

For Release Upon Delivery
10:00 a.m June 21, 2005

TESTIMONY OF
JULIE L. WILLIAMS
ACTING COMPTROLLER OF THE CURRENCY
OFFICE OF THE COMPTROLLER OF THE CURRENCY
Before the
COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS
Of the
UNITED STATES SENATE
June 21, 2005

Statement required by 12 U.S.C. 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

I. INTRODUCTION

Chairman Shelby, Ranking Member Sarbanes, and members of the Committee, I appreciate this opportunity to appear before you today to discuss the challenge of reducing unnecessary regulatory burden on America's banks. I also want to take this opportunity to express appreciation to Senator Crapo for his commitment and dedication to this issue.

The Office of the Comptroller of the Currency (OCC) welcomes the opportunity to discuss this challenge and to offer suggestions for reforms, including some suggestions particularly affecting national banks and the national banking system. We appreciate your efforts to pursue regulatory burden relief legislation, as evidenced by this hearing today.

Unnecessary burdens are not simply a matter of bank costs. When unnecessary regulatory burdens drive up the cost of doing business for banks, bank customers feel the impact in the form of higher prices and, in some cases, diminished product choice. Unnecessary regulatory burden also can become an issue of competitive viability, particularly for our nation's community banks. Over-regulation neither encourages greater competition nor improved allocation of resources; to the contrary, it can shackle competition and lead to inefficient use of resources.

The regulatory burdens imposed on our banks arise from several sources. One source is regulations promulgated by the Federal banking agencies. Thus, when we review the regulations we already have on the books and consider new ones, we have a responsibility

to ensure that our regulations effectively protect safety and soundness, foster the integrity of bank operations, and safeguard the interests of consumers, and do not impose regulatory burdens that exceed what is necessary to achieve those goals, and thereby act as a drag on our banks' efficiency and competitiveness.

We also need to recognize that not all the regulatory burdens imposed on banks today come from regulations promulgated by bank regulators. Thus, we welcome the interest of the Committee in issues such as regulatory implementation of the Bank Secrecy Act and anti-money laundering standards, and the ongoing efforts by the Securities and Exchange Commission (SEC) to implement the so-called "push-out" provisions of the Gramm-Leach-Bliley Act (GLBA) in a manner that is faithful to GLBA's intent and not so burdensome as to drive established banking functions out of banks.

Another source of regulatory burden is mandates of Federal legislation. Thus, relief from some manifestations of unnecessary regulatory burden requires action by Congress. My testimony contains a number of recommendations for legislative changes to reduce unnecessary regulatory burden by adding provisions to law to provide new flexibilities, modify requirements to be less burdensome, and in some cases, eliminate certain requirements currently in the law. This hearing today is a crucial stage in that process.

In summary, my testimony will—

- First, summarize how the Federal banking agencies are working together under the able leadership of Federal Deposit Insurance Corporation (FDIC) Vice Chairman

Reich through the process required by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) to identify unnecessary regulatory burdens;

- Second, summarize some important regulatory initiatives that the OCC is pursuing with the other Federal banking agencies to reduce burden;
- Third, summarize several of the OCC's priority legislative items for regulatory burden relief;
- Fourth, in the area of consumer protection, explain how we can both reduce unnecessary regulatory burden and more effectively use disclosures to provide information to consumers in a more meaningful way;
- Fifth, provide an overview of some other legislative items that the OCC supports that are included in a regulator/industry consensus package; and
- Sixth, provide some additional comments about other legislative proposals.

II. REGULATORY INITIATIVES TO ADDRESS REGULATORY BURDEN

EGRPRA PROCESS

The OCC is an active participant in and supporter of the regulatory burden reduction initiative being led by FDIC Vice Chairman Reich. Under Vice Chairman Reich's capable and dedicated leadership, the Federal banking agencies are working together to conduct the regulatory review required under section 2222 of EGRPRA. Section 2222 requires the Federal Financial Institutions Examination Council and each Federal banking agency to

identify outdated, unnecessary regulatory requirements and, in a report to Congress, to address whether such regulatory burdens can be changed through regulation or require legislative action. The current review period ends in September 2006.

The Federal banking agencies – the OCC, the Board of Governors of the Federal Reserve System (Fed), the FDIC, and the Office of Thrift Supervision (OTS) – have divided their regulations into thirteen categories for purposes of publishing those regulations for review as part of the EGRPRA process. Since the first joint notice was published in mid-2003, the agencies have issued a total of four joint notices for public comment and are about to put out a fifth. To date, we have received over 700 comments on our notices. We anticipate that a sixth and final joint notice will be published in the first half of 2006. Every comment received will be considered in formulating the agencies’ recommendations for specific regulatory changes as well as legislative recommendations.

Moreover, in addition to soliciting written comments, the Federal banking agencies, in conjunction with the Conference of State Bank Supervisors and state regulatory agencies, have held nine banker outreach meetings in different cities and regions throughout the country to hear first-hand the bankers’ concerns and suggestions to reduce burden. Additional outreach meetings may be scheduled. The agencies also are making every effort to ensure that there is ample opportunity for consumers and the industry to participate in this process, and we have held three consumer and community outreach meetings, including one in the Washington, D.C. area.

OTHER BURDEN REDUCTION REGULATORY INITIATIVES

The OCC constantly reviews its regulations to identify opportunities to streamline regulations or regulatory processes, while ensuring that the goals of protecting safety and soundness, maintaining the integrity of bank operations, and safeguarding the interests of consumers are met. In the mid-1990's, pursuant to our comprehensive "Regulation Review" project, we went through every regulation in our rulebook with that goal in mind. We have since conducted several supplemental reviews focused on particular areas where we thought further improvements could be made. The following are several significant regulatory projects we are pursuing to identify and reduce unnecessary regulatory burdens.

Improving the Value and Reducing the Burden of Privacy Notices. The OCC, together with the other Federal banking agencies, the Federal Trade Commission, the SEC, and the Commodity Futures Trading Commission, have undertaken an unprecedented initiative to simplify the privacy notices required under GLBA. Over a year ago, the agencies asked for comments on whether to consider amending their respective privacy regulations to allow, or require, financial institutions to provide alternative types of privacy notices, such as a short-form privacy notice, that would be more understandable and useful for consumers and less burdensome for banks to provide. The agencies also asked commenters to provide sample privacy notices that they believe work well for consumers, and to provide the results of any consumer testing that has been conducted in this area.

The OCC and the other agencies then engaged experts in plain language disclosures and consumer testing to assist in conducting a series of focus groups and consumer interviews to find out what sort of information consumers find most meaningful, and the most effective way to disclose that information to them. We expect that this consumer testing will be completed by the end of the year and will form the basis for a proposal to revise the current privacy notice rules. Personally, I believe this project has the potential to be a win-win for consumers and financial institutions – more effective and meaningful disclosures for consumers, and reduced burden on institutions that produce and distribute privacy notices.

Reducing CRA Burden on Small Banks. Recently, the OCC, the Fed, and the FDIC proposed amendments to our Community Reinvestment Act (CRA) regulations. The comment period closed a little over a month ago – on May 10. Current CRA rules define a “small bank” as a bank with assets of up to \$250 million. Banks above that asset threshold are categorized as “large” banks for CRA purposes and are subject to a three-part test that separately assesses their lending, services, and investments in their assessment areas.

The proposal would create a new class of “intermediate” small banks, namely those with assets between \$250 million and \$1 billion. “Intermediate” small banks would be subject to the streamlined small bank lending test and a flexible new community development test that would look to the mix of community development lending, investment, and services that a bank provides, particularly in light of the bank’s resources and capacities, and the

needs of the communities it serves. “Intermediate” small banks also would no longer be subject to certain data collection and reporting requirements.

The OCC, the Fed, and the FDIC joined in this proposal, which we thought was an effort to carefully balance the goals of reducing unnecessary regulatory reporting burdens with achieving the goals of the CRA. We are now reviewing the comments we received in response to the proposal and hope to conclude the rulemaking process in the near future.

III. OCC SUPPORT FOR REGULATORY BURDEN RELIEF LEGISLATION

The OCC also has recommended a package of legislative amendments that we believe will help reduce unnecessary regulatory burden on national banks and other depository institutions. I am pleased to present those items to you today for your consideration. In addition, the banking agencies have been discussing jointly recommending certain legislative changes to reduce burdens that have been identified as part of the EGRPRA process. The consensus items supported by the four Federal banking agencies and the industry also are discussed below in my testimony.¹ As the legislative process moves forward, we may jointly support additional items.

My testimony highlights some of the important items that the OCC believes will reduce regulatory burden on our banking system and benefit consumers. We have highlighted

¹ It is important to point out that, while a particular item recommended by the OCC, for example, may not be on the consensus list, this does not necessarily mean that a particular trade group or another Federal agency would oppose the item. In most cases, it simply means that an industry group or a Federal banking agency has not taken a position on the item.

other changes that the OCC believes will significantly enhance safety and soundness.

These and other suggestions are discussed in more detail in Appendix #1 to my testimony.²

NATIONAL BANK-RELATED PROVISIONS

Repealing State Opt-In Requirements for *De Novo* Branching. Repeal of the state opt-in requirement that applies to banks that choose to expand interstate by establishing branches *de novo* would remove a significant unnecessary burden imposed on both national and state banks that seek to establish new interstate branch facilities to enhance service to customers. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, interstate expansion through bank mergers generally is subject to a state “opt-out” that had to be in place by June 1, 1997. Interstate bank mergers are now permissible in all 50 states. *De novo* branching, however, is permissible only in those approximately 23 states that have affirmatively opted-in to allow the establishment of new branches in the state. Approximately 17 of these 23 states impose a reciprocity requirement.

In many cases, in order to serve customers in multi-state metropolitan areas or regional markets, banks must structure artificial and unnecessarily expensive transactions in order to establish a new branch across a state border. Enactment of this recommended amendment would relieve these unnecessary and costly burdens on both national and state banks.

² Many of the suggested changes that we discuss were included in H.R. 1375, the Financial Services Regulatory Relief Act of 2004, as passed by the House in the last Congress on March 18, 2004. However, we also are recommending some amendments that were not part of the House-passed bill.

