

# **Business Combinations**

## **Comptroller's Licensing Manual**

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# Business Combinations

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## Introduction

This booklet deals with business combinations as defined in the Glossary, which include mergers, consolidations, and certain purchase and assumption transactions. This booklet also covers reorganizations under 12 USC 215a-2 in which a national bank becomes a subsidiary of a bank holding company. A national bank must apply to, and obtain approval from, the Comptroller of the Currency (OCC) before consummating any business combination (combination), in which the resulting entity is a national bank. A combination may occur between a national bank and an affiliated or nonaffiliated bank or depository institution, such as a federal savings association. A combination also may involve a merger between a national bank and one or more of its nonbank subsidiaries or affiliates.

In its decisions on combinations, the OCC strives to preserve the soundness of the national banking system and to promote market structures conducive to competition and responsive to community needs. Normally, the OCC will approve combinations that will not have substantially adverse effects on competition and will be beneficial to the combining institutions and the public.

This booklet provides banks applying for a combination with detailed guidance, instructions, and policies and procedures. It discusses types of combination structures; the statutory factors that the OCC considers in making a decision on a proposed combination; the application process, including the prefiling process, filing the application, and processing time frames; application issues; specific requirements; and the post-approval process.

There also is a step-by-step procedures section for the applicant and the OCC to follow and a glossary of terms at the end of this booklet. Throughout the electronic version of this booklet, there are hyperlinks to forms, such as the Interagency Bank Merger Act Application and the OCC's Streamlined Business Combination Application, and other information that an applicant may use to file a combination application.

This booklet is to be used together with other booklets of the *Comptroller's Licensing Manual*. You should review the "[General Policies and Procedures](#)" booklet prior to completing the application for additional filing instructions.

Applications for a combination must include accurate and fully developed facts, and a determination that the transaction complies with all applicable statutes and regulations. The relevant federal statutes and regulations that govern combinations include 12 USC 24(Seventh), 215, 215a, 215a-1, 215a-2, 215a-3, and 215c; the Bank Merger Act (BMA -12 USC 1828(c)); the Riegle Neal Act (12 USC 1831u), and the OCC's implementing regulation for business combinations (12 CFR 5.33). These statutes and regulations are identified in the reference section of this booklet. The reference section also includes cites to relevant OCC decisions and interpretive letters and other source documents.

## Types of Combinations

A national bank may decide how to structure a combination based on a variety of factors, such as charter type (federal or state; or bank, savings association, or other type of thrift) of the target institution, location of the target institution, branching restrictions in the states in which the target is located, whether the target is Federal Deposit Insurance Corporation (FDIC) insured, whether the target is affiliated with the acquiring bank, and tax considerations. Various types of combination structures are discussed. In some cases, a national bank may elect to use a multi-step process that involves more than one type of combination.

## Same State Combinations with Banks and Thrifts

A national bank may combine with other depository institutions located within the same state. These same state combinations generally involve transactions in which the main offices of both the acquiring national bank and the target are located in the same state. Same state combinations, however, also may include those in which the main office of the target is located in a state in which the acquiring national bank has a branch (or a trust office, in the case of a national bank limited to the activities of a trust company), but not its main office.

As outlined below, the sources of authority for the various types of combination transactions, as well as authority to retain branches, may differ depending on the type of institution being acquired. In addition, these transactions may be subject to other statutory requirements, such as the BMA, which are discussed elsewhere in this booklet. The following lists different ways that a national bank may combine with other depository institutions located in the same state:

- Under 12 USC 215 or 215a, a national bank may acquire another national or a state bank with its main office in the same state as the acquiring bank. For purposes of sections 215 and 215a, “state bank” includes a state commercial bank, state trust company, state stock savings bank, or other state-chartered thrift. Authority to consolidate or merge under sections 215 or 215a does not depend on the insured status of the participating institutions. The resulting bank may retain the branches of the banks involved, including the branches that are not located in the same state as the main offices of the combining banks, if branch retention meets the requirements of the law governing branch retention in section 215 or 215a transactions (12 USC 36(b)(2)).
- In certain circumstances under 12 USC 215 or 215a, a national bank with its main office in one state may acquire another national or state bank, including a state thrift, with its main office in a different state. The most common situation is when the national bank is acquiring another national or state bank in a state in which the acquiring bank already operates a branch, and when the target institution operates branches only in that state or in other states in which the acquiring national bank already operates branches. The resulting national bank may retain the branches

of the banks involved, if permitted under the law governing branch retention in section 215 or 215a transactions (12 USC 36(b)(2)).<sup>1</sup>

- Under 12 USC 215c, a national bank may acquire a federal savings association through merger or consolidation. The resulting bank may retain the branches of the target thrift if the bank could establish branches at the sites of the federal thrift branches under 12 USC 36(c). Generally, this permits the retention of the thrift's branches in states where the national bank already has its main office or branches, or in states where the national bank may, and does, establish a de novo interstate branch, and state intrastate branching law, as applied to national banks by 12 USC 36(c), permits establishment of a branch at a site or sites of the various branches of the acquired federal savings association.
- A national bank may acquire all or part of a depository institution through a purchase and assumption transaction under 12 USC 24 (Seventh). The resulting bank may retain the branches of the target if it could establish branches at the sites of the target's branches under 12 USC 36(c). Generally, the resulting bank may retain the target's branches in states where the national bank already has its main office or branches, or in states where the national bank may, and does, establish a de novo interstate branch, and state intrastate branching law, as applied to national banks by 12 USC 36(c), permits establishment of a branch at a site or sites of the various branches of the target depository institution.

## Interstate Combinations under the Riegle-Neal Act

The Riegle-Neal Act (12 USC 1831u) authorizes interstate combinations between insured banks with different home states.<sup>2</sup> The "home state" of a bank under the Riegle-Neal Act is, for national banks, the state in which the bank's main office is located or, for state banks, the state that chartered the bank. Thus, under the Riegle-Neal Act, an insured national bank may combine with another insured bank with a different home state. As discussed in footnote 2 and the accompanying text under Same State Combinations, some combinations that are within the scope of the Riegle-Neal Act are also within the scope of sections 215 or 215a, and the applicant bank may select which authority to use.

Interstate combinations under the Riegle-Neal Act include mergers, consolidations, and purchase and assumption transactions. The Riegle-Neal Act provides its own branch retention authority (12 USC 36(d), 1831u(d)), and the resulting bank may retain, as branches, the main offices and branches of all

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<sup>1</sup>When these transactions, as described, involve insured banks, but not thrifts, they also may be accomplished under the Riegle-Neal Act, as discussed below in Interstate Combinations under the Riegle-Neal Act. In the circumstances described previously, an applicant may select whether to rely on Riegle-Neal or sections 215 or 215a for authority to undertake the transaction. When the acquiring and target banks have main offices in different states – such as when the target bank operates branches in states where the acquiring bank does not have its main office or any branches – the OCC generally strongly encourages applications under the Riegle-Neal Act.

<sup>2</sup>The Riegle-Neal Act covers only insured banks (as "bank" is defined in the Federal Deposit Insurance Act), and so it does not apply to combinations between national banks and state or federal thrifts or to combinations in which one of the banks is uninsured. As discussed below, a national bank may accomplish a Riegle-Neal combination with a state or federal thrift that has first converted to a national bank under, as applicable, 12 USC 35 and 12 CFR 5.24 or, if eligible, under 12 USC 1464(i)(5)(A), provided that the combination is consistent with other Riegle-Neal requirements. Also, as discussed later under the Interim Bank subheading, a national bank may accomplish a Riegle-Neal combination with an uninsured bank by first combining the uninsured bank into an interim national bank.

banks involved in the combination. The resulting bank may designate its main office from among the main offices and branches of the banks involved in the combination. For purchase and assumption transactions in which a national bank seeks to enter a new state by acquiring an existing branch of an insured bank, but without acquiring the bank, the state in which the target branch is located must permit branch acquisitions by an out-of-state bank.<sup>3</sup>

The Riegle-Neal Act imposes the following additional requirements:

- **Age requirements** — The bank being acquired must have existed for at least the minimum period of time, if any, specified in the host state's statutes (states cannot set a minimum time period in excess of five years). Banks chartered solely to acquire a bank or branch (that is, interim banks) are deemed to have existed for the same period of time as the target bank or branch in the case of the acquisition of a branch without the acquisition of the bank.
- **Filing requirements** — An acquiring bank must comply with the filing requirements of any state that will become a host state as a result of the transaction, if the requirements do not discriminate against out-of-state banks and bank holding companies or their subsidiaries and are similar in effect to those imposed on out-of-state nonbanking corporations (that is, "doing business" filing requirements). An acquiring bank also must submit a copy of its OCC application to the state bank supervisor of each host state. These filing requirements, however, do not mean that the national bank must apply to the state for approval to undertake the transaction.
- **Concentration limits** — The Riegle-Neal Act imposes nationwide and statewide deposit concentration limits on certain interstate merger transactions. Those limits, however, pertain only to interstate merger transactions involving nonaffiliated banks, and the statewide limitations apply only when both institutions, or their affiliates, have branches in the same state.<sup>4</sup> In addition, the acquiring bank in an affiliated combination should assess the applicability of separate state-imposed concentration limits.
- **CRA considerations** — All interstate combinations, including affiliate combinations, are subject to OCC review for compliance with the Community Reinvestment Act (CRA). The Riegle-Neal Act imposes additional CRA-related criteria on all nonaffiliated Riegle-Neal interstate mergers.

To approve a nonaffiliated combination that results in a bank having a branch in a state in which it had neither a branch nor an affiliated bank immediately prior to the transaction, the OCC will consider: compliance with the CRA (as it currently must do for any business combination), the most recent written CRA evaluation of any bank that would become an affiliate of the resulting bank,

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<sup>3</sup>For branch acquisitions under the Riegle-Neal Act, the state in which the target branch is located, rather than the selling bank's main office state or chartering state, is considered to be the home state of the selling bank.

<sup>4</sup>The nationwide limit prohibits the OCC from approving an interstate merger transaction if the resulting national bank and all of its insured affiliated depository institutions would control, upon consummation, more than 10 percent of the total amount of deposits of insured depository institutions in the United States. The statewide limitation prohibits the OCC from approving an interstate merger transaction if the resulting bank (and all of its insured depository institution affiliates) would control 30 percent or more of the total deposits of insured depository institutions in any state involved in the transaction. This 30 percent limit may be increased by state statute, regulation, or order or, by approval of the state bank supervisor if the standard of approval does not discriminate against out-of-state banks or holding companies or their subsidiaries.

and compliance by applicants with applicable state community reinvestment laws.

- **Adequate capital and management** — Each bank involved in the combination must be adequately capitalized as of the date the application is filed. In addition, the resulting bank must continue to be adequately capitalized and managed upon consummation of the combination.

## Interstate Combinations Between National Banks and Insured State and Federal Thrifts

The Riegle-Neal Act does not apply to interstate combinations between national banks and federal and state thrifts. However, an insured national bank may combine with an insured federal or state thrift that itself first converts to a national bank. A federal thrift that converts under 12 USC 1464(i)(5) and 12 CFR 5.24 may retain branches following the conversion if the standards set forth in 12 USC 1464(i)(5) are satisfied. These standards apply to federal thrifts that were in existence before November 12, 1999, and when, following the conversion, the thrift will meet all financial, management, and capital requirements applicable to the resulting national bank. Branches that are not eligible for retention under this provision could be retained if they could be established as new branches of the converted bank under 12 USC 36(c). A state thrift that converts under 12 USC 35 and 12 CFR 5.24 may retain branches following conversion if the standards set forth in 12 USC 36(b)(1) are satisfied.

