. 875, *supra*. Interpretive Letter No. 856, *supra*.

<sup>129</sup> Conditional Approval No. 361 (March 3, 2000); 12 CFR 7.5002(a)(1)(iv)(B).

<sup>130</sup> 12 CFR 7.5002(a)(1)(ii); Conditional Approval No. 347, *supra*.; Conditional Approval No. 221, *supra*.

<sup>131</sup> 12 CFR 7.5002(a)(1)(iii); Conditional Approval No. 369 (Feb. 25, 2000); Interpretive Letter No. 875, *supra*.

to negotiate and organize among themselves aggregate buying, selling, or financing efforts, and for other collaborative efforts.<sup>132</sup>

Incidental to its offering of commercially engaged Web site hosting, a national bank may provide Web design services to its merchant customers.<sup>133</sup>

#### *Acting as Finder for Insurance*

National banks may provide finder services in connection with insurance products and services. To identify permissible national bank finder arrangements in the insurance context (as an alternative to section 92 authority), the OCC considers: (1) the scope of the proposed activities; (2) the existence or absence of another insurance agent or broker in the arrangement; (3) whether the bank has a contractual relationship with an insurance company for selling its products, and if so, the nature of the relationship; and (4) the bank's compensation arrangement for the proposed activities. For example, national banks may participate in sharing arrangements with other banks whereby they combine their efforts to use the services of a group of independent agencies that would solicit and sell insurance services to bank customers on site, sharing pro rata in referred business.<sup>134</sup>

#### *Acting as Finder for Investment Advisory Services*

National banks may act as finder by referring bank customers to investment advisors.<sup>135</sup>

#### *Acting as a Finder for Marketing of Trust Services*

National and state banks as well as other individuals and institutions, including registered investment advisors, savings associations, savings banks, credit unions, financial planners, benefit consultants, independent insurance agents and brokers, certified public accountants, and attorneys may refer trust business to a national bank pursuant to written agreements.<sup>136</sup>

#### **(S) Offering correspondent services to the extent permitted by published OCC precedent.**

National banks have traditionally performed for their affiliates and other financial institutions an array of activities called "correspondent services." The OCC has long permitted national banks and their operating subsidiaries to offer these correspondent services as part of the business of banking.<sup>137</sup> A national bank may perform as a correspondent service for its affiliates and other financial institutions any service it may perform for itself.<sup>138</sup> Examples of correspondent services include

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<sup>132</sup> Conditional Approval No. 369, *supra*.

<sup>133</sup> Interpretive Letter No. 875, *supra*.

<sup>134</sup> Interpretive Letter No. 824, *supra*; Conditional Approval No. 99-38 (Oct. 29, 1999).

<sup>135</sup> Interpretive Letter No. 850, *supra*.

<sup>136</sup> Interpretive Letter No. 607, *supra*.

<sup>137</sup> Interpretive Letter No. 875, *supra*; Interpretive Letter No 811, *supra*; Corporate Decision No. 97-79 (Jul. 11, 1997).

<sup>138</sup> 12 CFR 7.5007; Interpretive Letter No. 868, (August 16, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-362; Interpretive Letter No. 854, *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-311 (February 25, 1999); Interpretive Letter No.

providing: computer networking packages and related hardware; data processing services and the sale of software that performs data processing functions; document control and recordkeeping; financial and consulting services; flood hazard determinations; security consulting services; loan collection and repossession services; and vault cash.<sup>139</sup>

**(T) Acting as agent or broker in the sale of fixed or variable annuities.**

National banks may sell fixed and variable annuities without regard to the place of 5,000 restriction in 12 USC 92 on the sale of insurance products.<sup>140</sup>

**(U) Offering debt cancellation or debt suspension agreements.**

National banks and their operating subsidiaries are authorized to enter into debt cancellation agreements under which a bank agrees to cancel all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event under the standards set forth in OCC's regulations.<sup>141</sup> Under those regulations, a national bank and its operating subsidiaries also are authorized to enter into debt suspension agreements under which a bank agrees to suspend all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement may be separate from or part of other loan documents. Debt suspension agreements do not include loan payment deferral arrangements in which the triggering event is the borrower's unilateral election to defer repayment or the bank's unilateral decision to allow a deferral of repayment.<sup>142</sup>

**(V) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions.**

*Closing, escrow and related services*

National banks and their operating subsidiaries may conduct loan closing, settlement and escrow services for themselves and for other lenders.<sup>143</sup> Such services may include receipt and assembly of real estate settlement and loan documents, obtaining signatures for such documents, receipt as escrow agent of loan funds, payoff of prior mortgages and liens, payment of prorated taxes and utility bills, disbursement of net loan proceeds to the seller, and recording of mortgage deeds and other documents.

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467, reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691 (January 24, 1989).

<sup>139</sup> See 12 CFR 7.5007.

<sup>140</sup> *Texas Bankers Ass'n v. Bomer*, 1997 U.S. Dist. LEXIS 13422 (W.D. Tex. Aug. 7, 1997); *Nationsbank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995). See Conditional Approval 311 (April 29, 1999); Interpretive Letter No. 749 (Sept. 13, 1996), reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-119.

<sup>141</sup> 12 CFR 37, 67 Fed. Reg. 58962 (Sept. 19, 2002) (Part 37); Interpretive Letter No. 640 (Jan. 7, 1994), reprinted in [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,527.

<sup>142</sup> Part 37; Interpretive Letter No. 827 (April 3, 1998), reprinted in [1997-98 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-276.

<sup>143</sup> See, for example, Conditional Approval No. 322, *supra*; Corporate Decision No. 99-06 (January 29, 1999); Conditional Approval No. 276, *supra*; Interpretive Letter No. 776, (March 18, 1997), reprinted in [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-203.

Closing and escrow services for loans made by the bank and its subsidiaries should be conducted in accordance with OCC rules regarding the origination and making of loans at banking and other than banking offices.<sup>144</sup> In particular, where services include the disbursement of loan proceeds, closings should occur either at a main or branch office of the bank or at the office of an unaffiliated entity, such as a lawyer's office or other location, that is not owned by the bank or any of its affiliates.

#### *Appraisal and evaluation services*

National banks and their operating subsidiaries may offer appraisal and evaluation services. These services may be performed for the subsidiary, parent bank, or other financial institutions.<sup>145</sup> Federally regulated institutions must obtain appraisals prepared by a certified or licensed appraiser in connection with federally related transactions. A federally related transaction is any real estate-related financial transaction made on or after August 9, 1990 by a regulated institution that requires the services of an appraiser.