Resolving Issues About Federal Court Diversity Jurisdiction. Another high priority item is an amendment that would resolve the differing interpretations of the state citizenship rule for national banks (and Federal thrifts) for purposes of determining Federal court diversity jurisdiction. This issue has significant practical consequences in terms of unnecessary legal costs and operational uncertainties for both national banks and Federal thrifts. We are cooperating with the OTS on this issue and we would be pleased to work with your staff on a legislative proposal.

The controversy has taken on increased importance for national banks in light of a recent Federal appeals court decision by the Fourth Circuit in November 2004 that created a split in the circuits by finding that, for purposes of determining diversity jurisdiction, a national bank is a citizen of *every* state in which it has a branch or potentially any other type of permanent office.³ Under the Fourth Circuit's diversity jurisdiction interpretation, Federally chartered national banks would be denied access to Federal court any time any opposing party is a citizen of a state in which the bank has a branch. While a national bank with just one interstate branch would be affected by this decision, the consequences are most severe for national banks that have established interstate branches in multiple states.

The Fourth Circuit's opinion has created uncertain standards on this issue since every other Federal Circuit Court has reached a contrary conclusion. In October 2004, the Fifth Circuit held that, in determining citizenship for purposes of Federal court diversity jurisdiction, a national bank is *not* located at its interstate branch locations.⁴ Similarly, in 2001, the

³ See *Wachovia Bank v. Schmidt*, 388 F.3d 414 (4th Cir. 2004).

⁴ See *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004).

Seventh Circuit found that a national bank is a citizen of only the state of its principal place of business and the state listed in its organization certificate.⁵ Indeed, over 60 years ago, the Ninth Circuit considered this issue and concluded that a national bank is a citizen only of the state where it maintains its principal place of business.⁶

Although the Supreme Court has recently agreed to review the Fourth Circuit's decision, this review does not supplant the need for a uniform rule that would apply to national banks and Federal savings associations to ensure that all Federally chartered depository institutions are treated in the same manner with respect to access to Federal court in diversity cases.⁷ Providing more certainty on this issue would reduce burden on national banks and Federal thrifts, including the substantial costs associated with repeatedly litigating this issue.

Providing Relief for Subchapter S National Banks. Another priority item supported by the OCC is an amendment that would allow directors of national banks that are organized as Subchapter S corporations to purchase subordinated debt instead of capital stock to satisfy the directors' qualifying shares requirements in national banking law. As a result, the directors purchasing such debt would not be counted as shareholders for purposes of the 100-shareholder limit that applies to Subchapter S corporations. This relief would make it

⁵ See *Firststar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001).

⁶ See *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943).

⁷ Federal thrifts are subject to similar uncertainty as national banks because Federal law does not currently specify their citizenship for purposes of diversity jurisdiction. Thus, courts have concluded that a Federal thrift generally is not a citizen of any state. See, e.g., *First Nationwide Bank v. Gelt Funding, Inc.*, No. 92 Civ. 0790, 1992 U.S. Dist. LEXIS 18278, at *30 (S.D.N.Y. Nov. 30, 1992).

possible for more community banks with national bank charters to organize in Subchapter S form while still requiring that such national bank directors retain their personal stake in the financial soundness of these banks.

Simplifying Dividend Calculations for National Banks. Under current law, the formula for calculating the amount that a national bank may pay in dividends is both complex and antiquated and unnecessary for purposes of safety and soundness. The amendment supported by the OCC would make it easier for national banks to perform this calculation, while retaining safeguards in the current law that provide that national banks (and state member banks)⁸ need the approval of the Comptroller (or the Fed in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. The amendment would ensure that the OCC (and the Fed for state member banks) would continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Other safeguards, such as Prompt Corrective Action, which prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)) would remain in place.

Modernizing Corporate Governance. The OCC also supports an amendment that would eliminate a requirement that precludes a national bank from prescribing, in its articles of association, the method for election of directors that best suits its business goals and needs.

⁸ See 12 U.S.C. § 324 and 12 C.F.R. § 208.5 generally applying the national bank dividend approval requirements to state member banks.

Unlike most other companies and state banks, national banks cannot choose whether or not to permit cumulative voting in the election of their directors. Instead, current law requires a national bank to permit its shareholders to vote their shares cumulatively. Providing a national bank with the authority to decide for itself whether to permit cumulative voting in its articles of association would conform the National Bank Act to modern corporate codes and provide a national bank with the same corporate flexibility available to most corporations and state banks.

Modernizing Corporate Structure Options. Another amendment supported by the OCC is an amendment to national banking law clarifying that the OCC may permit a national bank to organize in any business form, in addition to a “body corporate.” An example of an alternative form of organization that may be permissible would be a limited liability national association, comparable to a limited liability company. The provision also would clarify that the OCC by regulation may provide the organizational characteristics of a national bank operating in an alternative form, consistent with safety and soundness. Except as provided by these organizational characteristics, all national banks, notwithstanding their form of organization, would have the same rights and privileges and be subject to the same restrictions, responsibilities, and enforcement authority.

For example, organization as a limited liability national association may be a particularly attractive option for community banks. The bank may then be able to take advantage of the pass-through tax treatment for comparable entities organized as limited liability companies (LLCs) under certain tax laws and eliminate double taxation under which the same

earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends. Some states currently permit state banks to be organized as unincorporated LLCs and the FDIC adopted a rule allowing certain state bank LLCs to qualify for Federal deposit insurance. This amendment would clarify that the OCC can permit national banks to organize in an alternative business form, such as an LLC, in the same manner.

Paying Interest on Demand Deposits. The OCC supports amendments to the banking laws to repeal the statutory prohibition that prevents banks from paying interest on demand deposits.⁹ The prohibition on paying interest on demand deposits was enacted approximately 70 years ago for the purpose of deterring large banks from attracting deposits away from community banks. The rationale for this provision is no longer applicable today and financial product innovations, such as sweep services, allow banks and their customers to avoid the statutory restrictions. Repealing this prohibition would reduce burden on consumers, including small businesses, and reduce costs associated with establishing such additional accounts to avoid the restrictions.

Giving National Banks More Flexibility in Main Office Relocations. The OCC supports an amendment to national banking law that will reduce unnecessary burdens on a national bank seeking to relocate its main office within its home state. The amendment would provide that a national bank that is merging or consolidating with another bank *in the same state* pursuant to national banking law, rather than the Riegle-Neal Interstate

⁹ This provision was included in H.R. 1224, the Business Checking Freedom Act of 2005, as recently reported by the House Financial Services Committee and as passed by the House on May 24, 2005.

Banking and Branching Efficiency Act of 1994 (Riegle-Neal) which applies only to interstate mergers and consolidations, has the same opportunity to retain certain offices that it would have if the merger or consolidation were an interstate merger subject to Riegle-Neal. The amendment would allow a national bank, with the Comptroller's approval, to retain and operate as its main office any main office or branch of any bank involved in the transaction in the same manner that it could do if this were a Riegle-Neal transaction. This would give a national bank more flexibility when making the business decision to relocate its main office to a branch location within the same state.

Enhancing National Banks' Community Development Investments. The OCC supports an amendment that would increase the maximum amount of a national bank's investments that are designed primarily to promote the public welfare either directly or by purchasing interests in an entity primarily engaged in making these investments, such as a community development corporation. We recommend increasing the maximum permissible amount of such investments from 10% to 15% of the bank's capital and surplus. The maximum limit only applies if the bank is adequately capitalized and only if the OCC determines that this higher limit will not pose a significant risk to the deposit insurance fund. Today, more than 90% of national banks investments under this authority are in low-income housing tax credit projects and losses associated with such projects are minimal. Allowing certain adequately capitalized national banks to modestly increase their community development investments subject to the requirements of the statute will enable them to expand investments that have been profitable, relatively low-risk, and beneficial to their communities.

FEDERAL BRANCHES AND AGENCIES OF FOREIGN BANKS

The OCC also licenses and supervises Federal branches and agencies of foreign banks. Federal branches and agencies generally are subject to the same rights and privileges, as well as the same duties, restrictions, penalties, liabilities, conditions and limitations and laws that apply to national banks. Branches and agencies of foreign banks, however, also are subject to other requirements under the International Banking Act of 1978 (IBA) that are unique to their organizational structure and operations in the U.S. as an office of a foreign bank. In this regard, the OCC is recommending amendments to reduce certain unnecessary burdens on Federal branches and agencies while preserving national treatment with national banks.

Implementing Risk-Based Requirements for Federal Branches and Agencies. A

priority item for the OCC in this regard is an amendment to the IBA to allow the OCC to set the capital equivalency deposit (CED) for Federal branches and agencies to reflect their risk profile. We support an amendment that would allow the OCC, after consultation with the Federal Financial Institutions Examination Council, to adopt regulations setting the CED on a risk-based institution-by-institution basis. This approach would closely resemble the risk-based capital framework that applies to both national and state banks.

OCC OPERATIONS

Improving Ability to Obtain Information from Regulated Entities. The OCC supports an amendment that would permit all of the Federal banking agencies -- the OCC, FDIC, OTS, and the Fed -- to establish and use advisory committees in the same manner. Under current law, only the Fed is exempt from the disclosure requirements under the Federal Advisory Committee Act (FACA). Yet, all types of insured institutions and their regulators have a need to share information and to conduct open and frank discussions that may involve non-public information about the impact of supervisory or policy issues. Because of the potentially sensitive nature of this type of information, the public meeting and disclosure requirements under FACA may inhibit the supervised institutions from providing the agencies their candid views. Importantly, this is information that any one bank could provide to its regulator and discuss on a confidential basis. It is only when several banks simultaneously do so in a collective discussion and offer suggestions to regulators that issues are raised under FACA. Our amendment would cure this anomaly and enhance the dialogue between all depository institutions and their Federal bank regulators.

SAFETY AND SOUNDNESS

The OCC also supports a number of amendments that would promote and maintain the safety and soundness and facilitate the ability of regulators to address and resolve problem bank situations.

Enforcing Written Agreements and Commitments. The OCC supports an amendment that would expressly authorize the Federal banking agencies to enforce written agreements and conditions imposed in writing in connection with an application or when the agency imposes conditions as part of its decision not to disapprove a notice, *e.g.*, a Change in Bank Control Act (CBCA) notice.

This amendment would rectify the results of certain Federal court decisions that conditioned the agencies' authority to enforce such conditions or agreements with respect to a non-bank party to the agreement on a showing that the non-bank party was "unjustly enriched." We believe that this amendment will enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses.