The national bank resulting from the conversion then engages in a Riegle-Neal transaction with the acquiring national bank, provided the Riegle-Neal requirements set forth above are satisfied. Generally, the age of the newly converted bank prior to its conversion may be taken into account in determining compliance with Riegle-Neal age requirements. As with branch retention following Riegle-Neal combinations between insured banks, the resulting bank in the Riegle-Neal combination may retain the branches of all participating institutions.

## Transactions Involving Bank Holding Companies

Many combinations involve bank holding companies. Generally, shareholders controlling at least two-thirds of the common stock of a national bank can restructure their ownership so that the bank becomes a subsidiary of a new or nonaffiliated bank holding company. Shareholders also may choose to use a bank holding company in a combination transaction for tax purposes.

### **Reorganizations to Become a Holding Company Subsidiary**

National bank shareholders seeking to reorganize to form a holding company or be acquired by a nonaffiliated holding company typically used an interim national bank merger. Now 12 USC 215a-2 provides shareholders with a simplified alternative for effecting such reorganizations (see 12 CFR 5.32).

When reorganizing a national bank to become a subsidiary of a holding company under 215a-2, the national bank must file an application including certain certifications, documentation, and information including a statement of



publication. (Refer to Public Notice and Comment Period section for specific details.) For purposes of section 215a-2, a holding company is any company that controls a national bank or will control a national bank as a result of the reorganization. A company that is or will become a BHC under the BHCA also must file any application required under the BHCA with the appropriate Federal Reserve Bank.

When evaluating applications under section 215a-2, the OCC will consider the impact of the proposed affiliation on the financial and managerial resources and future prospects of the national bank. As in other applications, the OCC also will consider whether a significant deviation condition requiring OCC's prior written approval before making changes is appropriate. The OCC has limited opportunity to control changes in a national bank's business plan that may result under a BHC structure. The condition should be imposed in any 215a-2 decision where the OCC considers that the supervisory risk warrants such a condition. Examples where the condition may be appropriate include a relatively new national bank that is experiencing growth that significantly exceeds that which was projected or a bank that is considering new services, products, or business lines.

### **Reverse Triangular Mergers**

Generally, most business combinations are "forward" combinations in which the target institution is merged into the acquiring bank, which becomes the resulting institution. Applicants may seek to effect a combination using a reverse triangular merger, which often confers tax benefits. Under a reverse triangular merger, the "acquiring bank" is merged into the "target bank," which typically becomes a subsidiary of the acquiring bank's holding company.

With certain exceptions, the OCC will not approve a reverse triangular merger under 12 USC 215a because the "target bank's" shareholders are not granted dissenters' rights under that statute. Based on Internal Revenue Service interpretations, often the combining institutions can achieve the same tax benefits offered by a reverse triangular merger if the applicant structures the transaction as a consolidation under 12 USC 215, which provides dissenters' rights to shareholders of all parties to the combination. The OCC has made exceptions to allow reverse triangular mergers using 12 USC 215a if the transaction cannot be accommodated through a forward merger or a consolidation, if the "target bank" is wholly owned by a BHC, if the "target bank's" shareholders have unanimously approved the combination, or if the "target bank" is a state bank and state law protects the dissenting shareholders.

## **Acquiring a Bank Subsidiary of a Bank Holding Company**

A national bank may, through a multi-step process, use an operating subsidiary to facilitate a combination with a bank that is a wholly owned subsidiary of an unaffiliated BHC. In the first step, the operating subsidiary of the national bank acquires all of the shares of the target bank's holding company. The target bank's holding company is then liquidated or combined with its subsidiary bank. Finally, the national bank merges or consolidates with the target bank. Alternatively, in the first step, the target holding company is merged with the target bank, and then the national bank merges or consolidates with the target bank.

This structure is permissible provided that the acquiring bank obtains confirmation that the Federal Reserve System (Fed) will not consider the acquiring national bank to be a BHC. Also, the BHC generally must make a representation when filing that it has no outstanding liabilities, including present and contingent liabilities. The BHC must assume the merger cost prior to its dissolution, including all necessary payments to dissenting shareholders. In the application, the acquiring bank must identify any nonconforming assets or activities, including nonconforming subsidiaries, of the BHC and target bank involved in the combination that will not be disposed of or discontinued prior to consummation of the transaction, and set out its plans for such nonconforming assets or activities. (See Nonconforming Assets and Activities section for additional discussion.) In addition, the acquisition of the target bank's holding company stock and the subsequent merger or liquidation of the target bank must occur over a short time period, no longer than a few hours, in sequential steps, within a single transaction.

While a combination of the two banks would be subject to section 23A of the Federal Reserve Act and Regulation W because the banks would be affiliates at that stage, it likely would qualify for the BMA exemption (See Affiliate Transaction Restrictions). If the BMA exemption is not available, certain other exemptions may be available.

## **Interim Bank Combinations**

A national bank, BHC, or a group of individuals may charter and organize an interim national bank with OCC approval to facilitate a combination. An interim national bank does not operate independently, but exists, usually for a short time period, solely as a vehicle to effect a combination, such as acquiring a nonaffiliated bank, cashing out minority shareholders, or forming a BHC. Using an interim national bank to effect a merger may raise issues regarding dissenters' rights unless the interim bank is the acquiring bank, and the existing bank is the target bank. National banks and BHCs should contact the Fed to confirm whether they would be considered a BHC and, if so, file any applications required or request waiver of applications under the BHCA and its implementing regulation.

### **Common Uses**

*Acquiring a nonaffiliated bank* – An interim national bank may be used as a means of acquiring a nonaffiliated bank. The acquirer is assured of 100 percent ownership of the resulting bank, since all shareholders of the target bank must

surrender their shares in exchange for consideration in the merger or consolidation between the interim bank and the target bank.

*Eliminating minority shareholders* – A shareholder or shareholders who control a majority of the voting shares of a national bank, including a BHC, may use an interim national bank to eliminate or “freeze out” minority shareholders of the national bank. The majority shareholders form an interim national bank that acquires the existing national bank through a merger or consolidation.<sup>5</sup> Minority shareholders of the existing bank normally receive either cash or shares of the BHC in exchange for their shares of the existing bank.

*Forming a BHC* – Shareholders may use an interim national bank to form a BHC to own a national bank. Directors of the existing bank form a new company that applies to the Fed to become a BHC under the BHCA. The new company organizes the interim bank, which combines with the existing bank. Shareholders of the existing bank normally receive shares of the new BHC in exchange for their shares.

As previously stated, section 215a-2 provides a simplified process for reorganizing under a BHC. Unlike applications for interim bank mergers to form a BHC, applications filed with the OCC under section 215a-2 are not subject to the BMA factors or requirements, including public notice newspaper publication, or the CRA.

## **Chartering and Organization Requirements**

Applicants for interim bank combinations must apply for and receive approval to organize an interim national bank. The OCC has developed streamlined organization documents to establish the interim charter. [The interim bank charter](#) and the combination applications are processed simultaneously. Although an interim bank does not operate as a bank, it must comply with various chartering and organizational requirements.

## **Capitalization and Directors**

The OCC has broad discretion to set capital requirements for interim banks, including the ability to set capital requirements on a case-by-case basis. An interim bank generally will meet its capital requirements by having at least the amount of capital raised by the sale of directors’ qualifying shares. Interim bank directors’ residency, citizenship, and stock ownership requirements are the same as those for operating banks under 12 USC 72. (See [“Director Waivers”](#) booklet.)

The OCC grants preliminary approval to form an interim bank when it acknowledges receipt of the application to engage in a combination that involves the creation of the interim bank. The interim bank becomes a legal entity at that time and may enter into legally valid agreements or contracts after it files, and the OCC accepts, its executed Articles of Association, Organization Certificate, and

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<sup>5</sup>Interim bank transactions are eligible for expedited review only in a corporate reorganization resulting in the formation of a new BHC (see 12 CFR 5.33(d)(2)(ii)). A statutory merger involving an interim bank to eliminate minority shareholders (“freeze out” transaction) does not qualify for expedited review. However, if the transaction is structured as a consolidation and the resulting national bank’s charter number is that of the existing bank, the transaction can qualify for expedited review if it satisfies the streamlined application criteria under 12 CFR 5.33(j)(1).

Oaths of Directors. Before consummating the combination, the interim bank must complete the organization process by completing the [Stock Payment Certificate and Oaths of Directors and Officers](#).

### **Structure Issues**

For an interim bank combination structured as a merger under 12 USC 215a, the acquiring bank must be the interim bank and the target must be the existing bank to preserve dissenters' rights for the shareholders of the existing bank, unless the shareholders of the existing bank unanimously approve the transaction. The OCC generally will not approve purchase and assumption transactions that transfer all, or substantially all, of a target's assets and liabilities to an interim bank because the purchase and assumption structure does not provide dissenters' rights for the target's shareholders.

### **Timing Issues**

Although an interim national bank must be party to the combination agreement, it does not have to be organized at the time the primary parties execute the initial agreement. The interim bank may become a party to the transaction through an addendum provided in the initial agreement. (See "Agreements and Board of Directors' Approval" under the "Specific Requirements" heading of this booklet.)

## **Purchase and Assumption Transactions**

A bank may effect a business combination through a purchase and assumption transaction, as well as a merger or consolidation. With OCC approval under the BMA, an insured national bank may acquire the assets of another insured depository institution or assume any deposit liabilities of another insured depository institution. With FDIC approval under the BMA, a bank may assume deposits or similar liabilities from, or transfer deposits to, an uninsured bank or institution. The OCC interprets "acquire the assets" for BMA filing purposes to include the acquisition of assets such that the target is no longer a viable competitor, regardless of whether the target plans to liquidate immediately after consummation of the transaction.

If, after a purchase and assumption transaction, the target institution plans to liquidate or otherwise will no longer be a viable business, the OCC's policy requires that the application include information showing that possible creditors of the target institution, including potential contingent liability claimants, will be protected. This information is required regardless of the charter of the target institution. This information is not required if the acquiring national bank will assume all liabilities of the target institution, including contingent liabilities.

In addition, if the target institution is a national bank and plans to liquidate after the purchase and assumption transaction, the target bank must demonstrate that it will be able to liquidate in an orderly manner under 12 USC 181, unless the acquiring bank has assumed all liabilities and obligations, including contingent liabilities. If the target national bank plans to liquidate or otherwise will no longer be a viable business after the purchase and assumption transaction, the OCC expects the owners to begin the process of liquidating the bank under 12 USC 181 promptly after consummating the transaction and to return the bank's charter to the OCC, unless the bank and the OCC have agreed to other arrangements.

If the target is a national bank that plans to liquidate, the target bank's shareholders must approve the liquidation and the purchase and assumption transaction under 12 USC 181.