Title 12 CFR 34, Subpart C sets forth the occasions upon which appraisals are required and the standards that appraisals must meet. Certain real estate-related financial transactions are exempt from the requirements of 12 CFR 34 but require an evaluation to be prepared in accordance with the Interagency Appraisal and Evaluation Guidelines.<sup>146</sup> Banks and operating subsidiaries should consult the guidelines for specific information about the regulatory standards for appraisals and evaluations. If appraisal or evaluation services are offered to other financial institutions, the proper controls must be in place to ensure confidentiality.

#### *Affiliated business arrangements (ABAs) and compliance with RESPA*

Some permissible services qualify as "settlement services" under the Real Estate Settlement Procedures Act (RESPA), which prohibits persons from giving or receiving any fee or other compensation for the referral of real estate settlement services. RESPA, however, permits persons or entities to invest in settlement service providers and share in the income of those providers in proportion to their ownership interest in the provider, in addition to receiving bona fide compensation for goods and services rendered by the investor. These providers are referred to as ABAs and include operating subsidiaries that provide such services. Banks and these subsidiaries should ensure compliance with the requirements of RESPA. No lender may require a consumer to purchase settlement services from a particular provider as a condition of obtaining a loan, unless expressly authorized by RESPA; the party making the referral must make certain disclosures, and the compensation restrictions must be followed.

In addition, the Department of Housing and Urban Development (HUD) has issued guidelines for determining whether an ABA is a "bona fide" provider of settlement services and thus is not a sham or shell entity organized to circumvent RESPA's restrictions on payment of fees or other compensation for the referral of real estate settlement services business. These guidelines list a variety of factors that are to be

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<sup>144</sup> 12 CFR 7.1003, 7.1004, and 7.1005.

<sup>145</sup> Interpretive Letter No. 467, *supra*.

<sup>146</sup> Comptroller's Handbook, Commercial Real Estate and Construction Lending, Appendix E (November 1995), "Transactions That Require Evaluations," p. 118.

taken into account in determining whether an ABA is bona fide, though conformance to the guidelines does not necessarily require conformance to each of the factors. The factors include, among others: the adequacy of the entity's initial capital and net worth; whether the entity is staffed by its own employees; whether the entity manages its own business affairs; whether it has its own office separate from an office of one of its parents or, if not, whether it pays a general market value rent for the facility; whether it provides substantial services and incurs the risks and rewards of any comparable enterprise, or whether it contracts work out; whether it competes in the market place for business; and whether it sends business exclusively to one of the settlement service providers that created it, or to a number of entities. A full discussion and explanation of these guidelines is in the Department of Housing and Urban Development's RESPA Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Federal Register 29258 (June 7, 1996). See also OCC Bulletin 2005-27.

**(W) Acting as a transfer or fiscal agent.**

National banks may act as transfer agents. A transfer agent acts on behalf of an issuer of securities or on behalf of itself as an issuer of securities and performs the following functions: (1) countersigning securities upon issuance, (2) monitoring the issuance of securities to prevent unauthorized issuance, (3) registering the transfer of securities, (4) exchanging or converting securities, and/or (5) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. A national bank or national bank subsidiary must register with the OCC if it performs transfer agent functions for any security registered under Section 12 of the Exchange Act or any security that would be required to be registered, except for the exemption for registered investment company exemption and certain insurance company securities.<sup>147</sup> National banks without trust powers may perform transfer agent functions only for their own securities or for securities of affiliates.<sup>148</sup>

National banks may act as fiscal agents as the collection and remittance of funds are part of the business of banking.<sup>149</sup>

**(X) Acting as a digital certification authority to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.**

National banks and their operating subsidiaries may act as a digital certification authority, issuing digital certificates and acting as a repository of public keys and certificate information.<sup>150</sup> In addition, they may hold in escrow keys that are used for encryption.<sup>151</sup> Such certification and escrow activities do not require trust powers under 12 USC 92a. National banks and their operating subsidiaries engaging in these activities may also provide connected data processing services and may sell or rent equipment, including specialized, limited purpose software and hardware to be used in connection with the certification authority and repository services and other digital signature or data security systems. They may also provide

<sup>147</sup> OCC, National Bank Transfer Agents' Guide (August 1995). See Securities Exchange Act 17A(c); 12 CFR 9.20(a).

<sup>148</sup> OCC, National Bank Transfer Agents' Guide (August 1995)(relying on 12 USC § 92a).

<sup>149</sup> See Interpretive Letter No. 731 (July 1, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-048; Conditional Approval No. 361 (March 3, 2000); Conditional Approval No. 324 (August 17, 1999).

<sup>150</sup> Conditional Approval Letter No. 267 (Jan. 12, 1998).

<sup>151</sup> *Id.*

and sell software generating public/private key pairs for subscribers and software enabling subscribers to create or receive messages with digital signatures, verify digital signatures with public keys, and confirm that the messages were properly signed. They may also provide consulting or advisory services to help customers, including other banks, to implement digital signature systems.

National banks and their subsidiaries also may establish and operate a system for participant organizations to use in order to create and issue digital certificates, acting as the root certification authority (CA) of such a system. In addition to acting as the root CA, the national bank or operating subsidiary may establish business rules so that a customer of the participant organizations can quickly and easily obtain verification of a certificate issued by another CA in the system.<sup>152</sup>

Certification authority activities must be undertaken in conformity with OCC precedent<sup>153</sup> and OCC guidance as issued from time to time.<sup>154</sup>

**(Y) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.**

National banks and their operating subsidiaries may provide or sell a variety of "alternate media," including public transportation tickets or passes, event and attraction tickets, merchant gift certificates, prepaid telephone cards, and EBT script.<sup>155</sup> Because they have also long been permitted to provide or sell through

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<sup>152</sup> Conditional Approval Letter No. 339 (Nov. 16, 1999).

<sup>153</sup> To date, OCC precedent has addressed the use of digital certificates in "closed" systems only.

<sup>154</sup> See OCC Bulletin 99-20 (May 4, 1999).

<sup>155</sup> 12 CFR 5.34(e)(5)(v)(Y); Interpretive Letter No. 718 (March 14, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-033; Conditional Approval No. 285 (August 14, 1998); Interpretive Letter No. 854, *supra*; Interpretive Letter No. 890 (May 15, 2000), *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-409.



traditional means advertising and promotional material,<sup>156</sup> postage stamps,<sup>157</sup> travelers' checks,<sup>158</sup> money orders,<sup>159</sup> and credit and debit cards,<sup>160</sup> these items may also be provided electronically, such as through ATMs.<sup>161</sup> For any items that are sold through an ATM, a printed receipt complying with the requirements of Federal Reserve Board Regulation E, 12 CFR 205, must be provided.<sup>162</sup>

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<sup>156</sup> Interpretive Letter No. 316 (December 4, 1984), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,486.