Barring Convicted Felons From Participating in the Affairs of Depository

Institutions. The OCC also supports an amendment to the banking laws that would give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an *un*insured national or state bank or *un*insured branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these "bad actors" out of depository institutions applies only to *insured* depository institutions. Thus, for example, it would be harder to prevent an individual convicted of such crimes from serving as an official of an uninsured trust bank whose operations are subject to the highest fiduciary standards, then to keep that individual from an administrative position at an insured bank.

Strengthening the Supervision of “Stripped-Charter” Institutions. The OCC supports an amendment to the CBCA to address issues that have arisen when a stripped-charter institution (*i.e.*, an insured bank that has no ongoing business operations because, for example, all of the business operations have been transferred to another institution) is the subject of a change-in-control notice. The agencies’ primary concern with such CBCA notices is that the CBCA is sometimes used as a route to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance, even though the risks presented by the two transactions may be substantively identical. In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the current statutory grounds for denial of a notice under the CBCA. There also are significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. To address these concerns, the OCC supports an amendment that (1) would expand the criteria in the CBCA that allow a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider business plan information, and (2) would allow the agency to use that information in determining whether to disapprove the notice.

IV. REDUCING BURDENS AND ENHANCING EFFECTIVENESS OF CONSUMER COMPLIANCE DISCLOSURES

Many of the areas that are often identified as prospects for regulatory burden reduction involve requirements designed for the protection of consumers. Over the years, those requirements – mandated by Congress and initiated by regulators – have accreted, and in the disclosure area, in particular, consumers today receive disclosures so voluminous and so technical that many simply do not read them – or when they do, do not understand them.

No matter how well intentioned, the current disclosures being provided to consumers in many respects are not delivering the information that consumers need to make informed decisions about their rights and responsibilities, but they are imposing significant costs on the industry and consuming precious resources.

In recent years, bank regulators and Congress have mandated that more and more information be provided to consumers in the financial services area. New disclosures have been added on top of old ones. The result today is a mass of disclosure requirements that generally do not effectively communicate to consumers, and impose excessive burden on the institutions required to provide those disclosures.

There are two arenas – legislative and regulatory – in which we can make changes to produce better, more effective, and less burdensome approaches to consumer disclosures.

With respect to legislation to improve disclosures, we can learn much from the experience of the Food and Drug Administration (FDA) in developing the “Nutrition Facts” label. This well-recognized – and easily understood disclosure is on virtually every food product we buy.

The effort that led to the FDA’s nutrition labeling began with a clear statement from Congress that the FDA was directed to accomplish certain *objectives*. While Congress specified that certain nutrition facts were to be disclosed, it gave the FDA the flexibility to delete or add to these requirements in the interest of assisting consumers in “maintaining healthy dietary practices.” The current disclosure is the result of several years of hard work and extensive input from consumers. The “Nutrition Facts” box disclosure was developed based on goals set out by Congress and then extensive research and consumer testing was used to determine what really worked to achieve those goals.

This experience teaches important lessons that we need to apply to information provided to consumers about financial services products—

- First, financial services legislation should articulate the goals to be achieved through a particular consumer protection disclosure regime, rather than directing the precise content or wording of the disclosure.
- Second, the legislation should provide adequate time for the bank regulators to include consumer testing as part of their rulemaking processes.

- Third, Congress should require that the regulators must consider both the burden associated with implementing any new standards, as well as the effectiveness of the disclosures.

With respect to the regulatory efforts to improve disclosures, as discussed above, we are today using consumer testing – through focus groups and consumer interviews – to identify the content and format of privacy notices that consumers find the most helpful and easy to comprehend. We are hopeful that this initiative will pave the way for better integration of consumer testing as a standard element of developing consumer disclosure regulations.

On another front, the OCC also took the unusual step several months ago of submitting a comment letter to the Federal Reserve Board on its Advance Notice of Proposed Rulemaking related to credit card disclosures, discussing both the development of the FDA’s “Nutrition Facts” label and the efforts of the Financial Services Authority (FSA) in the United Kingdom to develop revised disclosures for a variety of financial products. Our comments highlighted some of the lessons learned from the FDA’s and FSA’s efforts and urged the Fed to take guidance from this experience:

- Focus on key information that is central to the consumer’s decision making (provide supplementary information separately in a fair and clear manner);
- Ensure that key information is highlighted in such a way that consumers will notice it and understand its significance;
- Employ a standardized disclosure format that consumers can readily navigate; and
- Use simple language and an otherwise user-friendly manner of disclosure.

V. BANKING AGENCY AND INDUSTRY CONSENSUS ITEMS

As a result of the dialogue between the Federal banking agencies – the OCC, the Fed, the FDIC, and the OTS – and the banking industry¹⁰ as part of the EGRPRA process and other discussions over the last several years on regulatory burden relief legislation, it has become apparent that there are a number of items that we all support. These consensus items are discussed in more detail in Appendix #2. Several of the items on the consensus list also were included in H.R. 1375 as passed by the House in the last Congress.

In brief, the banking industry groups and the four Federal banking agencies all support amendments to Federal law that would—

- Authorize the Fed to pay interest on reserve accounts under the Federal Reserve Act (FRA);¹¹
- Provide that member banks may satisfy the reserve requirements under the FRA through pass-through deposits;
- Provide the Fed with more flexibility to set reserve requirements under the FRA;
- Repeal certain reporting requirements relating to insider lending under the FRA;
- Streamline depository institutions’ requirements under the Bank Merger Act (BMA) to eliminate the requirement that the agency acting on the application must request competitive factor reports from all of the other Federal banking agencies;

¹⁰ Banking industry groups participating include the American Bankers Association, America’s Community Bankers, the Independent Community Bankers of America, and the Financial Services Roundtable.

¹¹ This amendment was included in H.R. 1224, the Business Checking Freedom Act of 2005, as recently reported by the House Financial Services Committee and as passed by the House on May 24, 2005.

- Shorten the post-approval waiting period under the BMA in cases where there is no adverse effect on competition;
- Exempt mergers between depository institutions and affiliates from the competitive factors review and post-approval waiting periods under the BMA;
- Improve information sharing with foreign supervisors under the IBA;
- Provide an inflation adjustment for the small depository institution exception under the Depository Institution Management Interlocks Act;
- Amend the Flood Disaster Protection Act of 1973 to:
 - (1) increase the “small loan” exception from the flood insurance requirements from \$5,000 to \$20,000 and allow for future increases based on the Consumer Price Index;
 - (2) allow lenders to force-place new flood insurance coverage if a borrower’s coverage lapses or is inadequate so that the new coverage is effective at approximately the same time that the 30-day grace period expires on the lapsed policy; and
 - (3) repeal the rigid requirement that the Federal supervisor of a lending institution must impose civil money penalties if the institution has a pattern or practice of committing certain violations and give the supervisor more flexibility to take other appropriate actions;
- Enhance examination flexibility under the Federal Deposit Insurance Act (FDIA) by increasing the small bank threshold from \$250 million to \$500 million so that more small banks may qualify to be examined on an 18-month rather than an annual cycle;¹² and

¹² As discussed in Appendix #1, the OCC also supports enhancing examination flexibility under the FDIA by giving the Federal banking agencies the discretion to adjust the examination cycle for an insured depository

- Provide that the Federal banking agencies will review the requirements for banks' reports of condition under the FDIA every five years and reduce or eliminate any requirements that are no longer necessary or appropriate.

VI. COMMENTS ON OTHER LEGISLATIVE PROPOSALS

We would like to take this opportunity to also make you aware of our views on some other legislative proposals that we understand may be under consideration.

Maintaining Parity Between Permissible Securities and Stock Investments of National

Banks and State Member Banks. The OCC understands that it has been suggested that the Federal Reserve Act (12 U.S.C. § 335)¹³ be amended in a way that would undo the long-standing parity between national banks' and state member banks' permissible direct and indirect investments. This parity dates back to the 1933 Glass-Steagall Act and was carefully maintained when GLBA was enacted in 1999. The OCC would oppose any changes to § 335 that remove restrictions on state member banks' investments unless corresponding changes are made for national banks. National banks are also member banks. If Congress determines that such restrictions are no longer necessary for the safety and soundness of state member banks, then, as a matter of competitive equity and reducing

institution (for a period of time **not to exceed** six months) if necessary for safety and soundness and the effective examination and supervision of insured depository institutions.

¹³ 12 U.S.C. § 335 states:

“State member banks shall be subject to the same limitations and conditions with respect to the purchasing, selling, underwriting, and holding of investment securities and stock as are applicable in the case of national banks under paragraph ‘Seventh’ of section 5136 of the Revised Statutes, as amended [12 U.S.C. § 24(Seventh)]. This paragraph shall not apply to an interest held by a State member bank in accordance with section 5136A of the Revised Statutes of the United States [12 U.S.C. § 24a] and subject to the same conditions and limitations provided in such section.”

unnecessary regulatory burden, these restrictions should no longer be applied to national banks.

The second sentence in § 335 was enacted in 1999 as part of the GLBA compromise relating to financial subsidiary activities. Consistent with the parity framework, this sentence provides that the restrictions in the first sentence do not apply to any interest held by a state member bank in accordance with the amendments made by GLBA that permit national banks to have financial subsidiaries, subject to the same conditions and limitations that apply to national banks. Thus, state member banks' financial subsidiaries are subject to the same limitations and prudential safeguards that apply to national banks' financial subsidiaries. This sentence was the result of a carefully crafted compromise to ensure that parallel firewalls, safeguards, and rules were applied to financial subsidiaries of national and state member banks.

Enhancing Investments in Bank and Thrift Service Companies. The OCC generally supports proposals that would permit banks to invest in thrift service companies and would permit savings associations to invest in bank service companies. Moreover, the OCC would not object to removing the geographic restrictions on the operations of thrift service corporations as long as the Bank Service Company Act is similarly amended to remove the geographic restrictions on bank service companies.

VII. CONCLUSION

Mr. Chairman, on behalf of the OCC, I thank you for your leadership in holding these hearings. The OCC strongly supports initiatives that will reduce unnecessary burden on the industry in a responsible, safe and sound manner. We would be pleased to work with you and your staff to make that goal a reality.