## Expansion and Contraction of Assets or Activities

The OCC has a long-standing practice of discouraging a national bank from removing substantially all of the assets and liabilities of the bank, creating a dormant bank or shell operation (see [Glossary](#)). The OCC has serious supervisory concerns including how the management or the board may use such a dormant charter; the nature of the services and products that might later be initiated; and increased operations and concentration risk. The OCC will consider the appropriateness of permitting a substantive sale that creates a dormant bank and the plan for final disposition and winding up of the bank's existence. For a detailed discussion, refer to the [General Policies and Procedures](#) booklet.

The OCC may permit, on a case-by-case basis, a dormant bank that will be in existence for a short-time period as part of a related group of transactions that includes a transaction to eliminate the national charter. An application may receive favorable consideration if it outlines the transaction from beginning to end. Examples include a proposal to sell assets to another institution followed by the merger of the dormant bank into another bank or a nonbank affiliate or the liquidation of the dormant bank--with all steps in the transaction occurring within a short time frame. The OCC may also allow the sale of assets in other contexts where the eventual use of the charter is identified.

## Combinations Involving Uninsured Entities

There are three categories of combinations involving uninsured entities: those that involve FDIC-insured banks acquiring uninsured depository institutions; those that involve uninsured national banks acquiring uninsured depository institutions; and national banks merging with one or more of their nonbank subsidiaries or affiliates.

National banks seeking to acquire an uninsured entity must file an application and obtain OCC approval under the OCC's combination regulation (12 CFR 5.33) and, if applicable, under national banking laws for consolidations or mergers, before consummating the combination. Applicants also must provide the OCC with assurances that the combination complies with legal requirements covering the proxy or information statement, and shareholders' approval of the proposed combination. (Refer to "Shareholder Considerations" under the "Application Process" heading for additional discussion.)

### **Insured National Bank Combining with an Uninsured Depository Institution**

In addition to filing an application with the OCC under relevant laws and regulations, an insured bank seeking to combine with an uninsured depository institution must apply to and receive prior approval from the FDIC under the BMA. Applications filed with the OCC should include a letter and a copy of the application filed with the FDIC.

## **Uninsured National Bank Combining with an Uninsured Depository Institution**

As noted previously, uninsured national banks may combine with other uninsured depository institutions, such as national trust banks or state trust companies, under the OCC's combination regulation. Applications to effect mergers and consolidations between uninsured depository institutions also must comply with relevant national banking laws. For purposes of those statutes, uninsured national trust banks seeking to combine with other uninsured depository institutions whose business is limited to providing trust services are considered to be located in states in which they have a trust office as defined in 12 CFR 9.2(j).

Combinations that only involve uninsured depository institutions are not subject to the BMA or the CRA. Accordingly, applicants for these transactions should complete and submit an [Interagency Bank Merger Application](#), but may omit questions relating to competition and CRA. Applicants should consult with the Department of Justice (DOJ), because these transactions are subject to federal antitrust statutes and may require filing under the Hart-Scott-Rodino Act.

## **National Banks Merging with Nonbank Subsidiary or Affiliate**

National banks may merge with one or more of their nonbank subsidiaries or affiliates with OCC approval (12 USC 215a-3). For purposes of this authority, a nonbank affiliate is any company, other than a bank or federal savings association that controls, is controlled by, or is under common control with the national bank. Control generally means having the ability to vote 25 percent or more of any class of voting securities. (Refer to the [Glossary](#) for definitions of "company," "nonbank affiliate," and "control.")

Both insured and uninsured national banks may participate in mergers under 12 USC 215a-3 when the resulting entity will be the national bank. However, the OCC permits only uninsured national banks to merge with a nonbank affiliate when the nonbank subsidiary or affiliate will be the resulting entity. An insured bank planning to merge into a nonbank subsidiary or affiliate first must repay its deposits or transfer them to another insured institution and become uninsured. In either case, the nonbank subsidiary or affiliate does not have to be located in the same state as the bank.

*Applications Involved* -- Both insured and uninsured national banks proposing to merge with a nonbank subsidiary or affiliate must seek approval from the OCC under section 215a-3. Insured banks also must seek approval from the FDIC under the BMA.

Applications to the OCC from both insured and uninsured banks for approval under section 215a-3 to merge a nonbank subsidiary or affiliate into the bank should contain information requested in the [Interagency Bank Merger Act Application](#). When an insured bank is also applying to the FDIC for approval under the BMA, the bank may submit a copy of its Interagency BMA application and request OCC approval under section 215a-3. The letter also should address compliance with other requirements, such as those below, not covered in the Interagency Bank Merger Act Application (see [sample letter](#)).

An uninsured bank seeking to merge into a nonbank subsidiary or affiliate should submit a letter addressing compliance with the following requirements, as well as other matters the OCC requests. Uninsured banks seeking to use this structure should contact the OCC before filing an application.

*Procedures and Requirements* -- The regulation that implements section 215a-3 (12 CFR 5.33) sets out requirements and procedures for these mergers. The nonbank subsidiary or affiliate must have the authority to enter the merger under the law of the state or other jurisdiction under which the nonbank subsidiary or affiliate is organized. The law need not specifically address national banks. This requirement typically is met when a state's law permits its domestic corporations to merge with entities organized under the law of another jurisdiction.

When the national bank will be the resulting entity, then the national bank must follow the procedures and requirements for matters such as notice of shareholder meeting, shareholder and director approval, and content of the merger agreement contained in 12 USC 215a (which addresses the merger of state banks into national banks). When the nonbank subsidiary or affiliate will be the resulting entity, then the national bank must follow the procedures and requirements for matters, such as notice of shareholder meeting, shareholder and director approval, the rights of dissenting shareholders, and appraisal of dissenters' shares contained in 12 USC 214a (which addresses the merger of national banks into state banks).

In both types of transactions, the nonbank subsidiary or affiliate follows the procedures and requirements set out in the law of the state or other jurisdiction under which the nonbank affiliate is organized. The rights of dissenting shareholders and the appraisal of dissenters' shares also are determined in the manner prescribed by the law of the state or other jurisdiction under which the nonbank subsidiary or affiliate is organized. (See "Definitions," 12 USC 214(a), for additional information on the term "state bank.")

While mergers under section 215a-3 are not eligible for the BMA exemption to sections 23A and 23B of the Federal Reserve Act, a merger between a bank and its operating subsidiary generally is exempt from sections 23A and 23B as implemented by Regulation W. Also, under certain circumstances Regulation W may provide section 215a-3 mergers with an exemption from the collateral requirements and quantitative limits of section 23A. (See discussion of Sections 23A and 23 B – Exemptions in the Affiliated Transaction Restrictions section of the booklet.)

*Decision Criteria* -- When evaluating applications under section 215a-3, the OCC will consider the purpose of the transaction, the impact on safety and soundness of the national bank, and any effect on the bank's customers. The OCC may deny the merger if it would have a negative effect on any of these factors.



## Decision Criteria

The OCC decides combination applications in which the resulting bank will be a national bank based on requirements under relevant laws and regulations. In its decision on combination applications, the OCC considers relevant statutory factors: competition, financial and managerial resources, convenience and needs and the CRA, and anti-money laundering efforts.

## Competition

Under the BMA, the OCC will not approve a combination that would result in substantially adverse competitive effects, unless these effects are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The DOJ and the responsible federal banking agency review the competitive effect of all BMA applications under federal banking and antitrust laws. Combinations solely involving uninsured depository institutions are not subject to the BMA, but are subject to general federal antitrust statutes such as the prohibitions against monopoly and substantial lessening of competition under the Sherman and Clayton Acts and notification under the Hart-Scott-Rodino Act as administered by the DOJ and Federal Trade Commission.

### Affiliated and Nonaffiliated Combinations

Combinations between national banks and their affiliates are considered competitively neutral, and, therefore, will not result in adverse competitive effects. The OCC generally deems a bank to be affiliated with another depository institution if one or more common individuals or companies control each depository institution. (Refer to the [Glossary](#) for a complete definition of “control.”) The OCC deems a bank and another depository institution involved in a combination to be under common control when a BHC has filed a related application with the Fed under the BHCA and the BHC acquisition consummates before the bank combination. The OCC deems a combination between a bank and another depository institution in which a BHC has requested that the Fed not require a related application under the BHCA as a nonaffiliated combination.

### Merger Screens

To speed the competitive review process and reduce regulatory burden on the banking industry, federal banking agencies and the DOJ have developed [Merger Screens](#) to identify proposed nonaffiliated combinations that clearly do not have significant adverse effects on competition. The OCC primarily relies on “Merger Screen A” for measuring competitive effects of a combination.<sup>6</sup> A proposed combination exceeds the threshold of Merger Screen A when it would cause the Herfindahl-Hirschman Index (HHI), a statistical measure of market concentration (see Glossary), to increase by more than 200 points to a level above 1800 based on increased concentration levels of deposits in any geographic banking market.

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<sup>6</sup> In addition, the OCC has concluded that geographic markets with populations of less than 10,000 are not economically significant for the purpose of this analysis, and therefore any anticompetitive effects in these markets are considered negligible. Generally, the OCC will not object to a proposed combination in such a market on anti-competitive grounds.



Applicants may elect to submit an independent competitive analysis for combinations that do not pass Merger Screen A.

Banks planning a combination that may raise a significant anticompetitive issue may consult with the OCC or the DOJ before submitting an application. Banks may wish to resolve anticompetitive issues by agreeing to make an appropriate divestiture.

### **Review Process**

In some instances, the DOJ may further review transactions that do not exceed the thresholds in Merger Screen A. If the OCC determines that no competitive concerns exist and the application satisfies the other evaluative factors for combinations, the OCC may approve the transaction, even if the DOJ has concerns over possible anticompetitive effects of the combination. In these cases, the OCC approval may include a condition that the applicant will comply with any agreement reached with the DOJ (for example, regarding divestitures). For a detailed discussion of the competitive review screening process and the DOJ process, refer to the Bank Merger Competitive Review in Appendix B of this booklet.

### **Combinations Involving Uninsured Depository Institutions**

Under the BMA, the FDIC and DOJ evaluate competitive effects of combinations that involve an insured national bank combining with an uninsured depository institution. Combinations in which each depository institution involved is uninsured are not subject to the BMA, but are subject to federal antitrust statutes and may require filing with the DOJ and Federal Trade Commission under the Hart-Scott-Rodino Act.

## **Financial and Managerial Resources**

The OCC considers the financial and managerial resources and future prospects of the combining and resulting institutions. The OCC weighs safety and soundness factors and normally will not approve a combination that will result in a bank with inadequate capital, unsatisfactory management, or poor earnings prospects.

In evaluating financial and managerial resources, the OCC relies upon the views of the supervisory office, and information from a variety of sources, such as reports of examination of the depository institutions involved in the combination and the applicant's plans to operate the resulting bank. The OCC will closely scrutinize substantive combinations that raise issues about management's ability to address increased risk to bank earnings and capital that can arise from any of the nine categories of risk that the OCC has defined for supervision purposes: credit, interest rate, liquidity, price, foreign exchange, transaction, compliance, strategic, and reputation. Generally, substantive combinations do not include corporate reorganizations solely to effect a structural change in a banking organization that is in satisfactory financial condition or combinations involving noncomplex target institutions that are small relative to the size of the acquirer.