<sup>157</sup> 12 CFR 5.34(e)(5)(v)(Y); 12 CFR § 7.1010; Interpretive Letter No. 890, *supra*.

<sup>158</sup> 12 CFR 5.34(e)(5)(v)(C); letter of John G. Heimann, Comptroller of the Currency (November 10, 1977), *reprinted in* [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,067; Interpretive Letter No. 890, *supra*; see No-Objection Letter No. 89-02 (April 17, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,014; *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 438 (1st Cir. 1972). [See also section(C) in these guidelines.]

<sup>159</sup> 12 CFR 5.34(e)(5)(v)(C); Interpretive Letter No. 890, *supra*; see 12 CFR 7.1014. [See also section (C) in these guidelines.]

<sup>160</sup> Former Interpretive Ruling 7.7378, 12 CFR 7.7378 (removed 1996 because the ability to issue credit cards "is well established and a specific interpretive ruling is not needed"); see No-Objection Letter No. 89-02, *supra*.

<sup>161</sup> Interpretive Letter No. 718, *supra*.

<sup>162</sup> *Id.*

## Appendix B: Noncontrolling Investment Guidelines

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### Introduction

National banks and their operating subsidiaries are permitted to make a noncontrolling investment, or hold a minority interest, in certain enterprises. The OCC regulation provides for an after-the-fact notice process if the enterprise is engaged in an activity permissible for after-the-fact notice under the OCC's operating subsidiary regulation or if the activity is substantively the same as that contained in published OCC precedent on noncontrolling investments.<sup>163</sup>

The following is a summary of noncontrolling investments or minority interests approved by published OCC precedent.<sup>164</sup>

### Noncontrolling Investment Activities

#### Lending

- *Appraisal Services.* Providing appraisals of the value of collateral before creditors make a mortgage loan.<sup>165</sup>
- *Automobile Loans.* Providing automobile loans. Loan customers are persons who purchase cars over the Internet from other, nonbank investors in the LLC.<sup>166</sup>
- *Commercial Real Estate Loans.* Originating and selling commercial real estate loans.<sup>167</sup>
- *Credit Card Banking.* Making, purchasing, selling, servicing, or warehousing credit card accounts.<sup>168</sup>
- *Credit Reporting.* Engaging in credit reporting activities, including operation of a credit-reporting bureau.<sup>169</sup>
- *Credit Reporting Services.* Providing credit reporting services in connection with the origination of loans.<sup>170</sup>
- *Data Processing Mortgage Rights.* Providing data processing services that facilitate the transfer of mortgage servicing rights, mortgage ownership, and the release of

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<sup>163</sup> 12 CFR 5.36(e).

<sup>164</sup> The narrative section of this booklet provides further information on the requirements governing the use of the after-the-fact notice procedure. The Operating Subsidiary Guidelines (Appendix A to the booklet) provides information on activities permissible for after-the-fact notice under the operating subsidiary regulation. 12 CFR 5.34(e)(5)(v).

<sup>165</sup> Conditional Approval No. 276 (May 8, 1998).

<sup>166</sup> Conditional Approval No. 321 (July 28, 1999).

<sup>167</sup> Conditional Approval No. 215 (September 11, 1996).

<sup>168</sup> Interpretive Letter No. 852 (Dec. 11, 1998), reprinted in [1998-99 Transfer Binder] Fed. Banking L. Rep. ¶ 81-309. See also Conditional Approval No. 269 (January 13, 1998).

<sup>169</sup> Conditional Approval No. 322 (July 30, 1999)

<sup>170</sup> Conditional Approval No. 336 (November 2, 1999)

mortgage rights through an electronic “book-entry” system to register and track mortgage rights.<sup>171</sup>

- *Escrow Services.* Engaging in escrow services.<sup>172</sup>
- *Home Equity Lines of Credit (Loans for Personal, Family, or Household Purposes (for example Consumer Loans)).* Lending to customers through home equity lines of credit, such as home improvement loans secured by second liens on family homes.<sup>173</sup>
- *Loan Closing Services.*
  - Conducting loan closing services for both themselves and for other lenders. Loan closing services may include the disbursement of loan proceeds.<sup>174</sup>
  - Conducting loan closing services as an affiliated business arrangement (ABA) as defined by, and in accordance with, the Real Estate Settlement Procedures Act.<sup>175</sup>
- *Loan Document Preparation.* Preparing loan documents that describe the rights and duties of the creditor and the borrower.<sup>176</sup>
- *Loan Origination and Servicing Activities.*
  - Engaging in loan origination and servicing activities, as well as commercial mortgage loan brokerage services.<sup>177</sup>
  - Engaging in loan origination and servicing activities that qualify the bank to receive a share of the New Markets Tax Credits awarded the entity in which the bank is investing.<sup>178</sup>
- *Loans Secured by Residential Real Estate.* Originating and selling residential real estate mortgage loans.<sup>179</sup>
- *Mortgage Banking Activities.* Buying, selling, and otherwise dealing in mortgages.<sup>180</sup>

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<sup>171</sup> Conditional Approval No. 333 (October 19, 1999)

<sup>172</sup> Conditional Approval No. 308 (April 8, 1999)

<sup>173</sup> Interpretive Letter No. 694 (Dec. 13, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-009. See also Conditional Approval No. 264 (December 29, 1997).

<sup>174</sup> Conditional Approval No. 322 (July 30, 1999)

<sup>175</sup> Conditional Approval No. 243 (May 9, 1997). The ABA’s structure, operating agreement and activities must be consistent with guidelines of the Department of Housing and Urban Development. See also (V) “Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions” of Appendix A.

<sup>176</sup> Conditional approval No. 276 (May 8, 1998). See also Conditional Approval No. 322 (July 30, 1999).

<sup>177</sup> Conditional Approval No. 293 (November 24, 1998).

<sup>178</sup> Interpretive Letter No. 996 (July 7, 2004) (to be published in CCH).

<sup>179</sup> Interpretive Letter No. 853 (February 16, 1999), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-310. See also Conditional Approval No. 225 (November 25, 1996).