I would be happy to answer any questions you may have.

APPENDIX #1

SUMMARY OF THE REGULATORY BURDEN RELIEF LEGISLATION SUPPORTED BY THE OFFICE OF THE COMPTROLLER OF THE CURRENCY

NATIONAL BANKS

Repealing State Opt-In Requirements for *De Novo* Branching. The OCC supports amending section 5155(g) of the Revised Statutes of the United States (12 U.S.C. § 36(g)), section 18(d)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. § 1828(d)(4)), section 9 of the Federal Reserve Act (FRA) (12 U.S.C. § 321), and section 3(d)(1) of the Bank Holding Company Act (BHCA) (12 U.S.C. § 1842(d)(1)) to ease certain restrictions on banks' interstate banking and branching. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act), an out-of-state national or state bank may establish a *de novo* branch in a state only if that state has adopted legislation affirmatively "opting in" to *de novo* branching. This amendment would repeal the requirement that a state expressly must adopt an "opt-in" statute to permit the *de novo* branching form of interstate expansion. The amendment also would repeal the state age requirement for interstate mergers. The Riegle-Neal Act permits a state to prohibit an out-of-state bank or bank holding company from acquiring an in-state bank unless the state bank has been in existence for a minimum period of time (which may be as long as five years).

Under the Riegle-Neal Act, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. While two states "opted out" at the time, interstate bank mergers are now permissible in all 50 states. By contrast, *de novo branching* by banks requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state and only approximately 23 states have opted in (17 of which require reciprocity). As a result, banks in many cases must structure artificial and unnecessarily expensive transactions in order to simply establish a new branch across a state border. However, Federal thrifts are not similarly restricted and generally may branch interstate without the state law "opt-in" requirements that are imposed on banks. Also, repeal of the state age requirement would remove a limitation on bank acquisitions by out-of-state banking organizations that is no longer necessary if interstate *de novo* branching is permitted.

Enactment of this amendment should enhance competition in banking services with resulting benefits for bank customers. Moreover, it will ease burdens on banks that are planning interstate expansion through branches and would give banks greater flexibility in formulating their business plans and in making choices about the form of their interstate operations. Community banks that seek to serve customers across state lines would especially benefit since they lack the resource base available to larger banks that is required to structure the more complicated transactions now required to accomplish that result.

Resolving Issues Concerning Federal Court Jurisdiction. The OCC supports amending the National Bank Act (12 U.S.C. § 1, *et seq.*) to resolve the issues concerning national banks' state citizenship for purposes of Federal court diversity jurisdiction. The OCC supports a parallel amendment to the Home Owners' Loan Act (HOLA) (12 U.S.C. § 1461, *et seq.*) that would provide the same rule for Federal savings associations. National banks and Federal thrifts are chartered by the Federal Government and not by any state and both charters have been subject to conflicting interpretations about state citizenship. As a result, it makes sense to treat all Federally chartered depository institutions the same and end the confusion.

National banks' diversity jurisdiction is governed by 28 U.S.C. § 1348. This statute provides that generally national banks are "citizens" of the states in which they are "located." However, the term "located" is not defined in § 1348, and the Federal courts have not defined the term consistently.

In 2001, a U.S. Circuit Court of Appeals concluded that a national bank is "located" in, and thus for diversity jurisdiction purposes a citizen of, the state of its principal place of business and the state listed in its organization certificate. *Firststar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001). The *Firststar* opinion created confusing jurisdictional issues. The state listed in a national bank's organization certificate may not necessarily be the state in which the national bank currently has its main office. Under Federal law, a national bank can relocate its main office to a state other than that designated in its organization certificate.¹⁴ However, no new organization certificate would need to be issued. After the relocation, the national bank may no longer have any offices in the state listed in its organization certificate.¹⁵ Under *Firststar*, however, the bank would continue to be deemed a citizen of that state for diversity purposes because it is the state listed in its organization certificate.

In 2003, a lower Federal court reached a different conclusion. It held that a national bank is "located" in the state where it has its principal place of business and in the state specified in its *articles of association*. The court reasoned that a national bank's articles of association must be updated to reflect the bank's current main office and, therefore, the articles of association and not the bank's organization certificate should be used to determine citizenship status in diversity cases. *Evergreen Forest Products v. Bank of America*, 262 F. Supp. 2d 1297 (M.D. Ala. 2003). Under this interpretation, a national bank also could potentially be a citizen of two states, but a different criterion is used to identify one of the two states.

Most recently, two Circuit Courts have reached opposite conclusions about how to determine the citizenship of national banks for purposes of diversity jurisdiction. In October 2004, the Fifth Circuit held in that a national bank is not "located" at its interstate

¹⁴ 12 U.S.C. § 30.

¹⁵ Separately, the OCC also has supported amending Federal law to clarify that, for corporate status purposes, a national bank's general business is transacted at its main office and not the place specified in its organization certificate.

branch locations for purposes of Federal court jurisdiction. *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004). In November 2004, the Fourth Circuit took a position that is contrary to the position taken by every other circuit court by finding that a national bank is "located" in every state in which it operates a branch or potentially any other type of permanent office. *Wachovia Bank v. Schmidt*, 388 F.3d 414 (4th Cir. 2004). Indeed, over 60 years ago, the Ninth Circuit concluded that a national bank is a citizen only of the state where it maintains its principal place of business. *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943).

The inconsistent interpretation of the same Federal statutory standard for diversity jurisdiction by different Federal courts has created substantial uncertainty for national banks. Under the Fourth Circuit's interpretation, a national bank would be denied access to Federal court under diversity jurisdiction when an opposing party is a citizen of a state in which the bank has a branch. While a national bank with just one interstate branch would be affected by this decision, the consequences are most severe for national banks that have established interstate branches on a multi-state basis. Federal thrifts are subject to similar uncertainty because Federal law does not currently specify their citizenship for purposes of diversity jurisdiction.¹⁶ Although the Supreme Court has recently agreed to review the Fourth Circuit's decision, this review does not supplant the need for a uniform rule for determining the citizenship of both types of Federally chartered depository institutions.

National banks and Federal thrifts share the common attribute of being chartered by the Federal Government and not by any state. Thus, both types of Federally chartered depository institutions should be subject to the same standard for purposes of Federal diversity jurisdiction.

Providing Relief for Subchapter S National Banks. The OCC supports amending section 5146 of the Revised Statutes of the United States (12 U.S.C. § 72) to provide more flexible requirements regarding director qualifying shares for national banks operating, or seeking to operate, as Subchapter S corporations. The National Banking Act currently requires all directors of a national bank to own "shares of the capital stock" of the bank having an aggregate par value of at least \$1,000, or an equivalent interest, as determined by the Comptroller, in a bank holding company that controls the bank. This amendment would permit the Comptroller to allow the use of a debt instrument that is subordinated to the interests of depositors, the Federal Deposit Insurance Corporation (FDIC), and other general creditors to satisfy the qualifying shares requirement for directors of national banks seeking to operate in Subchapter S status.

The requirement in current law creates difficulties for some national banks that operate in Subchapter S form. It effectively requires that all directors be shareholders, thus making it difficult for some banks to comply with the 100-shareholder limit that defines eligibility for the benefit of Subchapter S tax treatment, which avoids double tax on the bank's earnings. Such a subordinated debt instrument would have features resembling an equity interest,

¹⁶ See, e.g., *First Nationwide Bank v. Gelt Funding, Inc.*, No. 92 Civ. 0790, 1992 U.S. Dist. LEXIS 18278, at *30 (S.D.N.Y. Nov. 30, 1992).

since the directors could only be repaid if all other claims of depositors and nondeposit creditors of the bank were first paid in full, including the FDIC's claims, if any. It would thus ensure that directors retain their personal stake in the financial soundness of the bank. However, the holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S.

Simplifying Dividend Calculations for National Banks. The OCC supports amending section 5199 of the Revised Statutes of the United States (12 U.S.C. § 60) to simplify the formula for calculating the amount that a national bank may pay in dividends. The current law requires banks to follow a complex formula that is unduly burdensome and unnecessary for safety and soundness. The proposed amendment would retain certain safeguards in the current law that provide that national banks (and state member banks)¹⁷ need the approval of the Comptroller (or the Board of Governors of the Federal Reserve System (Fed) in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. For purposes of the approval requirement, these Federal regulators would retain the authority to reduce the amount of a bank's "net income" by any required transfers to funds, such as a sinking fund for retirement of preferred stock.

The amendment would reduce burden on banks in a manner that is consistent with safety and soundness. Among other things, the amendment would ensure that the OCC (and the Fed for state member banks) would continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Importantly, the amendment would not affect other safeguards in the National Bank Act (12 U.S.C. § 56). These provisions generally prohibit national banks from withdrawing any part of their permanent capital or paying dividends in excess of undivided profits except in certain circumstances.

Moreover, other safeguards, such as Prompt Corrective Action enacted in 1991, provide additional safety and soundness protections for all insured depository institutions. The proposed amendment would not affect the applicability of these safeguards. These additional safeguards prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)).

Modernizing Corporate Governance. The OCC supports amending section 5144 of the Revised Statutes of the United States (12 U.S.C. § 61), which currently imposes mandatory cumulative voting requirements on all national banks. This law requires that, in all elections of national bank directors, each shareholder has the right to (1) vote for as many candidates as there are directors to be elected and to cast the number of votes for each candidate that is equal to the number of shares owned, or (2) cumulate his or her votes by multiplying the number of shares owned by the number of directors to be elected and casting the total number of these votes for only one candidate or allocating them in any manner among a number of candidates. The OCC supports an amendment that would

¹⁷ See 12 U.S.C. § 324 and 12 C.F.R. § 208.5 generally applying the national bank dividend approval requirements to state member banks.

permit a national bank to provide in its articles of association the method of electing its directors that best suits its business goals and needs and would provide the OCC with authority to issue regulations to carry out the purposes of this section.

The Model Business Corporation Act and most states' corporate codes provide that cumulative voting is optional. The amendment recommended by the OCC would conform this provision of the National Bank Act to modern corporate codes and would provide national banks with the same corporate flexibility available to most state corporations and state banks.