The OCC also considers the applicant's plans to identify and manage systems integration issues, such as software compatibility, hardware requirements, and

network integration problems. The OCC's assessment and degree of scrutiny will consider the applicant's track record of integrating acquisitions. Any combination in which systems integration concerns are identified will be subject to additional review, which could warrant removal from expedited processing status, if otherwise eligible. If, after careful evaluation, the OCC determines that systems integration problems represent a significant concern, the OCC may impose conditions, enforceable pursuant to 12 USC 1818, to address the concern. These could include requirements and time frames for specific remedial actions and specific measures for assessing and evaluating the bank's systems integration progress.

If the problem cannot be resolved through conditions, or otherwise, the OCC may deny the application.

## Convenience and Needs and Community Reinvestment Act (CRA)

The OCC considers the likely impact of the applicant's plans on the community to be served in connection with a combination application under the BMA. The OCC will review significant anticipated changes in services or products and fees that will result from consummation of the transaction.

The OCC also considers the CRA records of performance for all participating insured depository institutions when rendering a decision on combination applications. In assessing the CRA records, the OCC considers the most recent Public Evaluations for each of the participating institutions and any comments received during the public comment period. The OCC also will consider comments received after the close of the comment period, provided that doing so would not inappropriately delay action on that filing. In addition, the OCC will consider comment letters relating to the participating institutions' CRA performance that were received from the public prior to the filing of an application. The OCC also will consider the applicant's responses to any comment letters. If the OCC determines that the CRA record of performance of any of the participating institutions is less than satisfactory, the OCC may deny or conditionally approve a business combination application.

See the "[Public Notice and Comments](#)" booklet for a detailed discussion of how convenience and needs and CRA factors affect the application process, including an application's removal from the expedited review process because of significant CRA issues.

## Anti-Money Laundering Efforts

When transactions are subject to the BMA, the OCC considers the anti-money laundering efforts of each insured depository institution involved, as required by the USA PATRIOT Act. The OCC reviews existing supervisory records, comments, if any, received during the public notice period, and comments from other regulators and public officials (refer to the sample document, [Anti-money Laundering Efforts Request](#)). The OCC anticipates that, in most cases, required information will be available from the supervisory record.

Refer to the *FFIEC [BSA/AML Examination Manual](#)* for an expanded discussion on the supervisory expectations.

## Application Process

A bank seeking to effect a combination that will result in a national bank must apply to the OCC and receive approval before consummating the transaction. The OCC encourages applicants to discuss possible significant policy, compliance, legal, or supervisory issues before submitting a filing. The OCC begins its review by determining whether the application is accurate and complete. During the review process, the OCC may ask the applicant to provide additional detailed information about any aspect of the proposal to reach an informed decision.

A number of factors will affect the processing time frame for a combination application. These factors include whether the filing is complete and qualifies for expedited review, or whether there are any reasons for removing the filing from expedited review. Other factors that may affect time frames include the public notice and comment period, the DOJ competitive factor review period, shareholder notice, timing of state law changes, and, if the OCC deems necessary, meetings or hearings. Combinations that involve the acquisition of an insured depository institution that is in imminent or immediate danger of failing may be subject to significantly shorter processing time frames.

## Prefiling Discussions

The OCC strongly encourages banks to contact the district Licensing staff before filing a combination application. Such contact enables the filer and the OCC to prepare effectively and process the filing efficiently. Applicants who are new to the application process or who have questions about the process are encouraged to request a prefiling conference or meeting to discuss the proposed transaction and processing steps applicable to the proposal. Applicants requesting OCC approval of an activity or transaction that involves novel, precedential, or highly complex or sensitive issues also should contact the appropriate district office before actually submitting the application, to discuss the issues raised. Such applications are expected to contain supporting written analysis, including a legal opinion that the proposal is not in contravention of the law. In addition, a prospective applicant should contact the OCC before filing a combination application to acquire an insured depository institution that the applicant believes is in imminent or immediate danger of failing. Parties also should consult with the OCC and DOJ before filing applications for combinations that raise anticompetitive concerns.

To request a prefiling conference or meeting, the bank's representative or contact person should contact the Licensing staff in the appropriate district office, which will coordinate participation by other OCC staff, as necessary.

## Filing the Application

An application that qualifies as a “business reorganization,” and any application involving a “qualifying business combination,” as those terms are defined in the [Glossary](#), will be granted expedited review. The OCC and the other banking agencies have adopted an [Interagency Bank Merger Act Application](#) that a national bank applicant should use to apply to the OCC for any combination that does not qualify for expedited review. An applicant involved in a transaction that qualifies for expedited review may file a [Streamlined Business Combination Application](#). (See Expedited Review discussion under the Time Frames heading.) Applicants should attach the appropriate [checklist](#) when using the interagency or streamlined forms. Applicants also should refer to the “[General Policies and Procedures](#)” ([GPP](#)) booklet of the Comptroller’s Licensing Manual (Manual) for guidance on how to file the application.

When acknowledging receipt of an application, the Licensing staff will indicate whether or not it qualifies for expedited review and will provide a target time frame for processing the filing. OCC staff will notify the applicant promptly if the situation changes (for example, the OCC removes the application from expedited review), or if the OCC needs additional information to complete its review of the application. Although the OCC will strive to request additional information at the earliest possible date, it may request information or opinions from an applicant at any time during the processing of a corporate filing.

## Expedited Review

Applications processed under expedited review are deemed approved as of the 45th day after receipt by the OCC, or the 15th day after the close of the public comment period (refer to the following discussion), whichever is later. Exceptions to the automatic approval process occur when the OCC acts on the application before the end of the expedited review period (but in no event prior to the conclusion of the public comment period) or the OCC removes the application from expedited review.

Under 12 CFR 5.13(a)(2), the OCC will remove a business combination from expedited review if the OCC concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA, or compliance concern, or raises a significant legal or policy issue. The OCC will notify applicants promptly if policy issues cause the OCC to remove an application from expedited review. (See the “[Public Notice and Comments](#)” and “[GPP](#)” booklets for additional discussion.)

### **Competitive Issues**

A combination between nonaffiliated institutions will be removed from expedited review for additional competitive analysis if it would increase the HHI, a statistical measure of market concentration (see [Glossary](#)), by more than 200 points in any relevant banking market that has a post-acquisition HHI of at least 1800. (Refer to Competition under the Decision Criteria heading for additional discussion.)

## **Rapid Growth**

Combination applications involving nonaffiliated depository institutions in which one of the institutions has experienced rapid asset growth, may be removed from expedited review to ensure adequate time for supervisory review.

## **Examinations and Investigations**

The OCC will remove a combination from expedited processing if it determines that, prior to reaching a decision, it must conduct an examination or field investigation to address or evaluate the supervisory implications of the proposal. The OCC will notify applicants whether it will charge for the examination or investigation (see sample [notice](#)).

## **Streamlined Application**

Under 12 CFR 5.33(j), any transaction that qualifies for expedited review also is eligible to use the [Streamlined Business Combination Application](#). Therefore, if the proposed business combination meets the definition of either a business reorganization or a qualifying business combination, it will qualify for expedited review and use of a streamlined application. Information requirements are not reduced for CRA performance, branch closings, convenience and needs, and related matters.

Appendix A to this booklet contains a diagram to assist the applicant in determining whether the proposed combination meets the criteria for expedited review and use of a streamlined application.

## **Standard Processing**

For applications that do not qualify for, or are removed from, expedited review, the OCC will set a target decision date on a case-by-case basis. The OCC expects that most applications that do not qualify for expedited review will be decided within 60 calendar days from their receipt or publication of public notice, whichever is later. However, an activity or transaction involving novel, precedent setting, or highly complex or sensitive issues could take longer to decide.

## **DOJ's Competitive Review Process**

The BMA requires that the OCC send a copy of the application to the DOJ for its view of the competitive effects of the combination. By statute, the DOJ has 30 calendar days to review and comment on the competitive aspects of the transaction. Also refer to the Competition section and Appendix B: Bank Merger Competitive Review of this booklet for additional details on the competitive review process.

## **DOJ Post-Approval Waiting Period**

National banks applying under the BMA generally must wait 30 days following receipt of OCC approval to consummate combinations involving the acquisition of a nonaffiliated depository institution. During this 30-day time period, which the OCC may shorten to 15-calendar days with DOJ's concurrence, the DOJ may initiate legal action to prevent consummation of a combination that it determines may have a significantly adverse effect on competition. Combinations not subject to the BMA may consummate immediately upon the OCC granting approval, subject to the bank satisfying all requirements the OCC imposed.

## **Prospective Competitive Factors Report**

Through an agreement with the DOJ, known as the Prospective Competitive Factors Report (PCFR), a national bank may consummate an affiliated combination immediately after the OCC grants approval and the applicant satisfies any requirements contained in the approval.<sup>7</sup>

The PCFR process eliminates the post-decision waiting period applicable to nonaffiliated combinations. The PCFR process is not available, however, for a transaction in which a merger application of two bank holding companies is pending decision at the Fed when their subsidiary banks file a combination application with the OCC. In these circumstances, once the Fed decides the BHC application, the applicant may request that the OCC consider the bank combination under the PCFR process, but the OCC must obtain DOJ's concurrence.

## **Public Notice and Comment Period**

Notice of a combination application subject to the BMA generally must be published three times in a newspaper of general circulation in the community in which the main office of each depository institution involved in the transaction is located. The notice described in this section is separate from the notice that must be published for the conduct of any shareholder meeting that is discussed under the "Shareholder Considerations" heading.

The public comment period for a combination is generally 30 days, commencing on the date of first publication. The first notice should be published on or about the date the application is filed with the OCC, but in no event more than three days before or after the date the application is filed. The second notice should be published one week after the first publication or, if the newspaper does not publish on that day, on the newspaper's publication date that is closest to that day. The last notice should be published on the 25<sup>th</sup> day after the first publication or, if the newspaper does not publish on the 25<sup>th</sup> day, on the newspaper's publication date that most closely precedes the 25<sup>th</sup> day.

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<sup>7</sup> The following affiliated transactions are covered under the PCFR: (1) combinations between two or more banks under common control; (2) combinations between an interim bank and an existing bank to facilitate the creation of a one-bank holding company; (3) combinations involving an interim bank established by an existing bank holding company to facilitate the acquisition of a nonaffiliated depository institution by the holding company, provided that an application has been filed with the Fed for approval of the holding company acquisition and the merger is to be consummated only in conjunction with the acquisition; and (4) a purchase and assumption of branch offices, if a single bank holding company owns or controls the outstanding voting stock of each of the depository institutions involved in the transaction.

The applicant should submit to the OCC confirmation of the public notice as part of the combination application. This confirmation should include a statement containing the name and address of the newspaper in which the notice was or will be published, and dates of publication. Refer to [Instructions and Sample Public Notice](#).

Prior to filing, applicants with operations in more than one state or in more than one major metropolitan market should consider publishing, at the same time, additional notices in major markets in which they operate to ensure adequate public awareness. In addition, the OCC may require additional public notice or may provide public notice itself if it believes it necessary to ensure adequate notice and opportunity to comment. Material differences between initial and subsequent notices may result in extended comment periods and delays in processing applications.