<sup>180</sup> Interpretive Letter No. 889 (April 24, 2000), *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-408. See also Interpretive Letter No. 711 (Feb. 23, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026; Conditional Approval No. 338 (November 10,

- *Real Estate Tax Services.* Providing complete real estate tax services, including, for example, procuring state and local tax bills, reporting such information to the servicers in time for establishing escrow accounts and paying tax bills, and data processing and administration services for escrows, taxes, and delinquencies.<sup>181</sup>
- *Real Property Conveyed as Security for DPC.* Acquiring, managing, and selling real property conveyed to the bank as security for or in satisfaction of debt previously contracted (DPC).<sup>182</sup>
- *Student Loans.* Originating and marketing student loans.<sup>183</sup>

## Leasing

- *Equipment and Personal Property Leasing.* Engaging in leasing, specifically, aircraft leasing.<sup>184</sup>
- *Leasing/Selling Excess Capacity.* Providing back-up call answering for a hotline to persons who are not bank customers if there is good faith excess capacity.<sup>185</sup>
- *Point-of-Sale Terminals.* Leasing point-of-sale terminals.<sup>186</sup>
- *Prime Auto Leasing.* Engaging in the origination, purchase, and securitization of prime auto leases.<sup>187</sup>

## Payment Services

- *Cash Management.* Providing cash management services.<sup>188</sup>
- *Check Cashing and Processing.* Engaging in check cashing through sales and leases of check cashing machines to third parties.<sup>189</sup>
- *Check Certification.* Providing check guarantee and verification services.<sup>190</sup>

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1999); Conditional Approval No. 243 (May 9, 1997); Conditional Approval No. 241 (May 1, 1997); Conditional Approval No. 318 (July 21, 1999).

<sup>181</sup> Conditional Approval No. 276 (May 8, 1998).

<sup>182</sup> Interpretive Letter No. 735 (July 15, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-052; Interpretive Letter No. 657 (March 31, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,605; and Conditional Approval No. 210 (July 15, 1996).

<sup>183</sup> Conditional Approval No. 216 (September 11, 1996). See also Interpretive Letter No. 692, *supra*.

<sup>184</sup> Interpretive Letter No. 887 (April 30, 2000), *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-406. See also Conditional Approval 316 (June 30, 1999); *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382-83 (9<sup>th</sup> Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); OCC Corporate Decision No. 97-54 (June 26, 1997); Conditional Approval No. 281 (July 30, 1998);

Conditional Approval No. 295 (December 3, 1998)

<sup>185</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>186</sup> Conditional Approval Letter No. 269 (January 13, 1998).

<sup>187</sup> Interpretive Letter No. 898 (July 14, 1998).

<sup>188</sup> Interpretive Letter No. 756 (Nov. 5, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-120. See also Conditional Approval No. 324 (Aug. 17, 1999).

<sup>189</sup> Conditional Approval No. 307 (March 19, 1999).

<sup>190</sup> Conditional Approval No. 287 (September 4, 1998).

## Data Processing and Correspondent Services

- *Analyzing Customer Information.* Analyzing customer information to determine potential needs and including brochures in statements about the availability of nonbanking products from vendors.<sup>191</sup>
- *Electronic Imaging Services.* Providing electronic imaging services to financial institutions. Electronic imaging systems use digital technology to capture, index, store, and retrieve electronic images of paper documents.<sup>192</sup>
- *Internet Merchant Hosting Services.* Providing Internet merchant hosting services to other financial institutions for resale to their merchants.<sup>193</sup>
- *Medical Claims Processing.* Engaging in medical claims processing, including using electronic data interchange facilities, billing, and facilitating payment through funds transfer and credit card processing.<sup>194</sup>
- *Merchant Processing Services.* Providing merchant credit and debit card processing services. Merchant processing generally involves verifying credit and debit card authorizations at the time of purchase, processing card transactions, settlement of card transactions, and depositing funds in merchants' accounts.<sup>195</sup>
- *Payment and Information Processing Services.* Providing payment and information processing services. The entity may provide electronic data processing and data interchange facilities to assist health care providers in communicating billing and payment-related information to insurance carriers responsible for providing medical benefits. Noncontrolling investments also may provide lockbox services. In addition, noncontrolling investments may provide ATM and POS-related services to depository institutions.<sup>196</sup>
- *Payroll Processing Services.* Offering payroll processing services by traditional as well as electronic means to commercial customers. Payroll processing services may include payroll computations, deductions and tax escrow account

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<sup>191</sup> Conditional Approval No. 265 (December 29, 1997).

<sup>192</sup> Interpretive Letter No. 805 (October 9, 1997), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-252). See also OCC Bulletin 94-8 (January 27, 1994); Conditional Approval No. 658 (October 13, 2004).

<sup>193</sup> Interpretive Letter No. 875 (October 31, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-369).

<sup>194</sup> Interpretive Letter No. 836 (March 12, 1996), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-290.

<sup>195</sup> Interpretive Letter No. 813 (October 14, 1997), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-261. See also Conditional Approval No. 289 (October 2, 1998); Conditional Approval No. 248 (June 27, 1997); Interpretive Letter No. 720 (January 26, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,035); Interpretive Letter No. 731 (July 1, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-048; Interpretive Letter No. 689 (August 9, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-004; and Banking Bulletin 92-94, Merchant Processing (May 5, 1992); Conditional Approval No. 265 (December 29, 1997); Conditional Approval No. 255 (September 25, 1997).

<sup>196</sup> Conditional Approval No. 282 (July 31, 1998); Letter to Wells Fargo Bank, NA (December 30, 1996); Interpretive Letter No. 705 (October 25, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-020.

management, and processing salary payments to employees either by direct deposit or by check preparation.<sup>197</sup>

- *Processing of Banking, Financial, or Economic Data.* Collecting, transcribing, processing, analyzing, and storing banking, financial, or related economic data for customers as part of the business of banking.<sup>198</sup>

### Consulting and Financial Advice

- *Consumer Financial Advice.* Providing financial advice to bank consumers, including advice regarding acquisitions and dispositions of businesses.<sup>199</sup>
- *Investment Advice.* Providing investment advice as part of or incidental to the business of banking.<sup>200</sup>

### Finder Activities

- *Acting as Finder for Government Agencies.* Hosting Web sites for government agencies and providing an electronic communications pathway for product ordering and payment as a finder activity.<sup>201</sup>
- *Acting as Finder for Insurance Activities.* Bringing together a potential purchaser of insurance and the seller of insurance by making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for a transaction that the parties themselves negotiate and consummate.<sup>202</sup>
- *Acting as Finder for Internet Vendors.* Providing bank customers links to nonbanking, third-party vendors' Internet Web sites.<sup>203</sup>
- *Acting as Finder for Like-Kind Exchanges.* Providing finder services for the owners of investment property.<sup>204</sup>

<sup>197</sup> Interpretive Letter No. 771 (February 24, 1997), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-135.

<sup>198</sup> Conditional Approval No. 361 (March 3, 2000); Interpretive Letter No. 516 (July 12 1990), *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220.

<sup>199</sup> Interpretive Letter No. 871 (October 14, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-365.