Modernizing Corporate Structure Options. The OCC supports amending the Revised Statutes of the United States (12 U.S.C. § 21 *et seq.*) to clarify the Comptroller's authority to adopt regulations allowing national banks to be organized in different business forms. Notwithstanding the form of organization, however, generally all national banks would continue to have the same rights and be subject to the same responsibilities, restrictions, and requirements except to the extent that different treatment may be appropriate based on the different forms of organization. Many of the requirements in the National Bank Act are based on a national bank having stock and shareholders. It is expected that the Comptroller will apply these requirements in a comparable manner to other authorized organizational forms except as warranted by the differences in form.

The OCC's suggested amendment would reduce burden on national banks and allow them to choose among different business organizational forms, as permitted by the Comptroller, and to select the form that is most consistent with their business plans and operations so that they may operate in the most efficient manner. Certain alternative business structures may be particularly attractive for community banks. For example, if the Comptroller should permit a national bank to be organized as a limited liability national association and establish the characteristics of such a national bank, the bank then may be able to take advantage of the pass-through tax treatment for comparable limited liability entities under certain tax laws and eliminate double taxation under which the same earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends.

Some states currently permit state banks to be organized as unincorporated limited liability companies (LLCs) and the FDIC recently adopted a rule that will result in certain state bank LLCs being eligible for Federal deposit insurance. Clarifying that national banks also may be organized in alternative business forms would provide a level playing field.

Paying Interest on Demand Deposits. The OCC supports repealing section 19(i) of the FRA (12 U.S.C. § 371a), section 5(b)(1)(B) of HOLA (12 U.S.C. § 1464(b)(1)(B)) and section 18 of the FDIA (12 U.S.C. § 1828) to permit member banks, thrifts, and nonmember banks, respectively, to pay interest on demand deposits.¹⁸ In a joint report submitted to Congress in September 1996, the OCC, along with the other Federal banking agencies, concluded that the statutory prohibition against the payment of interest on demand deposits no longer serves a useful public purpose. *See Joint Report: Streamlining*

¹⁸ This provision was included in H.R. 1224, the Business Checking Freedom Act of 2005, as passed by the House on May 24, 2005.

of Regulatory Requirements (September 23, 1996). Because banks can pay interest on NOW accounts held by individuals, it is primarily business checking accounts that are subject to prohibition on paying interest on demand deposits. Banks, however, find ways around this prohibition for their business customers through such financial products as sweep accounts that sweep excess demand deposits into money market investments. These programs are costly for the banks to maintain, an inefficient use of the banks' resources, and an unnecessary burden on business customers to establish such accounts. Community banks also are disadvantaged since they have fewer resources to apply to supporting these alternative arrangements than do larger banks.

Repealing Obsolete Limitations on the OCC's Removal Authority. The OCC supports amending section 8(e)(4) of the FDIA (12 U.S.C. § 1818(e)(4)) relating to the procedures for the removal of an institution-affiliated party (IAP) from office or participation in the affairs of an insured depository institution. With respect to national banks, current law requires the OCC to certify the findings and conclusions of an Administrative Law Judge to the Fed for the Fed's determination as to whether any removal order will be issued. This amendment would repeal this certification and Fed approval process and allow the OCC directly to issue the removal order with respect to national banks.

The present system stems from historical decisions made by Congress on circumstances that are no longer applicable. Originally, the role of the OCC in removal cases was to certify the facts of the case to the Fed. The Fed then made the decision to pursue the case and made the final agency decision. At that time, the Comptroller was a member of the Federal Reserve Board and, therefore, participated in the Fed's final removal decision. However, Congress later removed the Comptroller from the Fed and gave the OCC the authority directly to issue suspensions and notices of intention to remove.

All of the Federal banking agencies, except the OCC, may remove a person who engages in certain improper conduct from the banking business. This amendment would give the Comptroller the same removal authority as the other banking agencies to issue orders to remove persons who have been determined under the statute to have, for example, violated the law or engaged in unsafe or unsound practices in connection with an insured depository institution. Like the other banking agencies, the Comptroller should make these decisions about persons who engage in improper conduct in connection with the institutions for which the Comptroller is the primary supervisor. This is a technical change to streamline and expedite these actions and has no effect on a person's right to seek judicial review of any removal order. The Fed also supports this amendment.

Repealing Obsolete Intrastate Branch Capital Requirements. The OCC supports amending section 5155(c) of the Revised Statutes of the United States (12 U.S.C. § 36(c)) to repeal the requirement that a national bank, in order to establish an intrastate branch office in a state, must meet the capital requirements imposed by the state on state banks seeking to establish intrastate branches.

This technical amendment would repeal the obsolete capital requirement for the establishment of intrastate branches by national banks. This requirement is not necessary

for safety and soundness. Branching restrictions are already imposed under other provisions of law to limit the operations of a bank if it is in troubled condition. See 12 U.S.C. § 1831o(e) (prompt corrective action).

Giving National Banks More Flexibility in Main Office Relocations. The OCC supports amending national banking law to make several changes that will reduce unnecessary burdens on a national bank seeking to relocate its main office and will give a national bank more flexibility in structuring its business operations.

First, a national bank that is merging or consolidating with another bank *in the same state* does not have the same authority under current law to designate any office of the merged or consolidated entity as its main office as it would have if it were involved in an *interstate* merger or consolidation. *See* 12 U.S.C. § 1831u(d)(1). Under the Riegle-Neal Act, a resulting bank may, with the approval of its appropriate Federal banking agency, retain and operate any main office or branch of any bank involved in an *interstate* merger transaction as a main office or a branch of the resulting bank. *Id.*

The proposed amendment amends the National Bank Consolidation and Merger Act (12 U.S.C. §§ 215, 215a) to provide parity with respect to main office relocations. The amendments would allow a national bank, with the Comptroller's approval, to retain and operate, as its main office, any main office or branch of any bank involved in a merger or consolidation between a national bank and another bank *located in the same state*. This change would give a national bank engaging in a merger or consolidation transaction with another bank in the same state more flexibility to designate its main office and manage its business operations in the same manner that the Riegle-Neal Act provides flexibility and more business choices to banks engaged in interstate transactions with respect to main office relocations.

It is not necessary to amend current law to give a resulting national bank the authority to retain and operate the branch offices of any of the banks involved in a merger or consolidation under § 215 and § 215a or the authority to retain and operate a main office of any other bank involved in the transaction. This authority is provided under current law, subject to certain restrictions. *See* 12 U.S.C. § 36(b)(2). The issue is simply enabling the bank to designate as a main office a location in the same state in which the merging banks are located, that is not currently the main office of either of the combining banks.

Second, the proposal would amend national banking law at 12 U.S.C. § 30 to give a national bank more flexibility when relocating its main office to a branch location within the same state. Under current law, with written notice to the Comptroller, a national bank may relocate its main office to any branch location within the limits of the city, town, or village in which it is situated. *See* 12 U.S.C. § 30(b). If a national bank is seeking to relocate its main office to a branch location outside the city limits or to any other location within or outside the city limits, it must (1) obtain the vote of two-thirds of the shareholders, (2) obtain the Comptroller's approval, and (3) limit any such relocation to 30 miles outside the city limits. *Id.*

The proposed amendment continues to permit a national bank to relocate its main office to a branch location inside the city limits in which the main office is currently located with notice to the Comptroller. The amendment, however, changes current law in the following respects:

1. A national bank would be permitted to relocate its main office to a branch location that is within the same state as the main office *subject to the Comptroller's approval*. Shareholder approval would no longer be required for this business change in which no new deposit facilities are being established and the 30-mile relocation limit would not apply to these business decisions.

2. A national bank relocating its main office to a branch location inside the city limits or to a branch location in the same state would be permitted to operate the former main office as a branch if the bank could operate a branch at that location in accordance with 12 U.S.C. § 36(c). This limitation would ensure that a national bank would be able to convert its former main office to a branch under these amendments to 12 U.S.C. § 30 only if operating a branch at the same location would be permissible for state banks under § 36(c).

The amendment does not make any other changes to current law. Moreover, the amendment does not affect the Community Reinvestment Act requirements. The main office relocations that currently require an application to obtain Comptroller approval would still be subject to the same requirements.

Enhancing National Banks' Community Development Investments. The OCC supports increasing the maximum amount that a national bank can invest in community development activities. Under current law, 12 U.S.C. § 24(Eleventh) authorizes national banks to make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families, either directly or by purchasing interests in an entity primarily engaged in making these investments (CDC investments). This statute limits these aggregate investments to 5% of a national bank's unimpaired capital and surplus, unless the OCC determines that a higher amount will pose no significant risk to the deposit insurance fund and the bank is adequately capitalized. However, in no case, may the OCC permit a bank's aggregate outstanding CDC investments to exceed 10% of the bank's unimpaired capital and surplus. In addition, the OCC has the authority to limit a national bank's investment in any one project, as well the aggregate investments. The OCC's regulations governing these investments are in 12 C.F.R. Part 24. By regulation, the OCC also prohibits a national bank from making such an investment if it would expose the bank to unlimited liability. *See* 12 C.F.R. § 24.4(b).

Thus, a national bank may exceed the 5% investment only if it is adequately capitalized and only if the OCC determines that a higher limit will not pose a significant risk to the deposit insurance fund. Many national banks that have satisfied this test are moving closer to or have reached the maximum 10% of capital/surplus limit under current law.

This amendment would increase the maximum limit from 10% to 15%. The amendment would not change the requirements in current law for a national bank to be eligible for a

higher investment limit under the CDC authority. Today, more than 90% of national banks' CDC investments are in low-risk, low-income housing tax credit (LIHTC) projects and funds, many of which have credit enhancements with AA or AAA ratings. Losses associated with LIHTC investments are minimal, according to a recent Ernst & Young study (only 0.14% of LIHTC projects financed since 1987 have gone into foreclosure). Under the amendment, as in current law, the OCC would continue to be required to determine that an aggregate CDC investment amount that exceeds 5% of capital/surplus poses no significant risk to the deposit insurance fund and the requirement that the bank must be adequately capitalized still would apply. This amendment would enhance the ability of national banks to support community and economic development through investments with a successful track record.

Clarifying the Waiver of Publication Requirements for Bank Merger Notices. The OCC supports amending sections 2(a) and 3(a)(2) of the National Bank Consolidation and Merger Act (12 U.S.C. § 215(a) and 215a(a)(2), respectively) concerning the newspaper publication requirement of a shareholder meeting to vote on a consolidation or merger of a national bank with another bank located within the same state. This change would clarify that the publication requirement may be waived by the Comptroller in the case of an emergency situation or by unanimous vote of the shareholders of the national or state banks involved in the transaction.