All notices should be published in the joint names of all depository institutions involved in the transaction. If a bank operates under more than one name or under a name not substantially similar to its legal name, the public notices should contain both the legal name of the bank and the name(s) the bank uses in the community in which the publication circulates.

The notice must state whether the application involves an interim bank charter application and whether the application is a merger, consolidation, or purchase and assumption. It also must state whether any branches of the combining institutions will cease to operate as a result of the transaction. The bank still must follow the procedures found in the [“Branch Closings”](#) booklet. If the applicant knows that branches will close or consolidate because of the combination, but the identity and number of branches to be closed have not yet been finalized when the application is filed with the OCC, the notice should disclose that an as-yet-undetermined number of offices would cease to operate. Finally, if during the comment period an applicant identifies branches that it plans to close, it should amend subsequent publications to disclose this new information.

## Meetings and Hearings

In general, the OCC relies on written information submitted during the comment period to reach a decision on an application. However, the OCC will consider obtaining information through other means if useful in reaching a decision. (Refer to [“Public Notice and Comments”](#) booklet for additional discussion about OCC policies and procedures concerning meetings and public hearings.)

## Emergency Combinations

The OCC may shorten or eliminate the notice and comment periods, and post-approval waiting period under the BMA, if certain conditions are met. The OCC also may weigh the convenience and needs of the communities served by troubled institutions against possible anticompetitive effects of an emergency combination under the BMA.

In addition, when an interstate combination is filed under the Riegle-Neal Act, the filing is exempt from many of the requirements of the Riegle-Neal Act, if the



combination involves an insured bank in default or in danger of default, or with respect to which the FDIC provides assistance. These requirements include the age limits, branch acquisition limits, filing, concentration limits, CRA, and adequacy of capital and management requirements of the Riegle-Neal Act.

### **Expeditious (10-day, 5-day) Combinations**

The BMA allows the OCC to shorten the public, DOJ, and bank regulatory notice and comment periods before approval of a combination to 10 days and shorten the post-decision DOJ waiting period to five days when the OCC determines that an emergency exists requiring expeditious action. These transactions are commonly referred to as 10-day, 5-day emergency combinations.

- *Filing a 10-day, 5-day Combination Application.* A national bank interested in acquiring a target institution under 10-day, 5-day processing must submit a written request to the OCC (see [10-day, 5-day Processing Request](#)). The request should contain information to assist the OCC in determining that the target is affected by a combination of circumstances sufficiently serious to require swift action and shorten the public, DOJ, and bank regulatory notice and comment periods. The OCC will solicit written comments from the target institution's primary supervisory agency to attest to its condition. The OCC subsequently will review and evaluate this information and decide whether to approve or deny the acquiring bank's request for 10-day, 5-day processing. If the OCC disapproves the request for 10-day, 5-day processing, the combination is handled according to normal licensing procedures.

The applicant generally submits the Streamlined Bank Merger Application with the request for 10-day, 5-day processing. The OCC will review the application for accuracy and completeness while it considers the request for 10-day, 5-day processing. The OCC will provide copies of the combination application for 10-day, 5-day processing to the DOJ, for its views on the competitive effects of the proposal. By statute, those agencies have 10 days to review and comment on the application.

- *Processing Time Frames for 10-day, 5-day.* An institution that is party to a combination under 10-day, 5-day processing must publish notice to the public of its intention to combine twice during a 10-day period. Applicants should not publish notice of application under 10-day, 5-day processing until the OCC approves the applicant's request to process the application under emergency procedures. The first publication using 10-day, 5-day processing should appear on the day after the OCC approves the request, or as soon as possible thereafter. The second and final publication should occur approximately one week after the date of the first publication.

If the OCC approves a combination under 10-day, 5-day processing, the acquiring bank may consummate the transaction following a 5-day post-decision waiting period during which the DOJ may comment on whether the combination is anticompetitive. The OCC will issue a letter certifying consummation, if the bank has met all pre-merger requirements specified in its approval letter.



- *Other Considerations.* The BMA allows the OCC to approve a merger if anticompetitive effects of the transaction are clearly outweighed in the public interest by the probable effect of the transaction on meeting the convenience and needs of the community to be served. This situation may arise when a bank is the only party to express interest in acquiring an insured depository institution that is in imminent or immediate danger of failing.

### **Immediate Combinations**

The BMA allows the OCC to eliminate the public notice and comment requirements and permit consummation immediately upon approval if the OCC finds that it must act immediately to prevent the probable failure of an FDIC-insured depository institution involved in the transaction.

## **Shareholder Considerations**

In general, before consummating a merger or consolidation that will result in a national bank, shareholders that own or control at least two-thirds of the capital stock of each depository institution or nonbank subsidiary or affiliate involved must approve at a shareholders' meeting the terms and conditions that govern the transaction. The following is guidance for notifying shareholders of the terms and conditions of the transaction, and the time and place of shareholder meetings.

### **Proxy Disclosures**

National banks, seeking to merge or consolidate with other depository institutions or with one or more of their nonbank subsidiaries or affiliates, must adequately inform all shareholders eligible to vote on all aspects of the transaction and notify shareholders of the [Shareholders' Meeting to Vote on the Combination](#). Only banks with securities registered under the Securities Exchange Act of 1934, subject to 12 CFR 11, must submit preliminary proxy materials or information statements to the OCC's Securities and Corporate Practices (SCP) Division before distribution to shareholders. All other banks must submit a copy of final proxy materials or information statements used for the combination to the appropriate district office no later than the time they are sent to shareholders.

All proxy materials and information statements should point out that OCC approval or possible approval of the combination:

- Reflects only its view that the transaction does not contravene applicable competitive standards imposed by law and is consistent with regulatory policies relating to safety and soundness.
- Is not an OCC opinion that the proposed combination is financially favorable to the stockholders or that the OCC has considered the adequacy of the terms of the transaction.
- Is not an endorsement of, or recommendation for, the combination.

The last statement, because of its significance, should be emphasized, for example through use of boldface or capital letters.

### **Timing of OCC Approval and Proxy Release**

If a bank has not printed its proxy materials when it receives OCC approval of the combination, the proxy materials or information statement should disclose the facts and circumstances surrounding the approval, usually in those portions dealing with regulatory matters. If the bank has printed its proxy materials or information statement, but has not mailed them at the time it receives approval, it generally must include a supplementary letter or “sticker” containing the appropriate disclosures. Proxy material or information statements that are mailed before the bank receives OCC approval should indicate that the application has been filed and that OCC approval is necessary to consummate the transaction. The statement also should state that, as of the date of the mailing, OCC approval has not been granted.

If the OCC’s approval is granted after the proxy material or information statement is mailed, but before the shareholders’ meeting or vote, supplemental disclosures about the combination’s approval, and a new proxy card, if appropriate, should be sent to the shareholders. However, if the OCC’s approval is granted shortly before the shareholders’ meeting, the bank should consult with counsel on disclosure obligations concerning the combination approval.

### **Shareholders' Notice and Meeting**

Applicants generally must publish notice of the shareholders’ meetings to ratify merger or consolidation agreements on the same day each week for four consecutive weeks in a newspaper of general circulation in the communities in which each institution’s main office is located. Publication of shareholder notice to the national bank shareholders may be waived when the OCC determines that an emergency exists that justifies such waiver or by unanimous action of the national bank shareholders. In addition, a BHC that is the sole shareholder of a bank may approve a merger or consolidation agreement without holding a shareholders’ meeting.<sup>8</sup> (See [Shareholders’ Waiver of Notice of Shareholders’ Meeting and Written Consent of Business Combination](#) document.)

In addition to the newspaper notice, at least 10 days prior to the meeting, a bank soliciting shareholder votes must send to each shareholder, by certified or registered mail, a notice accompanied by a proxy or information statement. If one or more of the entities involved in a combination is not a national bank, then the applicants should consider the relevant laws and regulations governing notice and publication requirements for the non-national bank entities.

The notice for the conduct of any shareholder meeting is separate from the public notice that must be published. (Refer to the Public Notice and Comment discussion in the Application Process section for additional public notice details.)

### **Shareholder Approval**

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<sup>8</sup> If a bank has more than one shareholder, shareholders with actual notice of the shareholder meeting may waive defects in the shareholder notice, but not the shareholders’ meeting.

Before consummating a merger or consolidation that will result in a national bank, shareholders that own or control at least two-thirds of the capital stock of each depository institution or nonbank subsidiary or affiliate involved must approve the terms and conditions that govern the transaction at a shareholders' meeting. If one or more of the institutions is a state institution, and the laws of that state require more than a two-thirds affirmative vote for ratification of the agreement, that higher affirmative vote must be obtained before consummating the transaction. The shareholder approval requirement cannot be waived, even in an emergency involving the imminent or immediate failure of an FDIC-insured depository institution. The OCC will not certify consummation of a combination until it receives the required secretary's certificate for shareholders' approval or certified declaration(s) of unanimous shareholder consent from the holding company.

In purchase and assumption transactions, usually no shareholder vote is required for the acquiring or purchasing bank. The target bank's shareholders may be required to vote, however, when the target is a national bank that will go into liquidation after or concurrent with the purchase and assumption, or if state law requires it for a target state-chartered bank.

## **Application Issues**

This section provides an overview of the accounting treatment, transactions with affiliates, capital, certain legal issues, and other requirements related to the combination application.

## **Accounting**

A national bank should account for a combination in accordance with Generally Accepted Accounting Principles (GAAP). As discussed below, affiliated combinations should be accounted for at historical cost in a manner similar to pooling of interest. Nonaffiliated combinations should be accounted for under the purchase method of accounting. An applicant in a combination must use pushdown accounting when it acquires 95 percent or more of the voting stock of the target institution. With OCC approval, the applicant may use pushdown accounting when it acquires more than 80 percent, but less than 95 percent, of the voting stock of a target institution.

### **Affiliated Combinations**

A combination between two or more affiliated banks is accounted for in accordance with Appendix D to Statement of Financial Accounting Standards Number 141. This standard requires that such combinations be accounted for at historical cost in a manner similar to pooling of interest accounting. This accounting is appropriate when all, substantially all (90 percent or more) of the assets, or assets that constitute a "business" (as defined in GAAP) of the target entity are transferred to an affiliated bank.

The call report requires that the transfer of individual or groups of assets between affiliated parties be accounted for at fair value, and that banks recognize gains and losses on the transfer in the same manner as if they had sold the assets to a third party. This call report provision is applied to all transfers of assets that do not involve "substantially all" of the assets or assets that constitute a "business"

of an affiliate and, therefore, do not qualify under Appendix D to Statement of Financial Accounting Standards Number 141.

### **Nonaffiliated Combinations**

Statement of Financial Accounting Standards Number 141 requires that all nonaffiliated combinations be accounted for under the purchase method of accounting. The pooling-of-interest method is no longer allowed for combinations involving nonaffiliated entities.

Purchase accounting records an acquisition on the books of the acquirer by allocating the purchase price to the assets acquired and liabilities assumed, based on their fair values. The capital section of the acquired bank is eliminated and entries are made to record the cash, debt, or stock issued. The stock and debt issued should be recorded at their fair value. Any excess of the cost of the acquisition over the net fair value of the assets acquired (both tangible and intangible) and liabilities assumed is recorded as goodwill, which is not part of regulatory capital.