<sup>200</sup> Interpretive Letter No. 871, *supra.* See also Interpretive Letter No. 851 (December 8, 1998), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-308; Letter to Premier Bank, NA (March 16, 1995); Conditional Approval No. 241 (May 1, 1997); Conditional Approval No. 270 (January 21, 1998); Conditional Approval No. 300 (January 13, 1999).

<sup>201</sup> Interpretive Letter No. 883 (March 3, 2000), *reprinted in* [2000-2001 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-402.

<sup>202</sup> Interpretive Letter No. 889, *supra.*; Interpretive Letter No. 824 (February 27, 1998); *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-273 (Feb. 27, 1998); Conditional Approval No. 221 (December 4, 1996).

<sup>203</sup> Conditional Approval No. 221 (December 4, 1996). See also Conditional Approval No. 361 (March 3, 2000); Conditional Approval No. 369 (February 25, 2000) and Interpretive Letter No. 611 (November 23, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449.

<sup>204</sup> Conditional Approval 322 (July 30, 1999).

- *Acting as Finder for Merchants through the Internet.* Hosting merchants' commercial Web sites, bringing potential customers and merchants together for a transaction that the parties' themselves negotiate and consummate.<sup>205</sup>
- *Acting as Finder for Real Estate Transactions.* Acting as a finder and bringing together parties wishing to finance the purchase, construction, development, or placement of real estate equity interests, and securities related to real estate.<sup>206</sup>

### **Real Estate Related Activities**

- *Appraisal Services.* Performing real estate appraisals for the bank and for other lenders.<sup>207</sup>
- *Property for Bank Premises.* Acquiring property for bank premises if (1) the aggregate amount of the investment is less than or equal to the national bank's capital stock; or (2) the aggregate amount of the investment is less than or equal to 150 percent of the national bank's capital and surplus, and the national bank is "well capitalized" and has a CAMEL rating of 1 or 2, provided that the bank provides the OCC with notice 30 days after this investment. Prior OCC approval is required for investments in bank premises that do not meet the above criteria.<sup>208</sup>
- *Property Inspections.* Engaging in property inspections in connection with lending activities.<sup>209</sup>
- *Real Estate Tax and Management Service.* Engaging in real estate reporting and management services in connection with certain loans made by the bank or its lending affiliates. A national bank also may hold a noncontrolling interest in an entity that provides real estate tax services that assure that real estate taxes are paid on time.<sup>210</sup>
- *Title Abstracting Services.* Engaging in residential and commercial title abstracting services; that is, the preparation of reports of chains of title drawn from public record, but without interpretations, conclusions, or expressions of opinion as to the validity of title.<sup>211</sup>
- *Title Insurance and Loan Closing Services.* Providing title insurance and engaging in loan closing management activities.<sup>212</sup>

### **Support Services**

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<sup>205</sup> Interpretive Letter No. 875, *supra*.

<sup>206</sup> Conditional Approval No. 241 (May 1, 1997); Conditional Approval No. 284 (August 14, 1998).

<sup>207</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>208</sup> Conditional Approval No. 298 (December 15, 1998).

<sup>209</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>210</sup> Conditional Approval No. 317 (July 19, 1999); Conditional Approval No. 276 (May 8, 1998).

<sup>211</sup> Conditional Approval 308 (April 8, 1999).

<sup>212</sup> Conditional Approval No. 327 (September 14, 1999); Interpretive Letter No. 842 (September 28, 1998), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-297; Conditional Approval No. 276 (May 8, 1998).

- *Agent for Deposit Placement.* Acting as agent and placing customers' funds in foreign currency time deposits with foreign banks.<sup>213</sup>
- *Employee Benefit and Payroll Services.* Providing employee benefit services and payroll services to financial institutions and nonfinancial companies.<sup>214</sup>
- *Professional Employer Organization.* Marketing human resource and employee-related administrative services to small and medium-sized customers.<sup>215</sup>

### **Fiduciary Activities**

- *Trust Bank Stock.* Holding interests in trust banks.<sup>216</sup>

### **Insurance and Annuities Activities**

- *Insurance Company Products and Investment Funds Hedging.* Holding interests through subsidiaries in various insurance company products and investment funds containing bank-ineligible securities to hedge, on a dollar-for-dollar basis, the subsidiary's obligations to make payments to employees under nonqualified deferred compensation plans.<sup>217</sup>
- *Marketing and Consulting Services to Insurance Agencies.* Providing marketing and consulting services to insurance agencies.<sup>218</sup>
- *Place of 5000 Satellite Offices.* In an entity located in a "place of 5,000," soliciting and selling insurance in the same manner permissible in New York for New York licensed insurance agencies generally and as authorized by the investment's state insurance license. In particular, a noncontrolling investment may sell insurance through satellite offices, in addition to the investment's "place of 5,000" location, as permitted under state law.<sup>219</sup>
- *Scope of Market.* Holding an interest in a LLC that does business as an insurance agency or broker, including acting as agent in the sale of disability and life insurance.<sup>220</sup>
- *Title Insurance.* Selling title insurance as agent.<sup>221</sup>

<sup>213</sup> Interpretive Letter No. 778 (March 20, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81-205.

<sup>214</sup> Interpretive Letter No. 909 (May 2, 2001), *reprinted in* [Current Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-433; Interpretive Letter No. 994 (June 14, 2004).

<sup>215</sup> Conditional Approval No. 456 (March 10, 2001).

<sup>216</sup> Interpretive Letter No. 697 (November 15, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-016. See also Interpretive Letter No. 815 (December 2, 1997), *reprinted in* [1997-1998 Transfer Binder] (CCH) 81-263; Interpretive Letter No. 831 (June 8, 1998), *reprinted in* [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-285.

<sup>217</sup> Interpretive Letter No. 878 (December 22, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-375.

<sup>218</sup> Conditional Approval No. 302 (January 21, 1999).

<sup>219</sup> Interpretive Letter No. 873 (December 1, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-367. See also Interpretive Letter No. 819 (January 20, 1998), *reprinted in* [1997-1998 Transfer Binder] (CCH) ¶ 81-268; Conditional Approval No. 236 (April 3, 1997).

<sup>220</sup> Conditional Approval No. 242 (May 7, 1997). See also Conditional Approval No. 303 (February 16, 1999).

<sup>221</sup> Conditional Approval No. 371 (March 20, 2000).