This amendment does not affect other requirements in the law. The current law also requires that the consolidation or merger must be approved by at least a 2/3 vote of the shareholders of each bank involved in the transaction. In addition, the shareholders of the banks generally must receive notice of the meeting by certified or registered mail at least ten days prior to the meeting. These provisions are not changed.

Repealing Obsolete References to the Main Place of Business of a National Bank. The OCC supports amending two sections of the Revised Statutes of the United States (12 U.S.C. §§ 22 and 81) to replace obsolete language that is used in these two sections with the modern term "main office."

The change to 12 U.S.C. § 22 would clarify that the information required to be included in a national bank's organization certificate is the location of its *main office*. The change of 12 U.S.C. § 81 would clarify that the general business of a national bank shall be transacted in its *main office* and in its branch or branches. Both statutes currently use obsolete terms to describe a main office of a national bank.

Deleting Obsolete Language in the National Bank Act. The OCC supports amending section 5143 of the Revised Statutes of the United States (12 U.S.C. § 59) to delete obsolete language. Generally, 12 U.S.C. § 59 permits a national bank to reduce its capital and distribute cash or other assets to its shareholders that become available as a result of the reduction if approved by a vote of two-thirds of its shareholders and by the OCC. The current statute, however, also references two obsolete provisions. The first provision limits the amount of the capital reduction to a "sum not below the amount required by this chapter to authorize the formation of associations." This limitation refers to the obsolete

minimum capital requirement for a de novo institution that was provided under 12 U.S.C. § 51; however, 12 U.S.C. § 51 was repealed in 2000 by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. No. 106-569, Title XII, § 1233(c). The second obsolete provision limits the amount of a bank's capital that can be reduced to the "amount required for its outstanding circulation." The reference to "outstanding circulation" relates to the obsolete practice by national banks of issuing circulating notes to serve as currency.

This amendment would delete the obsolete language in the statute but would maintain the current relevant requirement that a national bank cannot reduce its capital and distribute assets to its shareholders unless approved by two-thirds of its shareholders and by the OCC.

SAFETY AND SOUNDNESS

Enforcing Written Agreements and Commitments. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq.*) to add a new section that provides that the Federal banking agencies may enforce the terms of (1) conditions imposed in writing in connection with an application, notice, or other request, and (2) written agreements.

This amendment would enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses. This amendment is intended to reverse some court decisions that question the authority of the agencies to enforce such conditions or agreements against institution-affiliated parties (IAP) without first establishing that the IAP was unjustly enriched. In addition, the amendment would clarify that a condition imposed by a banking agency in connection with the nondisapproval of a notice, *e.g.*, a notice under the Change in Bank Act (CBCA), can be enforced under the FDIA.

Barring Convicted Felons From Participating in the Affairs of Depository Institutions. The OCC supports amending section 19 of the FDIA (12 U.S.C. § 1829) to give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an *uninsured* national or state bank or *uninsured* branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these bad actors out of depository institutions applies only to *insured* depository institutions. The OCC believes that this amendment would help to enhance the safe and sound operations of uninsured, as well as insured, institutions.

Ensuring That Accountants of Insured Depository Institutions Are Held to the Same Standard as Other IAPs. The OCC supports amending section 3(u)(4) of the FDIA (12 U.S.C. § 1813(u)(4)) to remove the "knowing and reckless" requirement. This change would hold independent contractors to a standard that is more like the standard that applies to other IAPs. Under current law, independent contractor IAPs are treated more leniently

under the enforcement provisions in the banking laws than are directors, officers, employees, controlling shareholders, or even agents for the institution or shareholders, consultants, and joint venture partners who participate in the affairs of the institution. To establish that an independent contractor, such as an accountant, has the type of relationship with the insured depository institution that would allow a Federal banking agency to take action against the accountant as an IAP for a violation of law, breach of fiduciary duty, or an unsafe or unsound banking practice, the banking agency today must show that the accountant “knowingly and recklessly” participated in such a violation. This amendment would strike the “knowing and reckless” requirement. However, other requirements in the statute with respect to requiring a banking agency to show that the violation by the independent contractor caused or is likely to cause more than a minimal loss to, or have a significant adverse effect on, the institution would still apply.

The knowing and reckless standard in the current law is so high that it is extremely difficult for the banking agencies to take enforcement actions against accountants and other contractors who engage in clearly negligent conduct. The amendment will strengthen the agencies’ enforcement tools with respect to accountants and other independent contractors.

Strengthening the Supervision of Stripped-Charter Institutions. The OCC supports amending the CBCA in section 7(j) of the FDIA (12 U.S.C. § 1817(j)) to expand the criteria to allow a Federal banking agency to extend the time period to consider a CBCA notice. Under the CBCA, a Federal banking agency must disapprove a CBCA notice within certain time frames or the transaction may be consummated. Initially, the agency has up to 90 days to issue a notice of disapproval. The agency may extend that period for up to an additional 90 more days if certain criteria are satisfied and this amendment provides for new criteria that would allow an agency to extend the time period under this additional up to 90-day period. The new criteria that an agency could use to extend the time period can provide the agency more time to analyze the future prospects of the institution or the safety and soundness of the acquiring party’s plans to make changes in the institution’s business operations, corporate structure, or management. Moreover, the amendment would permit the agencies to use that information as a basis to issue a notice of disapproval.

The OCC believes that this amendment will address issues that have arisen for the banking regulators when a stripped-charter institution (*i.e.*, an insured bank that has no ongoing business operations because, for example, all of the business operations have been merged into another institution) is the subject of a CBCA notice. The agencies’ primary concern with such CBCA notices is that the CBCA is sometimes used as a way to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance.

In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the statutory grounds for the denial of a notice under the CBCA. There are also significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal

banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. In the case of a CBCA notice to acquire a stripped-charter institution, acquirers are effectively buying a bank charter without the requirement for prior approval and without the scope of review that the law imposes when applicants seek a new charter, even though the risks presented by the two sets of circumstances may be substantively identical. The recommended amendment would expand the criteria in the CBCA that allows a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider the acquiring party's business plans and the future prospects of the institution and use that information in determining whether to disapprove the notice.

Providing a Statute of Limitations for Judicial Review of Appointment of a Receiver for a National Bank

The OCC supports amending section 2 of the National Bank Receivership Act (12 U.S.C. § 191) to provide for a 30-day period to judicially challenge a determination by the OCC to appoint a receiver for a national bank. Current law generally provides that challenges to a decision by the Office of Thrift Supervision (OTS) to appoint a receiver or conservator for an insured savings association or the FDIC to appoint itself as receiver or conservator for an insured state depository institution must be raised within 30 days of the appointment. 12 U.S.C. §§ 1464(d)(2)(B), 1821(c)(7). There is, however, no statutory limit on a national bank's ability to challenge a decision by the OCC to appoint a receiver of an insured or uninsured national bank.¹⁹ As a result, the general six-year statute of limitations for actions against the U.S. applies to the OCC's receiver appointments. *See James Madison, Ltd. v. Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996).

The six-year protracted time period under current law complicates resolution and winding up the affairs of an insured national bank in a timely manner with legal certainty. The recommended amendment would make the statute of limitations governing the appointment of receivers of national banks consistent with the time period that generally applies to other depository institutions. The amendment would not affect a national bank's ability to challenge a decision by the OCC to appoint a receiver, but simply require that these challenges must be brought in a timely manner and during the same time frame that generally applies to other depository institutions.

Allocating Examiner Resources More Efficiently. The OCC supports amending section 10(d) of the FDIA (12 U.S.C. § 1820(d)) to provide that an appropriate Federal banking agency may make an up to six-month adjustment in the examination cycle of an insured depository institution, if necessary for safety and soundness and the effective examination and supervision of insured depository institutions. Under current law, insured depository institutions must be examined by their appropriate Federal banking agencies at least once during a 12-month period in a full-scope, on-site examination unless an institution qualifies for the 18-month rule. Small insured depository institutions with total assets of less than

¹⁹ Under current law, there is a 20-day statute of limitations for challenges to the OCC's decision to appoint a conservator of a national bank. 12 U.S.C. § 203(b)(1).

\$250 million²⁰ and that satisfy certain other requirements may be examined on an 18-month basis rather than a 12-month cycle. This amendment would permit a Federal banking agency to make adjustments in the scheduled examination cycle for an insured depository institution as necessary for safety and soundness but the agency could not extend the examination cycle for any such institution by more than six months.

Such an amendment would give the appropriate Federal banking agencies the discretion to adjust the examination cycle for insured depository institutions by up to six months to ensure that examiner resources are allocated in a manner that provides for safety and soundness. For example, as deemed appropriate by a Federal banking agency, a well-capitalized and well-managed bank's examination requirement for an annual or 18-month examination could be extended by up to six months if the agency's examiners were needed to immediately examine troubled or higher risk institutions. This amendment would permit the agencies to use their resources in a more efficient manner.

Enhancing the Ability of Banking Agencies to Suspend or Remove Bad Actors From Depository Institutions. The OCC supports amending section 8(g) of the FDIA (12 U.S.C. § 1818(g)) to clarify that the appropriate Federal banking agency may suspend or prohibit IAPs charged or convicted with certain crimes (including those involving dishonesty, breach of trust, or money laundering) from participating in the affairs of any depository institution and not only the institution with which the party is or was last affiliated. The amendment also would clarify that the section 8(g) authority applies even if the IAP is no longer associated with the depository institution at which the offense allegedly occurred or if the depository institution with which the IAP was associated is no longer in existence. Moreover, the amendment would allow the banking agency to suspend or remove an individual who attempts to become involved in the affairs of an insured depository institution after being charged with a covered crime. It makes little sense to allow the agencies to suspend or remove a person who is charged with such a crime while serving at an insured depository institution, but deny the agencies the ability to remove a person that becomes affiliated with an insured depository institution while under indictment for the same type of crime.