Fair value of the loan portfolio generally is determined on a loan-by-loan basis and should consider both interest rate and credit risk.<sup>9</sup> The premium or discount resulting from this analysis is accounted for on an individual loan basis. If a loan is on accrual status, the premium or discount should be accreted to income to earn a level yield over the remaining life of the loan.<sup>10</sup> Subsequent impairment of value to a loan should be recognized through a charge to the allowance for loan and lease losses.<sup>11</sup>

An exception to the requirement for an individual loan analysis is made for groups of similar consumer loans. The fair value of those loans may be determined on an aggregate basis. The premium or discount resulting from this analysis, however, should be applied to all the loans in the pool on a pro rata basis, so that each can be accounted for separately.

An appropriate allowance for loan losses of the acquired bank generally may be included as a purchase adjustment.<sup>12</sup> The allowance, however, should not exceed the amount on the acquired bank's books immediately prior to the acquisition.

Marketable securities generally are recorded based on quoted market values. Certain other assets, such as purchased bank premises and other real estate owned (OREO), are accounted for at fair value, based either on evaluations or independent appraisals. Deposits are recorded generally at historical cost. However, a core deposit intangible may be recorded as a separate asset.

An intangible asset should be recognized as an asset separate from goodwill if it arises from contractual or legal rights, or if it is capable of being separated or

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<sup>9</sup> See Statement of Financial Accounting Standards Number 141, "Business Combinations."

<sup>10</sup> See Statement of Financial Accounting Standards Number 91, "Accounting for Nonrefundable Fees and Costs Associated with Originating or Acquiring Loans and Initial Direct Costs of Leases" and Statement of Position Number 03-3 (SOP 03-3), "Accounting for Certain Loans or Debt Securities Acquired in a Transfer."

<sup>11</sup> Statement of Financial Accounting Standards Number 5, "Accounting for Contingencies."

<sup>12</sup> For loans accounted for under SOP 03-3, the allowance for loan losses may not be included as a purchase adjustment. In addition, the FASB has a proposal to amend FAS 141, which will prohibit the entire allowance for loan losses of the acquired bank to be included as a purchase adjustment.

divided from the acquired entity and sold, transferred, licensed, rented, or exchanged.

Each intangible asset should be recorded at estimated fair value and amortized over its useful life, unless the life is determined to be indefinite. The method of amortization should reflect the pattern in which the economic benefits of the intangible asset are consumed. This will often result in the use of an accelerated method of amortization that allocates larger amounts of amortization to the earlier years of the asset's estimated life.

If an intangible asset is determined to have an indefinite life, it will not be amortized. However, it should be tested for impairment at least annually. If it is subsequently determined to have a definite useful life, it should be tested for impairment and then amortized over its estimated remaining useful life.

### **Push-down Accounting**

When a holding company acquires a bank, the new basis of accounting is recorded on the holding company's books. Push-down accounting also establishes this new basis of accounting on the books of the acquired bank. Push-down accounting is required when 95 percent or more of the voting stock of the bank is acquired. With the OCC's approval, push-down accounting may be used when more than 80 percent, but less than 95 percent is acquired.

## **Affiliate Transaction Restrictions**

National banks are subject to quantitative and qualitative restrictions on certain "covered transactions" with "affiliates" under sections 23A and 23B of the Federal Reserve Act (FRA), codified as 12 USC 371c, 371c-1, and their implementing regulation, Regulation W (12 CFR 223). Regulation W became effective on April 1, 2003, and adds significantly to both the limitations and exemptions contained in sections 23A and 23B. The restrictions contained in sections 23A and 23B and Regulation W are designed to safeguard the interests of the bank when it engages in transactions with affiliates. "Covered transactions," restricted by sections 23A and 23B, include a bank's purchase of assets from, investment in securities issued by, or loan or extension of credit to, an affiliate. The acceptance of securities issued by an affiliate as collateral security for a loan and the issuance of a guarantee, acceptance, or letter of credit on behalf of an affiliate are also "covered transactions." Certain other types of transactions are subject to the restrictions of sections 23B, as well.<sup>13</sup>

For purposes of business combinations, the restrictions most likely will arise in mergers of a nonbank company with an affiliated national bank or combinations involving one or more affiliated, uninsured depository institutions.<sup>14</sup> Most other affiliated business combinations, such as combinations involving only affiliated insured depository institutions that are reviewed under the BMA, are exempt from most of the restrictions in sections 23A and 23B and Regulation W.

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<sup>13</sup> Note that an affiliate's donation of assets to a bank (where the acquiring bank neither pays cash or other consideration nor assumes liabilities in exchange for the assets received) is not considered a "purchase" of assets by the bank, and is therefore not subject to sections 23A and 23B. If the bank pays consideration or assumes liabilities, the transaction is treated as a purchase of assets.

<sup>14</sup> For purposes of Regulation W, "depository institution" means any insured bank or savings association, as defined in the Federal Deposit Insurance Act, 12 USC 1813, but does not include any branch of a foreign bank. The same affiliate transaction restrictions on the bank apply to combinations with any "depository institution."

“Affiliate” for purposes of sections 23A and 23B and Regulation W generally includes any company that controls the bank or that is controlled by the same company or by the same shareholders that control the bank. Certain other relationships between a bank and a company can confer “affiliate” status on the company, as well. Depository institutions generally are included in the term “company.”

“Control” under sections 23A and 23B generally occurs when shareholders have the power to vote 25 percent or more of any class of voting securities, are able to control in any manner the election of a majority of the directors or trustees of the company, or the Fed determines after notice and opportunity for hearing that they directly or indirectly exercise a controlling influence over the management and policies of a company.

Regulation W expands the statutory definition of control significantly in two respects. First, it provides a rebuttable presumption that a shareholder that owns or controls 25 percent or more of a company’s nonvoting equity capital controls that company. Second, it provides a rebuttable presumption that a shareholder that owns or controls instruments (including warrants and options) that are convertible or exercisable at the option of the holder into other securities (such as common stock) controls those other securities. To rebut either of these presumptions of control, a bank or shareholder must file rebuttal materials with the Fed. Applicants may wish to inform the OCC if they intend to file such materials with the Fed.

Regulation W, unlike sections 23A and 23B, distinguishes between a bank’s insured and uninsured depository institution affiliates. Regulation W provides that a bank’s transactions with an *insured* depository institution affiliate may be eligible for certain exemptions from the restrictions of section 23A and Regulation W, such as the so-called BMA and “sister-bank” exemptions. However, a bank’s transactions with an *uninsured* depository institution affiliate do not qualify for most exemptions from section 23A and thus are generally subject to all of section 23A’s restrictions.

Similarly, Regulation W provides that for purposes of section 23B, insured depository institutions are not considered affiliates, but uninsured depository institutions *are* treated as affiliates subject to the arm’s-length standard and other applicable restrictions. Thus, a bank’s transactions with an insured depository institution that is an affiliate under section 23A are not subject to section 23B, but its transactions with an uninsured depository institution affiliate are subject to section 23B. Exemptions from sections 23A and 23B are discussed in more detail below. Applicants considering engaging in transactions in reliance on these exemptions may wish to consult with the OCC in advance because of the complexity of these regulatory exemptions.<sup>15</sup> Affiliates include most financial subsidiaries of banks<sup>16</sup>; any investment company for which the bank, its subsidiaries, or affiliates acts as investment adviser; and certain other companies

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<sup>15</sup> When an uninsured depository institution is a subsidiary of another depository institution, the subsidiary generally is not treated as an affiliate of its parent bank for purposes of either sections 23A or 23B, but instead is treated as an exempt operating subsidiary from the perspective of the parent bank. From the perspective of the *uninsured* subsidiary depository institution, however, the parent bank *is* treated as an affiliate, and thus the restrictions of sections 23A and 23B apply to transactions with its parent bank.

<sup>16</sup> A company that is a financial subsidiary solely because it engages in the sale of insurance as agent or broker in a manner that is not permitted for national banks is treated as an operating subsidiary.

sponsored and advised by the bank, or its subsidiaries or affiliates. Other affiliates include certain “other investment funds” (generally private funds) advised by the bank, its subsidiaries, or affiliates; certain companies held under the Gramm-Leach-Bliley Act’s merchant banking or insurance authority; certain partnerships associated with a bank; and companies that the Fed or the OCC determine should be treated as affiliates.

## Sections 23A and 23B — Provisions

The three provisions within sections 23A and 23B that tend to present issues in connection with corporate reorganizations are: (1) the quantitative limits, (2) the prohibition on purchasing low-quality assets (see [Glossary](#) for definition), and (3) the requirement that transactions with affiliates be conducted on arm’s-length terms. Sections 23A and 23B also require that covered transactions be consistent with principles of safety and soundness and that credit transactions with affiliates generally be collateralized.<sup>20</sup> Depending on the structure of the reorganization, a full or partial exemption from these restrictions may be available.

- *Quantitative Limits.* In the absence of any available exemption, a bank may not engage in “covered transactions” with an affiliate in an amount that exceeds 10 percent of the bank’s capital and surplus — 20 percent of capital for all affiliates as a group. Regulation W prescribes certain valuation rules for section 23A covered transactions that must be applied in order to determine whether such a transaction complies with these quantitative limits. For example, the value of a purchase of assets is calculated by combining the value of liabilities assumed plus any consideration paid for the assets. A bank must observe the quantitative limits when engaging in a covered transaction with an affiliate unless an exemption is available. Thus, a bank’s purchase of assets from its holding company, or any subsidiary of that holding company that is not an insured depository institution, usually may not exceed 10 percent of the acquiring bank’s capital and surplus. Transactions with financial subsidiaries, however, are treated differently from transactions with other affiliates with respect to these quantitative limits. A bank’s transactions with its own financial subsidiary are not subject to a 10 percent limit, though they are included in the 20 percent limit.
- *Transfers of Low-Quality Assets.* A bank’s purchase of low-quality assets from an affiliate is generally prohibited unless the purchase is made in connection with a transaction eligible for the BMA exemption. When a corporate reorganization contemplates a bank’s acquisition of low-quality assets from an affiliate, and the BMA exemption is not available, a banking organization has at least the following four options that are acceptable to both the OCC’s and the Fed’s staff:
  - The affiliate holding the low-quality assets may retain them and transfer the rest of the assets to the bank.
  - The affiliate may transfer the low-quality assets to the bank’s shareholders as a dividend or in some other legally permissible way.

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<sup>17</sup> The term “credit transaction” includes not only loans or extensions of credit, but also a bank’s issuance of a guarantee or letter of credit on behalf of an affiliate or a confirmation of a letter of credit issued by an affiliate. It also includes a cross-netting arrangement, as that term is defined in Regulation W.

The shareholders may in turn either keep the assets or donate, but not sell, them to the bank. A donation of the low-quality assets may be made concurrently with the bank's purchase of permissible assets from the same transferor, provided it is done in a separate transaction.

- The bank may make a written request to the Fed for a special exemption from section 23A. (See procedure set forth at 12 CFR 223.43.)
- The affiliate holding the assets may sell any servicing rights associated with the assets to the bank, while retaining title to the assets. If the assets later recover and lose their "low-quality" status, they may be sold outright to the bank.