- *Title Insurance and Annuity Sales.* Acting as insurance agent, owning interest in title insurance agency, and engaging in annuity sales as agent.<sup>222</sup>
- *Reinsurance of Credit Life, Credit Accidental Death, and Credit Disability Insurance.* Reinsuring mortgage life, mortgage accidental death, and mortgage disability insurance on loans originated by lenders with an ownership interest in the investment entity.<sup>223</sup>
- *Reinsurance of Private Mortgage Insurance.* Reinsuring mortgage insurance on loans originated, purchased, or serviced by lenders with an ownership interest in the investment entity.<sup>224</sup>
- *Professional Liability Insurance.* Incidental purchase of securities by a bank of an insurance carrier where purchase of the securities is necessary to obtain professional liability insurance.<sup>225</sup>

### Securities Activities

- *Business Trusts.* Having interests in certificates of participation in business trusts created to hold and manage a substantial portion of the bank's investment securities portfolio.<sup>226</sup>
- *Clearinghouse Membership.* Purchasing a share in a clearinghouse to enable participation in permissible exchange and clearinghouse activities.<sup>227</sup>
- *Investment Funds Management.* Holding limited equity interests in certain private investment funds for which a national bank serves as investment manager.<sup>228</sup>
- *Investment Portfolio Management.* Providing investment portfolio management.<sup>229</sup>
- *Investment Advisory Company.* Providing investment advisory services through a company that owns limited equity interests in investment funds to which it provides services.<sup>230</sup>
- *Principal in Bank Eligible Securities.* Investing and trading as principal in bank eligible securities.<sup>231</sup>

<sup>222</sup> Conditional Approval No. 574 (January 27, 2003).

<sup>223</sup> Interpretive Letter No. 835 (July 31, 1998), reprinted in [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-289.

<sup>224</sup> Interpretive Letter No. 985 (January 14, 2004), reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-511.

<sup>225</sup> Interpretive Letter No. 965 (February 24, 2003)

<sup>226</sup> Interpretive Letter No. 745 (August 27, 1996), reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-110).

<sup>227</sup> Interpretive Letter No. 929 (February 11, 2002).

<sup>228</sup> Interpretive Letter No. 940 (May 24, 2002).

<sup>229</sup> Conditional Approval No. 289 (October 2, 1998).

<sup>230</sup> Interpretive Letter No. 897 (Oct. 23, 2000), reprinted in [2000-2001 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-416.

- *Private Placement of Securities.* Arranging private placements of debt and equity securities for bank customers.<sup>232</sup>
- *Riskless Principal.* Buying and selling securities on an agency or riskless principal basis.<sup>233</sup>
- *Securities Brokerage.* Providing full service securities brokerage services (investment advisory services and brokerage services) to the bank's customers.<sup>234</sup>
- *Small Business Investment Companies.* Having an interest in, and making loans to, a small business investment company that will make loans and invest in securities permissible under the SBIC Act.<sup>235</sup>
- *Warrants for Common Stock.* Having an interest in a subsidiary that holds warrants of acquired shares of common stock.<sup>236</sup>

### **Technology and Electronic Activities**

- *Internet Banking Powers.* Offering Internet home banking services.<sup>237</sup>
- *Commercial Web Site Hosting Services.* Providing a package of Internet-based services that include hosting merchants' Web sites on its server; providing an electronic pathway for product ordering and payment; maintaining merchants' data associated with the Web sites on its server; providing reports on transactions, Web site hits, and sales data; and payment processing.<sup>238</sup>
- *Hyperlinks between Bank Web Sites and Third-Party Sites.* Establishing hyperlinks between its home pages and the Internet pages of third-party providers so that bank customers will be able to access those nonbank sites from the bank site.<sup>239</sup>
- *Research and Development.* Engaging in research and development to establish identity certification services.<sup>240</sup>

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<sup>231</sup> Interpretive Letter No. 889, *supra.*; Interpretive Letter No. 652 (Sept. 13, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 83,600.

<sup>232</sup> Interpretive Letter No. 871, *supra.*

<sup>233</sup> Interpretive Letter No. 889, *supra.*; Interpretive Letter No. 622 (April 9, 1993), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 83,504; Interpretive Letter No. 626 (July 7, 1993), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Reg. (CCH) 83,508; Interpretive Letter No. 371 (June 13, 1986), *reprinted in* [1984-1987 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 85,541.

<sup>234</sup> Interpretive Letter No. 871, *supra.*; *Securities Industry Association v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *aff'd.* 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984). See also Conditional Approval No. 303 (February 16, 1999).

<sup>235</sup> Conditional Approval No. 305 (March 15, 1999). See also Interpretive Letter No. 832 (June 18, 1998), *reprinted in* [1998-1999 Transfer Binder] Fed. L. Banking Reg. (CCH) ¶ 81-286.

<sup>236</sup> Conditional Approval No. 319 (July 26, 1999).

<sup>237</sup> Conditional Approval No. 289 (October 2, 1998).

<sup>238</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>239</sup> Conditional Approval No. 221 (December 4, 1996).

<sup>240</sup> Conditional Approval No. 301 (January 15, 1999).

- *Trade Finance*. Facilitating trade financing between United States exporters and Latin American importers by arranging financing, obtaining credit insurance, and acting as escrow agent.<sup>241</sup>
- *Virtual Malls*. Operating a “virtual mall,” where a bank-hosted set of Web pages with a collection of links to third-party Web sites that allow customers to shop for a range of financial and non-financial products and services via links to sites of third-party vendors and merchants, can electronically confirm payment authorization before shipping goods.<sup>242</sup>
- *Web Design and Development Services*. Providing Web design and development services to the bank’s merchant customers.<sup>243</sup>

### Electronic Bill Payments

- *Electronic Bill Payment and Presentment Services through the Internet*. Offering electronic bill payment and presentment services over the Internet.<sup>244</sup>
- *Electronic Interbank Switch*. Holding an interest in a switch to support electronic bill presentment services over the Internet.<sup>245</sup>
- *Electronic Bill Payment, Money Transfer, and Related Data Processing*. Holding an interest in an LLC that offers electronic bill payment, transfer of money, and related data processing for these services.<sup>246</sup>

### Stored Value

- *Closed Stored Value Card Systems*. Designing, installing, and supporting “closed” stored value card systems at universities and other institutions.<sup>247</sup>
- *Creation, Sale, and Redemption of Stored Value Cards*. Providing “open” stored value card systems and engaging in the development, marketing, delivery, and maintenance of stored value and information systems.<sup>248</sup>
- *Stored Value System*. Providing an electronic payments system that enables non-depositor customers to store pre-paid value on a card, but that is maintained in a central database.<sup>249</sup>

### Electronic Data Interchange (EDI) Services

<sup>241</sup> Conditional Approval No. 436 (December 19, 2000).

<sup>242</sup> Interpretive Letter No. 875, *supra*.

<sup>243</sup> Interpretive Letter No. 875, *supra*. See also Interpretive Letter No. 883, *supra*.