Under current law, if an IAP is charged with such a crime, the suspension or prohibition will remain in effect until the charge is finally disposed of or until terminated by the agency. If the individual is convicted of such a crime, the party may be served with a notice removing the party from office and prohibiting the party from further participating in the affairs of a depository institution without the consent of the appropriate Federal banking agency.²¹ Before an appropriate Federal banking agency may take any of these

²⁰ The OCC together with the other Federal banking agencies and certain banking industry trade groups are also recommending that the small-bank examination threshold be increased to \$500 million. See Appendix #2.

²¹ Under another provision of the FDIA, any person convicted of any crime involving dishonesty, breach of trust, or money laundering may not, among other things, become or continue as an IAP with respect to any insured depository institution without the prior consent of the FDIC. 12 U.S.C. § 1829. As discussed above, the OCC also supports amending § 1829 to apply to *uninsured*, as well as insured, depository institutions and to give the OCC the authority to keep these convicted felons out of uninsured national banks or Federal branches or agencies.

actions under section 8(g), the agency must find that service by the party may pose a threat to interests of depositors or impair public confidence in a depository institution. The statute further provides that an IAP that is suspended or removed under section 8(g) may request a hearing before the agency to rebut the agency's findings. Unless otherwise terminated by the agency, the suspension or order of removal remains in effect until the hearing or appeal is completed. Current law, however, applies only to the depository institution with which the IAP is then associated. This amendment will help to ensure that, if a Federal banking agency makes the required findings, the agency has adequate authority to suspend or prohibit an IAP charged with such crimes from participating in the affairs of any depository institution if any of the various circumstances described above should occur.

FEDERAL BRANCHES AND AGENCIES OF FOREIGN BANKS

Implementing Risk-Based Requirements for Federal Branches and Agencies. The OCC supports an amending section 4(g) of the International Banking Act of 1978 (IBA) (12 U.S.C. § 3102(g)) concerning the Comptroller's authority to set the amount of the capital equivalency deposit (CED) for a Federal branch or agency. The CED is intended to ensure that assets will be available in the U.S. for creditors in the event of liquidation of a U.S. branch or agency. The current CED statute that applies to foreign banks operating in the U.S. through a Federal license may impose undue regulatory burdens without commensurate safety and soundness benefits. These burdens include obsolete requirements about where the deposit must be held and the amount of assets that must be held on deposit. As a practical matter, the IBA sets the CED at 5% of total liabilities of the Federal branch or agency and provides that the CED must be maintained in such amount as determined by the Comptroller. As a result, Federal branches and agencies often must establish a CED that is larger than the capital that would be required for a bank of corresponding size or for a similar size state-chartered foreign branch or agency in major key States.

The OCC recommends that section 4(g) be amended to allow the OCC, after consultation with the Federal Financial Institutions Examination Council (FFIEC), to adopt regulations allowing the CED to be set on a risk-based institution-by-institution basis. Such an approach would more closely parallel the risk-based capital framework that applies to national and state banks. The Federal Reserve Board has no objections to the OCC's amendment.

Allowing the Option for a Federal Representative Office License. The OCC supports amending section 4 of the IBA (12 U.S.C. § 3102) to permit the OCC to license Federal representative offices. Representative offices of foreign banks generally engage in representational functions. They do not engage in core banking activities, such as accepting deposits or lending money. Although the IBA sought to provide foreign banks with a Federal option for their U.S. offices by giving the OCC the authority to license Federal branches and agencies, it did not provide the OCC with the authority to establish

Federal representative offices. In this respect, the IBA does not fully implement the goal of national treatment for foreign banks seeking to establish a representative office in the United States.

The absence of a Federal representative office option has in some cases resulted in additional regulatory burden for those foreign banks that would want to have their entire U.S. operations under a Federal license. If foreign banks with an existing Federal branch or agency want to have a representative office, they are required to establish them under state law provisions, and thus gain an additional U.S. regulator.

The amendment supported by the OCC would provide foreign banks with the option of establishing Federal representative offices with OCC approval and under the OCC's supervision. Specifically, it would authorize the OCC to approve the establishment of a representative office, provided that state law does not prohibit this establishment. In acting on an application to establish a Federal representative office, the OCC generally would apply the same criteria that it applies when it acts on Federal branch or agency applications.

The amendment also would provide that the OCC would have the authority to regulate, supervise, and examine representative offices that it licenses. Finally, to ensure that the OCC has adequate authority to enforce this provision, the proposal would amend section 3(q) of the FDIA to include a Federal representative office as an entity for which the Comptroller serves as the appropriate Federal banking agency and, would further amend the FDIA to clarify that representative offices are subject to the enforcement authority of the Fed and OCC under 12 U.S.C. § 1818.

This amendment would not affect or in any way diminish the Fed's authority under current law to approve (in addition to the primary, or licensing, authority) the establishment of foreign banks' U.S. offices (Federal- or state-licensed branches, agencies, or representative offices) and to examine any of these entities under the IBA. Moreover, the Fed would have the same ability to recommend to the OCC that the license of a Federal representative office be terminated that it has under current law to recommend that the license of a Federal branch or agency be terminated.

Providing Equal Treatment for Federal Agencies of Foreign Banks. The OCC supports amending section 4(d) of the IBA (12 U.S.C. § 3102(d)) to provide that the prohibition on uninsured deposit-taking by Federal agencies of foreign banks applies only to deposits from U.S. citizens or residents. As a result, a Federal agency would be able to accept uninsured foreign source deposits from non-U.S. citizens. State agencies of foreign banks may accept uninsured deposits from parties who are neither residents nor citizens of the United States, if so authorized under state law. However, due to slight language differences in the IBA, the D.C. Circuit Court of Appeals has held that Federal agencies cannot accept any deposits, including those from noncitizens who reside outside of the United States. *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 623 (D.C. Cir. 1983).

The amendment supported by the OCC would allow Federal agencies to accept the limited *uninsured* foreign source deposits that state agencies may accept under the IBA. As a result, Federal agencies would be able to offer the same services to foreign customers that may be offered by state agencies. Because these deposits are not insured, this amendment does not pose any risks to the deposit insurance fund.

Maintaining a Federal Branch and a Federal Agency in the Same State. The OCC supports an amendment to section 4(e) of the IBA (12 U.S.C. § 3102(e)) to provide that a foreign bank is prohibited from maintaining both a Federal agency and a Federal branch in the same state only *if* state law prohibits maintaining both an agency and a branch in the state. Current law prohibits a foreign bank from operating both a Federal branch and a Federal agency in the same state notwithstanding that state law may allow a foreign bank to operate both types of offices.

According to the legislative history of the current provision, this prohibition was included in the IBA to maintain parity with state operations. However, today some states permit foreign banks to maintain both a branch and agency in the same state. For example, Florida law permits a foreign bank to operate more than one agency, branch, or representative office in Florida (*see* Fla. Stat. Ann. § 663.06). This amendment would repeal an outdated regulatory burden in current law and permit a foreign bank to maintain both a Federal branch and a Federal agency in those states that do not prohibit a foreign bank from maintaining both of these offices. This change would enhance national treatment and give foreign banks more flexibility in structuring their U.S. operations.

INFORMATION SHARING

Improving Ability to Obtain Information from Regulated Entities. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq.*) to permit the OCC, FDIC, Fed, and OTS to establish and use advisory committees in the same manner. The Federal Advisory Committee Act (5 U.S.C. App.) (FACA) generally requires that the meetings of advisory committees must be open to the public, and that advance notice of a committee meeting must be published in the *Federal Register*. The minutes of the meeting and all working papers and other documents prepared for or by the advisory committee also must be publicly available.

Under current law, only the Fed is exempt from the disclosure requirements under the Federal Advisory Committee Act (FACA). Yet, all types of insured institutions and their regulators have a need to share information and to conduct open and frank discussions that may involve non-public information about the impact of supervisory or policy issues. Because of the potentially sensitive nature of this type of information, the public meeting and disclosure requirements under FACA may inhibit the supervised institutions from providing the agencies their candid views. Importantly, this is information that any one bank could provide to its regulator and discuss on a confidential basis. It is only when several banks simultaneously do so in a collective discussion and offer suggestions to

regulators that issues are raised under FACA. Our amendment would cure this anomaly and enhance the dialogue between all depository institutions and their Federal bank regulators.

Improving Information Sharing. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq.*) to provide that a Federal banking agency has the discretion to furnish any confidential supervisory information, including a report of examination, about a depository institution or other entity examined by the agency to another Federal or state supervisory agency and to any other person deemed appropriate.

Such an amendment would give the other Federal banking agencies parallel authority to share confidential information that was given to the Fed in Sec. 727 of the Gramm-Leach-Bliley Act (GLBA). This provision is discretionary and nothing in this provision would compel a banking agency to disclose confidential supervisory information that it has agreed to keep confidential pursuant to an information sharing or other agreement with another supervisor. There is no reason why parallel provisions should not apply to all the Federal banking agencies.

APPENDIX #2

SUMMARY OF THE REGULATORY BURDEN RELIEF LEGISLATION SUPPORTED BY THE OCC, FED, FDIC, OTS AND INDUSTRY TRADE GROUPS²²

Giving the Federal Reserve Authority to Pay Interest on Reserve Balances.

The OCC together with the other Federal banking agencies and the industry trade groups support an amendment to section 19(b) of the FRA (12 U.S.C. § 461(b)) to give the Fed the authority to pay interest on balances held by depository institutions at the Federal Reserve banks.²³ Section 19(b) requires depository institutions to maintain reserves against their transaction accounts and certain other deposits (required reserves). Banks also may hold other types of balances in their accounts at Federal Reserve banks. To avoid the prohibition on payment of interest on required reserves, banks have created mechanisms to minimize required reserves. This amendment would permit the Fed to pay interest on all reserve balances on at least a quarterly basis at a rate not to exceed the general level of short-term interest rates. The Fed would have authority to issue regulations regarding the payment, distribution, and crediting of interest pursuant to this section.

Authorizing Member Banks to Use Pass-Through Reserve Accounts. The OCC together with the other Federal banking agencies and the industry trade groups support an amendment to section 19(c)(1)(B) of the FRA (12 U.S.C. § 461(c)(1)(B)). This amendment would permit member banks to use their deposits in affiliated or correspondent banks, which in turn are deposited by the affiliate or correspondent bank in a Federal reserve bank, for purposes of satisfying the member banks' required reserves. Under current law, only nonmember banks can use the pass-through arrangement. This amendment would permit member banks also to use pass-through deposits, which are considered the equivalent of deposits in a Federal Reserve bank, as a reserve management tool.