Other options may be available as well. However, in every case, the OCC will review any low-quality assets in a portfolio and determine whether their acquisition by a bank conforms with safe and sound banking practices. Banks are advised to contact the OCC if a contemplated transfer of low-quality assets may present a barrier to accomplishing a transaction.

- *Section 23B and the "Arm's-Length Requirement."* As previously noted, section 23B of the FRA requires that transactions between a bank and its affiliates be conducted on an arm's-length basis. Section 23B provides that banks may engage in certain transactions with an affiliate on terms and under circumstances, including credit standards, that are substantially the same as, or at least as favorable to the bank as those prevailing at the time for comparable transactions with or involving nonaffiliated companies. If no such comparable transactions exist, then the bank must transact on terms and under circumstances, including credit standards, which in good faith would be offered to, or would apply to, nonaffiliated companies. For purposes of section 23B, Regulation W excludes from the definition of "affiliate" all insured depository institutions, but treats uninsured depository institutions as affiliates in the same manner and to the same extent as nonbank affiliates (unless the uninsured depository institution is itself a subsidiary of the bank, in which case it generally is treated as an operating subsidiary). Thus, a transaction between a bank and an insured depository institution need not comply with the arm's-length requirement and may be valued at cost or any other measure, provided that the transaction is not unsafe or unsound. But transactions between a bank and an uninsured sister depository institution that is not a subsidiary must be conducted on an arm's-length basis. Moreover, as is the case with section 23A, mergers or purchase-and-assumption transactions between affiliated insured depository institutions that are reviewed and approved under the BMA are exempt from section 23B and Regulation W. If one of the transacting institutions is uninsured, the acquiring bank should contact the OCC even when the combination will be reviewed and approved under the BMA.



## Sections 23A and 23B — Exemptions

A near-complete exemption to all affiliate-transactions restrictions, including the prohibition against a bank's purchase of low-quality assets from an affiliate, is available when a reorganization involves a combination of a bank with an affiliated, insured depository institution subject to the BMA. Only the safety and soundness requirement of section 23A applies to such combinations. Moreover, section 23B does not apply to a combination of a bank with an affiliated insured depository institution because an insured depository institution is not included under the definition of "affiliate" in section 23B.

Transactions between affiliated depository institutions that do not qualify for the BMA exemption also may receive favorable treatment under the "sister-bank" exemption, although this exemption is available only when a bank is engaging in a covered transaction with an affiliated *insured* depository institution. Combinations that qualify for the sister-bank exemption, but not for the BMA exemption, are subject to the prohibitions against unsafe or unsound transactions and purchasing low-quality assets.

As discussed above, all transactions between affiliated insured depository institutions are exempt entirely from section 23B because the definition of "affiliate" for purposes of section 23B excludes insured depository institutions. But uninsured sister depository institutions are treated as affiliates. A bank's transactions with uninsured sister depository institutions are subject to section 23B unless an exemption from section 23B is available.

Regulation W created two new exemptions that may be useful for banks contemplating combinations. First, Regulation W exempts certain "internal corporate reorganizations" from the collateral requirements and quantitative limits of section 23A, but not from the low-quality-asset prohibition, the safety and soundness requirement, or from section 23B. Several conditions must be satisfied for the exemption to be available. These conditions are: (1) the transactions must be part of an internal corporate reorganization of a holding company involving the transfer of all or substantially all of the assets of an affiliate or of a division of an affiliate; (2) the bank must provide advance notice to the OCC and the Fed, including a description of the primary business of the affiliate and an indication of the proposed date of the transfer; (3) the bank's top-tier holding company must commit to the OCC and the Fed (and carry through on its commitment) to make the bank whole with respect to any assets that become low-quality during the first two years after the transfer, either by making cash contributions to the bank or by purchasing the low-quality assets; (4) a majority of the bank's board of directors must review and approve the transactions in advance; (5) the value of the covered transaction, when aggregated with any other transactions undertaken pursuant to this new internal corporate reorganization exemption during the previous 12 months, must represent less than an amount set by the OCC that is between 10 and 25 percent of the bank's capital and surplus; and (6) the holding company and all of its subsidiary depository institutions must be well-capitalized and well-managed both before and after consummation of the transfer.

Second, Regulation W exempts from the collateral requirements, quantitative limits and low-quality asset prohibitions of section 23A, and also exempts from section 23B, asset purchases by *de novo* banks, provided that the OCC has

approved the asset purchase in writing in connection with its review of the formation of the new bank.

Regulation W also exempts “step transactions” from the provisions of section 23A except for the safety and soundness requirement, though not from section 23B. A step transaction occurs when a bank acquires the securities of a company within one day (the OCC may extend this time limit) after the company first becomes an affiliate as a result of its acquisition by an affiliate of the bank. The acquiring bank must acquire all of the shares that were acquired by the transferring affiliate. An example of a step transaction would be if a bank’s holding company acquires 100 percent of the shares of an unaffiliated company and then immediately transfers all of the shares of that company to its subsidiary bank. Certain conditions, set forth at section 223.31(d) of Regulation W, must be satisfied for the step transaction exemption to be available, including notice by the bank to both the OCC and the Fed at or before the time when the transferred company first becomes an affiliate.

## Bank Name

The OCC considers the name of a bank to be primarily a business decision subject to any applicable state law. When different names are used for marketing after consummation, the bank should take steps to prevent customer confusion about the institution with which they are doing business and the extent of deposit insurance coverage for their accounts. (See [“GPP”](#) booklet.) Although the OCC does not regulate bank names, the National Bank Act requires that every national bank’s formal name include the word “national.” Refer to [“Changes of Corporate Address and Title”](#) booklet for additional information.

## Directors’ Residency and Citizenship Requirements

Every national bank director must be a citizen of the United States throughout their term of service (12 USC 72). The OCC, however, may waive those requirements for a minority of the total number of directors of any national bank.

A majority of a national bank’s directors must reside in the state in which the bank is located (that is, the state(s) in which the bank has its main office or branches) or within 100 miles of its main office for at least one year immediately preceding their election and during their continuance in office (12 USC 72). The OCC has discretion to waive those residency requirements. Refer to the [“Director Waivers”](#) booklet for additional information.

## Dividends and Capital Reduction

National banks may include with a combination application requests to declare dividends under 12 USC 60(b) and 12 CFR 5.64 or to reduce capital under 12 USC 59 and 12 CFR 5.46. With prior OCC approval,<sup>18</sup> a bank may make a cash or noncash distribution to a parent bank or parent holding company to complete a business combination. Refer to the [“Capital and Dividends”](#) booklet for additional information.

## Fiduciary Powers

A national bank that does not have fiduciary powers under 12 USC 92a, and that plans to acquire a state bank or federal thrift that engages in activities for which a national bank would need fiduciary powers, must seek and obtain OCC approval before exercising fiduciary powers. The request for fiduciary powers may be included in the combination application. No additional approval is necessary if two or more national banks combine through merger or consolidation, and any of the banks has, prior to the combination, received OCC approval to exercise fiduciary powers, and the resulting bank exercises fiduciary powers in the same manner and to the same extent as the national bank to which approval was originally granted. Also, no approval is required for a national bank with OCC approval to exercise fiduciary powers to continue exercising those powers if it is the resulting bank in a merger or consolidation with a state bank or federal thrift. (See 12 CFR 5.26(b)(1) or (2) and the [“Fiduciary Powers”](#) booklet for additional discussion.)

## Investment in Bank Premises

A bank that proposes to increase its investment in bank premises in connection with a combination may need to seek and receive OCC approval under 12 CFR 5.37 before consummating the combination. If the bank’s investment would cause it to exceed its capital stock or a level previously approved, it must submit a notice or an application to the supervisory office. (For details, an applicant should refer to the [“Investment in Bank Premises”](#) booklet.)

## Legal Issues

A combination application should include cites of federal and state laws relevant to the combination. If the applicant believes that the proposed combination raises legal issues, it should provide an opinion from counsel that addresses these issues, as well as why the proposal is not in contravention of state law, when the target is state-chartered, or federal law when the target is a federally chartered thrift. Counsel should indicate that any action required by the applicable federal or state law has been or will be taken before consummation of the proposal. The OCC may request an opinion if one is not provided.

## Liquidation Account

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<sup>18</sup> Distributions to the parent bank or to the holding company that fit this description will have no effect on the bank’s future dividend paying capacity.

When the target in a combination is a thrift that converted from a mutual to a stock institution, the resulting national bank must establish and maintain a liquidation account. This account represents the eligible depositors' interest in the net worth of the mutual institution at the time it converted to a stock institution. In the event of a solvent liquidation of the resulting bank, eligible depositors are entitled to a priority distribution from the institution's net worth before any distributions are made to stockholders. In the Consolidated Reports of Condition and Income (call report), the account is considered a part of the bank's undivided profits and should be included with the Tier 1 capital line item.

## Main Office Designation

Banks should consult the OCC before filing an application if the main office of the resulting bank in a merger or consolidation under 12 USC 215a or 215 will be located at a place other than the main office of the acquiring bank.

A national bank resulting from a Riegle-Neal Act combination may, with OCC approval, retain and operate, as its main office or a branch, a main office or branch that any bank involved in the transaction operated immediately before the combination.

## Resulting Bank Charter Number

In a transaction structured as a merger under 12 USC 215a or 215c and 12 CFR 5.33, the resulting bank generally uses the charter number of the acquiring bank. If, however, the acquiring bank is an interim national bank and the target is a national bank, the resulting bank may retain the charter number of the target national bank. In a transaction structured as a consolidation under 12 USC 215 or 215c and 12 CFR 5.33, the resulting bank may use the charter number of any national bank involved in the transaction or a new charter number.

## Undercapitalized Banks

In processing a combination application from an undercapitalized bank, the OCC must determine that:

- The bank has filed an acceptable capital restoration plan.
- The bank is implementing the plan.
- The proposed combination is consistent with and will further achievement of the plan.

## Specific Requirements

This section provides detailed guidance concerning certain information requirements in the Interagency and Streamlined BMA applications.

## Agreements and Board of Directors' Approval

A majority of the board of directors of each of the participating depository institutions involved in a merger or a consolidation must approve an agreement to combine. (See [Sample Agreements—Merger; Consolidation; Secretary's Certificate of Board of Directors' Approval of Combination](#)). Alternatively, a bank's board of directors may waive their notice of a board meeting and approve a combination agreement by consent. (See [Board of Directors' Waiver of Notice of Board Meeting and Written Consent of Business Combination](#).) The shareholders of each combining institution must ratify and confirm the agreement. (See [Shareholders' Consideration](#) for additional discussion.) If a target depository institution in a merger or consolidation is a state bank, and the law of the state where the target is located is more stringent with respect to board and shareholder approval than the national bank merger and consolidation statutes, then the target bank must abide by the state law requirements. Management, as directed by the board of directors' resolution, usually executes a purchase of assets and assumption of liabilities agreement.

In combinations involving interim banks, the OCC will accept agreements executed between the primary parties (for example, an operating depository institution and a BHC). The agreement must provide for the interim bank to become a party to the agreement upon its organization. This is done through an addendum to the initial agreement. Combination agreements structured in this manner are permissible if: (1) the agreement is a legal instrument satisfying all the requirements of 12 USC 215 or 215a; (2) the initial agreement clearly states the intent to include the interim bank in the combination; and, (3) the interim bank becomes a party to the agreement before consummation of the combination.