<sup>244</sup> Conditional Approval No. 304 (March 5, 1999). See also Conditional Approval No. 289 (October 2, 1998).

<sup>245</sup> Conditional Approval No. 332 (October 18, 1999).

<sup>246</sup> Conditional Approval No. 389 (May 19, 2000).

<sup>247</sup> Interpretive Letter No. 737 (August 19, 1996), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-101.

<sup>248</sup> Interpretive Letter No. 855 (March 1, 1999), *reprinted in* [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-312. See also Conditional Approval No. 220 (December 2, 1996); Corporate Decision No. 98-39 (March 27, 1998).

<sup>249</sup> Conditional Approval No. 568 (December 31, 2002).

- *EDI Services.* Holding interests in companies that allow businesses to send and receive payments, invoices, and orders worldwide. Specifically, these companies may design and develop a network for electronic transfer of funds and financial information, along with the development and marketing of related software.<sup>250</sup>
- *Electronic Funds Transfer Network.* Engaging in a broad range of EFT-related activities, including operating the networks, data processing, and providing consulting services to depository institutions.<sup>251</sup>
- *Operation of an Electronic Toll Collection System.* Using modern technology in serving as a government fiscal agent.<sup>252</sup>
- *Dispensing Prepaid Alternative Media.* Dispensing "alternative media" through ATMs, including event tickets, vouchers, and gift certificates.<sup>253</sup>

### Digital Certification

- *Digital Certification.* Acting as a certification authority to enable subscribers to generate digital signatures that verify the identity of a sender of an electronic message.<sup>254</sup>
- *Multiple Bank Certification Authority (CA) Network System.* Establishing an entity that will support a multiple bank CA network system. The central entity will act as the root CA for the sub-CA banks and will establish business rules so that customers of any sub-CAs can quickly and easily obtain verification of a certificate issued by any other CA bank in the system.<sup>255</sup>

### Internet Access Service

- *Internet Access Service.* Establishing and operating an electronic distribution channel for providing electronic financial services to customers of participating financial institutions.<sup>256</sup>
- *Internet Access and Sale of Excess Capacity.* Providing back-up call answering for a hotline to persons who are not bank customers if there is good faith excess capacity.<sup>257</sup>

### Software Development and Production

- *Software Development, Distribution and Support.* Providing services and technology to facilitate secure electronic payments over the Internet.<sup>258</sup>

<sup>250</sup> Interpretive Letter No. 732 (May 10, 1996), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049.

<sup>251</sup> Interpretive Letter No. 854 (February 25, 1999), reprinted in [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-311; Interpretive Letter No. 890 (May 15, 2000); Interpretive Letter No. 993 (May 16, 1997); CRA Decision Letter No. 122 (June 23, 2004).

<sup>252</sup> Conditional Approval No. 361 (March 3, 2000)

<sup>253</sup> Conditional Approval No. 285 (August 14, 1998).

<sup>254</sup> Conditional Approval No. 339 (November 16, 1999); Conditional Approval No. 301 (January 15, 1999); CRA Decision Letter No. 122 (June 23, 2004); Corporate Decision No. 2002-4 (February 18, 2002).

<sup>255</sup> Conditional Approval No. 339 (November 16, 1999).

<sup>256</sup> Conditional Approval No. 221 (December 4, 1996).

<sup>257</sup> Conditional Approval No. 361 (March 3, 2000).

## Other

- *Interest in Airplane.* Owning a noncontrolling interest in a LLC that will own and operate a single small airplane to use in the conduct of the bank's business.<sup>259</sup>
- *ATM Sales/Leases to Third Parties.* Selling and leasing ATMs, as well as their proprietary software and hardware, to enable check cashing services.<sup>260</sup>
- *Interest in a Banker's Bank.* Owning a noncontrolling interest in an institution organized as a banker's bank, not otherwise authorized under 12 USC 27(b).<sup>261</sup>

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<sup>258</sup> Interpretive Letter No. 868 (August 16, 1999), *reprinted in* [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-362; Interpretive Letter No. 677 (June 28, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625. See also Interpretive Letter No. 756, *supra.*; Conditional Approval No. 254 (August 21, 1997); Conditional Approval No. 289 (October 2, 1998).

<sup>259</sup> Interpretive Letter No. 943 (July 24, 2002), *reprinted in* [Current Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 81-468.

<sup>260</sup> Conditional Approval No. 307 (March 19, 1999).

<sup>261</sup> Interpretive Letter No. 970 (June 25, 2003)

## Glossary

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An **adequately capitalized** bank means the capital level is as described in 12 CFR 6.4(b)(2).

A **bank service company** is a corporation, a limited liability company (LLC), or similar entity organized to provide services authorized by the Bank Service Company Act, 12 USC 1861 through 1867, all of whose capital stock is owned by one or more insured depository institutions in the case of a corporation, or all of the members of which are one or more insured depository institutions in the case of an LLC.

A **depository institution** is any bank or savings association. For bank service company purposes, a depository institution is defined as an insured bank, a financial institution subject to examination by the Office of Thrift Supervision or the National Credit Union Administration (NCUA) Board, or a financial institution whose accounts or deposits are insured or guaranteed under state law and eligible to be insured by the Federal Deposit Insurance Corporation or the NCUA Board.

A **depository institution affiliate**, for purposes of investing in a financial subsidiary, is any bank or savings association that qualifies as an affiliate under Section 2 of the Bank Holding Company Act of 1956, 12 USC 1841.

**Eligible debt** means unsecured long-term debt that is:

- Not supported by any form of credit enhancement, including a guaranty or standby letter of credit; and
- Not held in whole or in any significant part by any affiliate, officer, director, principal shareholder, or employee of the bank or any other person acting on behalf of or with funds from the bank or an affiliate of the bank.

A **financial subsidiary** is a corporation, LLC, or similar entity, controlled by one or more insured depository institutions, conducting activities that are financial in nature or incidental to financial activities. Financial subsidiaries do not include operating subsidiaries, bank service companies, or statutory subsidiaries.

A **functionally regulated affiliate (FRA)** is a bank affiliate, including a bank subsidiary, whose primary regulator is the Securities and Exchange Commission (SEC), state insurance commissioners, or the Commodities Futures Trading Commission (CFTC). An FRA does not include a depository institution's holding company. FRAs include SEC-registered securities broker dealers, SEC- or state-registered investment advisers, SEC-registered investment companies, state-supervised insurance companies and agencies, and entities subject to CFTC regulation.

An **insured depository institution** is any bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation.

**Investing** in a bank service company includes making any advance of funds to a bank service company, whether by the purchase of stock, the making of a loan, or otherwise, except a payment for rent earned, goods sold and delivered, or services rendered before the payment was made.