Providing the Fed with More Flexibility to Set Reserve Requirements. The OCC together with the other Federal banking agencies and the industry trade groups support amending section 19(b)(2)(A) of the FRA (12 U.S.C. § 461(b)(2)(A)) to give the Fed more discretion in setting reserve requirements and implementing monetary policy. Under current law, the reserve requirements must be set within a certain range but no lower than 8% or 3% depending on the size of the transaction account. This amendment would give the Fed the flexibility to set reserve requirements at a lower rate and even reduce the reserve requirements to zero.

²² The industry trade groups include the American Bankers Association, America's Community Bankers, the Independent Community Bankers of America, and the Financial Services Roundtable.

²³ This provision was included in H.R. 1224, the Business Checking Freedom Act of 2005, as passed by the House on May 24, 2005.

Reducing Reporting Burdens Relating to Insider Lending Reporting. The OCC together with the other Federal banking agencies and the industry trade groups support amending section 22(g) of the FRA (12 U.S.C. § 375a) and section 106(b)(2) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972(2)) to eliminate certain reporting requirements concerning loans made to insiders. Specifically, the reports that would be eliminated are (1) the report that must be filed with a bank's board of directors when an executive officer of the bank obtains certain types of loans from another bank that exceeds the amount the officer could have obtained from his or her own bank, (2) the supplemental report a bank must file with its quarterly call report identifying any loans made to executive officers during the previous quarter, and (3) an annual report filed with a bank's board of directors by its executive officers and principal shareholders regarding outstanding loans from correspondent banks.

Nothing in these amendments affects the substantive insider lending restrictions that apply to banks or the banking agencies' enforcement of those restrictions. Under the OCC's regulations, national banks are required to follow the Fed's regulations regarding insider lending restrictions and reporting requirements (see 12 C.F.R. § 31.2). The Fed's regulations require member banks to maintain detailed records of all insider lending. In addition, the OCC has the authority under 12 U.S.C. § 1817(k) to require any reports that it deems necessary regarding extensions of credit by a national bank to any of its executive officers or principal shareholders, or the related interests of such persons. Thus, the OCC believes the amendment will not affect its ability to obtain the information needed to review a bank's compliance with insider lending laws.

Streamlining Depository Institution Merger Application Requirements. The OCC together with the other Federal banking agencies and the industry trade groups support amending the BMA (12 U.S.C. § 1828(c)) to provide that the responsible agency in a merger transaction, which is generally the Federal banking agency that has the primary regulatory responsibility for the resulting bank, must request a competitive factors report only from the Attorney General, with a copy to the FDIC. Under current law, this report must be requested from all of the other Federal banking agencies but the other agencies are not required to file a report. This amendment would appropriately streamline the agencies' procedures in processing BMA transactions.

Shortening of the Post-Approval Antitrust Review Period. The OCC together with the other Federal banking agencies and the industry trade groups support amending section 11(b)(1) of the BHCA (12 U.S.C. § 1849(b)(1)) and section 18(c)(6) of the BMA (12 U.S.C. § 1828(c)(6)) to permit the shortening of the post-approval waiting period for certain bank acquisitions and mergers. Under current law, the post-approval waiting period generally is 30 days from the date of approval by the appropriate Federal banking agency. The waiting period gives the Attorney General time to take action if the Attorney General determines that the transaction will have a significant adverse effect on competition. The waiting period under both the BHCA and BMA, however, may be shortened to 15 days if the appropriate banking agency and the Attorney General agree that no such effect on competition will occur. The proposed amendment would shorten the mandatory 15-day waiting period to 5 days.

The amendment would give the banking agency and the Attorney General more flexibility to shorten the post-approval waiting period as appropriate for those transactions that do not raise competitive concerns. If such concerns exist, the 30-day waiting period will continue to apply. This change will not affect the waiting periods for transactions that involve bank failures or emergencies. In those cases, the statute already provides for other time frames

Providing Streamlined Procedures for Mergers Between Affiliated Banks. The OCC together with the other Federal banking agencies and the industry trade groups support amending section 18(c) of the FDIA (12 U.S.C. § 1828(c)) to exempt merger transactions between affiliated insured depository institutions from certain requirements under the statute. These transactions would be exempt from the competitive factors review by the Attorney General and the other banking agencies and from the post-approval waiting periods in the law as described above. Because this is a merger between affiliated depository institutions, this is not generally the type of merger that would have an affect on competition. Thus, the requirements and the time delays in the statute that are intended to allow for anticompetitive review are not necessary. Such transactions would still, however, require an application and the prior written approval of the responsible Federal banking agency.

Improving Information Sharing With Foreign Supervisors. The OCC together with the other Federal banking agencies and the industry trade groups support amending section 15 of the IBA (12 U.S.C. § 3109) to add a provision that ensures that the Fed, OCC, and FDIC cannot be compelled to disclose information obtained from a foreign supervisor if public disclosure of this information would be a violation of foreign law and the U.S. banking agency obtained the information pursuant to an information sharing arrangement with the foreign supervisor or other procedure established to administer and enforce the banking laws. The banking agency, however, cannot use this provision as a basis to withhold information from Congress or to refuse to comply with a valid court order in an action brought by the U.S. or the agency.

This amendment would provide assurances to foreign supervisors that the banking agencies cannot be compelled to disclose publicly confidential supervisory information that the agency has committed to keep confidential, except under the limited circumstances described in the amendment. This authority is similar to the authority provided to the Securities and Exchange Commission under the securities laws (15 U.S.C. § 78q(h)(5)). Some foreign supervisors have been reluctant to enter into information sharing agreements with U.S. banking agencies because of concerns that the U.S. agency may not be able to keep the information confidential and public disclosure of the confidential information provided could subject the supervisor to a violation of its home country law. This amendment will be helpful to ease those concerns and will facilitate information sharing agreements that enable U.S. and foreign supervisors to obtain necessary information to supervise institutions operating internationally.

Providing an Inflation Adjustment for the Small Depository Institution Exception under the Depository Institution Management Interlocks Act (DIMIA).

The OCC together with the other Federal banking agencies and the industry trade groups support amending section 203(1) of DIMIA (12 U.S.C. § 3202(1)). Under current law, generally a management official may not serve as a management official of any other nonaffiliated depository institution or depository institution holding company if (1) their offices are located or they have an affiliate located in the same MSA, or (2) the institutions are located in the same city, town, or village, or a city, town, or village that is contiguous or adjacent thereto. For institutions of less than \$20 million in assets, the SMSA restriction does not apply. The amendment would increase the current \$20 million exemption to \$100 million. The OCC supports this amendment. This \$20 million cap has not been amended since the current law was originally enacted in 1978. However, the asset size of FDIC-insured commercial banks between 1976 and 2000 has increased over five fold. Depository institutions of all sizes will continue to be subject to the city, town, or village test.

Reducing Flood Insurance Burden. The OCC together with the other Federal banking agencies and the industry trade groups support several amendments to the Flood Disaster Protection Act of 1973.

First, the group supports an amendment to section 102(c)(2)(A) (42 U.S.C. § 4012a(c)(2)(A)) that would increase the small loan exemption from \$5,000 to \$20,000 and provide for a 5-year increase based on increases in the Consumer Price Index. Under current law, loans that have an original outstanding principal balance of \$5,000 or less and a repayment term of one year or less are exempt from the flood insurance requirements. The \$5,000 maximum amount was put into place in 1994 and has not been increased since that time. This is an appropriate adjustment that will not impair the safety and soundness of financial institution lenders. The requirement that the loan must have a repayment term of one year or less will **not** be changed by the amendment.

Second, the group supports an amendment to section 102(e)(2) (42 U.S.C. § 4012a(e)(2)) relating to the forced placement of flood insurance by a lender. Under current law, if the lender determines that the property securing a loan is not covered by flood insurance, *e.g.*, the policy has lapsed, or is covered by inadequate insurance, the lender must purchase flood insurance on behalf of the borrower if the borrower fails to do so with 45 days after receiving notice. However, most policies only have a 30-day grace period and, thus, lenders are being forced to purchase expensive gap insurance from private insurers to cover the 15-day period before a new policy under the National Flood Insurance Program (NFIP) becomes effective. We propose to shorten this time period for the lender to purchase insurance from 45 days to 30 days so that a lender will be able to purchase effective NFIP insurance before the expiration of the 30-day grace period.

Third, the group supports an amendment that would repeal the mandatory civil money penalties (CMPs) that apply under current law if a lending institution has a pattern or practice of committing certain violations. This amendment would allow the supervisor of the institution to take other actions as appropriate on a case-by-case basis that may include CMPs or possibly a less severe action depending on the circumstances of a particular case.

Enhancing Examination Flexibility. The OCC together with the other Federal banking agencies and the industry trade groups support an amendment to section 10(d)(4)(A) of the FDIA (12 U.S.C. § 1820(d)(4)(A)) that would increase the small bank threshold from \$250 million to \$500 million for purposes of the 18-month examination requirement.²⁴ Under current law, a small bank with total assets of less than \$250 million that is well capitalized, well managed, and, if it has assets of over \$100 million (which may be raised to \$250 million by the banking agency), is also rated in an outstanding condition may be examined on an 18-month cycle, rather than an annual cycle. This proposal would raise the small bank threshold to \$500 million but would make **no other changes in the requirements.** To be eligible for the 18-month cycle, the small bank would still need to be well capitalized, well managed, and satisfy the overall condition rating requirement.

Reviewing Call Report Burden. The OCC together with the other Federal banking agencies and the industry trade groups support an amendment to section 7(a) of the FDIA (12 U.S.C. § 1817(a)) requiring the Federal banking agencies to conduct a five-year review of call report information and schedules, with the first such review occurring one-year after enactment. The agencies, in consultation with each other, would be required to reduce or eliminate information or schedules if such information or schedules are not otherwise required by law and are no longer necessary or appropriate.

²⁴ The OCC also supports enhancing examination flexibility under the FDIA by giving the Federal banking agencies the discretion to adjust the examination cycle for an insured depository institution (for a period of time **not to exceed** six months) if necessary for safety and soundness and the effective examination and supervision of insured depository institutions. *See* Appendix #1.