A **limited liability company (LLC) or a similar entity** is an unincorporated business entity organized under state law, providing its members limited liability. It does not include a limited partnership.

**Long-term debt** for a financial subsidiary means any debt obligation with an initial maturity of 360 days or more.

**Offshore subsidiary** is a subsidiary that will maintain records offshore, or that is organized under laws other than those of the 50 United States, the District of Columbia, or any other Territory or possession of the United States.

An **operating subsidiary** is a separate corporation, LLC, or similar entity, in which a national bank maintains more than a 50 percent voting or similar type of controlling interest, or otherwise controls the subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary. An operating subsidiary may engage in activities that are part of, or incidental to, the business of banking, or are otherwise authorized for a national bank, under 12 USC 24(Seventh), or in other activities authorized for national banks or their subsidiaries under other statutes. (An operating subsidiary does not include statutory subsidiaries or a subsidiary in which the bank acquired shares, in good faith, through foreclosure on collateral, by compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted.)

A **principal investor** is the insured depository institution that has the largest amount invested in the equity of a bank service company. When two or more insured depository institutions have equal amounts invested, the bank service company must designate one of them as its principal investor.

An **undercapitalized** bank means the capital level is as described in 12 CFR 6.4(b)(3).

A **well-capitalized** bank means the capital level is as described in 12 CFR 6.4(b)(1).

A **well-managed** bank means that, unless otherwise determined in writing by the OCC:

- The bank has a composite CAMELS rating of 1 or 2; and for financial subsidiaries at least a management rating of 2; or
- If the bank has not been examined, the existence and use of managerial resources that OCC Bank Supervision determines satisfactory.

## References

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<b>Affiliate Transactions, Sections 23A and 23B of the Federal Reserve Act</b>	
Laws	12 USC 371c, 371c-1
Regulation	12 CFR 223
<b>Agricultural Credit Corporations</b>	
Law	12 USC 24(Seventh)
<b>Annuities</b>	
Law	12 USC 24(Seventh)
<b>Bank Holding Company Act of 1956</b>	
Laws	12 USC 1841 - 1850
<b>Bank Ownership of Property</b>	
Law	12 USC 29
Regulation	12 CFR 7.1000
<b>Bank Service Company</b>	
Laws	12 USC 1843(c)(8), 1861-1867
Regulation	12 CFR 5.35
<b>Branches</b>	
Law	12 USC 36
Regulation	12 CFR 5.30
<b>Business of Banking</b>	
Law	12 USC 24 (Seventh)
<b>Capital</b>	
Laws	12 USC 51a-60, 3907
Regulations	12 CFR 3, 6
<b>Community Development Corporation or Entity</b>	
Laws	12 USC 24(Eleventh)
Regulation	12 CFR 24
<b>Data Processing</b>	
Laws	12 USC 24(Seventh), 1863
Regulation	12 CFR 7.5006
<b>Decisions</b>	
Regulation	12 CFR 5.13
<b>Electronic Banking Activities</b>	
Regulations	12 CFR 7.5000 - 7.5010
Issuance	FFIEC IT Handbook Series
<b>Eligible Activities—Notice Procedures</b>	
Regulation	12 CFR 5.34(e)(5)(v)



<b>Examination Authority</b>	
Laws	12 USC 481, 484, 1820a, 1831v 12 USC 1867(c)
Regulation	12 CFR 7.400
<b>Federal Deposit Insurance Act</b>	
Law	12 USC 1831v
<b>Fees</b>	
Regulation	12 CFR 8.8
<b>Fiduciary Powers</b>	
Law	12 USC 92a
Regulations	12 CFR 5.26, 9
<b>Financial Activities</b>	
Law	12 USC 24a
Regulation	12 CFR 5.39
<b>Financial Statements, Statutory Limits</b>	
Law	12 USC 32, 56, 60, 84, 371d
<b>Financial Subsidiaries</b>	
Law	12 USC 24a
Regulation	12 CFR 5.39
<b>Finder</b>	
Regulation	12 CFR 7.1002
<b>Freedom of Information Act Request</b>	
Issuance	PPM 2100-15, January 2006
<b>Gramm-Leach-Bliley Act</b>	
Laws	12 USC 24a (Section 121) 12 USC 1820a (Section 115) 15 USC 6712 (Section 302) 15 USC 6713 (Section 303) 15 USC 6801 (Section 501)
<b>Hart-Scott-Rodino Antitrust Improvements Act of 1976</b>	
Law	15 USC 18a
<b>Insurance</b>	
Laws	12 USC 24(Seventh), 92 15 USC 6712, 6713
Regulations	12 CFR 2, 14
Issuance	Comptroller's Handbook for Insurance Activities

<b>Investment Advisors Act of 1940</b> Laws	15 USC 80b-1 - 21
<b>Investment Company Act</b> Laws	15 USC 80a-1 - 64
<b>Investment Discretion</b> Regulation	12 CFR 9.2(i)
<b>Investment in Bank Premises</b> Law Regulations	12 USC 371d 12 CFR 5.37, 7.1000
<b>Leasing</b> Law Regulation	12 USC 24(Tenth) 12 CFR 23
<b>Legal Lending Limit</b> Law Regulation	12 USC 84 12 CFR 32
<b>Limited Liability Company</b> Law Regulations	12 USC 1861 12 CFR 5.34, 5.35, 5.36
<b>Operating Subsidiaries</b> Law Regulation Issuance	12 USC 24(Seventh) 12 CFR 5.34 Bulletin 2004-55
<b>Other Equity Investments</b> Law Regulation	12 USC 24(Seventh) 12 CFR 5.36
<b>Nonconforming Assets</b> Law	12 USC 35
<b>Privacy</b> Law	15 USC 6801-6827
<b>Related Organizations</b> Issuance	Comptroller's Handbook for Related Organizations
<b>Safe Deposit Subsidiary</b> Law	12 USC 24(Seventh)
<b>Savings Association Eligible to be Acquired</b> Law Regulation	12 USC 1823 12 CFR 5.36
<b>Securities Exchange Act of 1934</b>	

Laws	15 USC 78a – 78mm
<b>Self-Dealing</b>	
Laws	12 USC 375, 375a, 375b, 376
Regulations	12 CFR 9, 31, 215
Issuance	Comptroller's Handbook on Insider Activities
<b>Small Business Investment Company</b>	
Law	12 USC 682(b)
Regulation	12 CFR 7.1015
<b>State Law</b>	
Regulation	12 CFR 7.4006
<b>Transactions with Affiliates, Sections 23A and 23B of the Federal Reserve Act</b>	
Laws	12 USC 371c, 371c-1
Regulation	12 CFR 223