## Branch Authorization and Closing

### **Branch Authorization**

The resulting bank in a combination may retain, as branches, the branches of the acquiring bank and the main offices and branches of the target institution as permitted under 12 USC 36. The application should address the legal authority of the resulting bank to retain branches of all institutions participating in the combination, including branches of national banks.

The combination application must include a list of all locations for which the resulting bank requests an OCC authorization letter. The application also must list all branches of each institution involved in the combination, including those of a national bank, which the resulting bank will not retain following consummation. (See Branch Closings below.)

The OCC issues an authorization letter following consummation of the transaction for all branches that it had not approved prior to the transaction, that is, any office that will be a branch of the resulting bank that was not approved as a branch of a national bank before the combination. (See [Branches Requiring Authorization](#) form.) The authorization letters will cover the main offices of the combining institutions (except the resulting bank's main office) and all existing branch offices (brick and mortar branches and other types of facilities that meet the definition of a branch under national banking laws) of the acquired institutions that are not national banks.

If permitted under 12 USC 36, banks may retain approved, but unopened branches, if all required approvals for those branches were received prior to the transaction. The application must include a list of all approved, but unopened branches, for which authorization is requested. A bank should be aware of the 18-month expiration period affecting approved, but unopened, branches.

### **Branch Closings**

The applicant must identify branch sites that will cease to operate as a result of the transaction. If the applicant is unable to determine at the time of filing the exact number and location of the branch closings, the application must state that a yet-to-be-determined number of offices will close and provide as much specificity as possible. When the exact locations are determined, the applicant must follow established branch closing procedures. (See the [“Branch Closing”](#) booklet.)

The responsibility for filing the notice lies with the acquiring or resulting national bank, but either party to a combination may give notice. Thus, for example, the acquirer may give the notice before consummating the transaction when the acquirer intends to close a branch following consummation, or the target or seller may give the notice, because it intends to close a branch at or prior to consummation.

### **Nonconforming Assets and Activities**

An applicant must identify any nonconforming assets or activities, including nonconforming subsidiaries, of any institutions involved in the combination that will not be disposed of, or discontinued, prior to consummation of the transaction. A nonconforming asset or activity is one that is impermissible for a national bank or, if permissible in general, is being conducted in a manner that exceeds limits applicable to national banks. Nonconforming assets include investments in subsidiaries or other entities that engage in activities not permissible for a national bank or a financial subsidiary of a national bank. If the applicant has questions about the legal authority of the resulting bank to retain certain assets or continue certain activities, the application should contain an analysis of the legality of the assets or activities, including a legal opinion, if appropriate.

The OCC generally permits the resulting bank a reasonable period of time, usually not more than two years after consummation of the combination, to divest or conform nonconforming assets or discontinue or conform nonconforming activities of the target without undue hardship. An applicant seeking to retain nonconforming assets or activities must provide information describing its plan to conform, divest, or discontinue nonconforming activities, and an explanation of the reasonableness of the time periods involved. If an asset or activity is conforming only if it is held or conducted in a financial subsidiary, then the resulting bank must hold the asset or conduct the activity in a financial subsidiary, or if not, then the bank must conform or divest the asset or activity within two years.

### **Subsidiary and Investment Authorization**

An applicant acquiring a non-national bank with an operating subsidiary that does business directly with consumers must submit an interim “Annual Report on Operating Subsidiaries” as described in [OCC Bulletin 2004-55](#) at the consummation of the transaction. This report is required if the subsidiary does business directly with consumers in the United States and is not functionally regulated. Refer to the bulletin for details.

A national bank that proposes to acquire a community development project or corporation that the OCC previously has not approved must seek and receive OCC approval under 12 CFR 24 before consummating the combination.

## Post Approval Process

### Extension of Time

When the OCC approves or conditionally approves a filing, the applicant has up to 12 months to consummate the transaction. The approval will lapse if a combination is not consummated within one year from the date of OCC approval.

The OCC normally does not grant extensions of time to consummate. However, an extension of the approval time may be requested from the appropriate district office and granted if the applicant can provide sufficient information to prove that the reason for the delay is beyond its control (for example, environmental clean up) or otherwise satisfy the OCC that sufficient grounds exist to extend the approval.

### Consummation

Applicants should advise the OCC at least 10 days before the desired consummation date for the combination, allowing the OCC adequate time to determine if the bank has met all pre-merger requirements specified in the approval letter. (See [Notice of Consummation](#).) Generally, the OCC will issue its certification letter immediately after consummation of the transaction.

### Lending Limit Calculation

When a combination transaction results in a change in capital category under 12 USC 1831o, and 12 CFR 6 (prompt corrective action), the OCC will confirm in writing that the bank should begin to calculate its lending limit based on the resulting capital and will note the effective date of such change.

In addition, on a case-by-case basis, the OCC can require recalculation of a bank's lending limit when a combination transaction causes a change to capital but does not result in a change in capital category. Further, a bank may request permission from the OCC to recalculate its lending limit when a combination transaction causes a material change to capital but does not result in a change in capital category.

### Oath of New Directors



The resulting bank must furnish the OCC with an executed "[Oath of Bank Director](#)" for all new directors added as a result of a merger. In a consolidation, the resulting bank must furnish the OCC with an executed "Oath of Bank Director" for all directors.

## OCC Semiannual Assessment

The OCC assesses a bank based on the assets reported as of a June 30 or December 31 call report date. For example, for any consummation date between July 1 and December 31, the resulting bank's first assessment will be based on its December 31 assets.

If a bank leaves the national bank system on June 30 or December 31, no fee is assessed for the upcoming period. Institutions must leave the national banking system prior to the close of business on the call report date to avoid paying the *full* semiannual assessment.

The assessment fee is due on March 31 and September 30 of each year and is automatically deducted from the bank's designated bank account on the payment due date. If a bank leaves the national bank system before the payment date, the bank should contact the Financial Management Division at 202-874-5150 to discuss arrangements for payment.

## Dissenting Shareholder Rights and the Appraisal Process

### **Perfecting Dissenters' Rights**

A shareholder dissenting from a conversion, consolidation, or merger involving a national bank may be entitled to receive the value of his or her shares from the resulting entity. The specific details of the steps a shareholder must follow to perfect his or her dissenters' rights are detailed in the appropriate statute under which the transaction is authorized. See 12 USC 214a, 215, 215a, 215a-2, 215a-3, or 215c and 12 CFR 5.33. The requirements in each of these sections vary slightly and should be read carefully and followed precisely to ensure dissenters' rights are not erroneously forfeited. In addition, any proxy material distributed to the shareholders should describe the appropriate steps for dissenting shareholders.

Generally, a shareholder must either dissent by voting against the transaction at the shareholders' meeting or notifying the bank in writing at or prior to such meeting that he or she dissents from the plan to convert, consolidate, or merge. Within 30 days after the date of consummation of the transaction, the dissenting shareholder also must confirm in writing his or her dissent to the transaction and surrender his or her stock certificates to the resulting bank. Next, a committee of three is selected to appraise the stock of the dissenting shareholders. The committee is comprised of one representative that the majority of dissenting shareholders appoints, one representative the resulting entity appoints, and one representative that those two representatives appoint. If two members of the three-member committee agree on the value of the shares, that value will govern. If that value is acceptable to one or more dissenting shareholders, the process is complete for those shareholders who find the value acceptable, and the appraised value of the shares is paid by the resulting entity. If that value is not



acceptable to one or more dissenting shareholders, those shareholders may, within five days of being notified of the appraised value, appeal to the OCC, who will then conduct a reappraisal that will be final and binding upon the appellants.

In addition, if, within 90 days of the date of consummation of the transaction, for any reason one or more of the appraisers are not selected, or the appraisers fail to determine a value, any interested party may request in writing an appraisal from the OCC. With two exceptions, the statutes indicate that the OCC's appraisal or reappraisal is final and binding on all parties, and the resulting entity pays the cost of an OCC appraisal or reappraisal.

The exceptions are for transactions in which a national bank is merging or consolidating into a federal savings association or in which an uninsured national bank is merging into a nonbank affiliate. In both of those instances, the regulations require the parties, including the national bank, to agree that the OCC's appraisal will be final and binding and on how the total expenses of the OCC will be divided among the parties and paid to the OCC. See 12 CFR 5.33(g)(3)(iii) and 5.33(g)(5)(iv). Also, see the Licensing Fee Schedule for the OCC's current fee for performing a [stock appraisal](#).

In addition, when dissenters' rights are provided in accordance with 12 USC 215 or 215a, the dissenting shareholder may also be entitled to receive additional compensation. The shares of stock of the receiving entity that would have been delivered to the dissenting shareholder must be sold at public auction. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess of such sale price must also be paid to such dissenting shareholders.

The rights and appraisal process for dissenting shareholders of a state bank or nonbank affiliate is determined in the manner as prescribed by the law of the state or other jurisdiction, as appropriate.

## **OCC's Valuation Methodology**

Because the statutes that provide for appraisals do not define "value" nor does the legislative history illuminate congressional intent, the OCC has elected to use valuation methods that ensure that stockholders receive full value for their shares being appraised. The OCC normally will not apply certain minority discounts to the fair valuation of the dissenting shares of stock. After reviewing the particular facts in each case and the available information on a bank's shares, the OCC selects an appropriate valuation method, or combination of methods, to determine a fair estimate of the shares' value.

The OCC values the stock as of the date of consummation of the conversion, consolidation, or merger, with the exception of those transactions that are subject to the requirements of 12 USC 214a, in which case the value is determined as of the date the shareholders meeting was held authorizing the transaction. The OCC also may apply a market discount due to the lack of marketability for stock that is closely held or has a limited trading history. The use of a marketability discount for stock that is not readily marketable is a standard practice in the business valuation industry. The OCC has determined that where the facts warrant the inclusion of this type of discount, such a discount is helpful in reaching the best possible determination of the value.

For banks that are considered going concerns, the OCC typically uses one of three methods or a combination of those methods to determine a reasonable estimate of the shares' value. Each of those methods is described below – market value, investment value, and adjusted book value. If more than one method is used, varying weights are applied in reaching an overall valuation. The weight given to the value by a particular valuation method is based on how accurately the given method is believed to represent a fair price. For example, the OCC may give more weight to a value representing infrequent trading by shareholders than to the value derived from the investment value method when the subject bank's earnings trend is so irregular that it is considered to be a poor predictor of future earnings.

For mergers and consolidations, the OCC recognizes that purchase premiums do exist and may, in some instances, be paid in the purchase of small blocks of shares. However, the payment of purchase premiums depends entirely on the acquisition or control plans of the purchasers, and such payments are not regular or predictable elements of value. Consequently, the OCC's valuation methods do not include consideration of purchase premiums in arriving at the value of shares.

### **Market Value Method**

Market value is the price at which a willing buyer and seller would exchange a share of stock in an “arm’s-length” transaction. If sufficient trading in the shares exists and the prices are available from direct quotes from the *Wall Street Journal* or a market maker, those quotes are considered in determining value. In the event the stock is heavily traded on a major exchange, it is likely the OCC would simply apply that value for the appropriate date. If no value is readily available, or if the value available is not well established, the OCC likely will use other methods of estimating value, such as the investment value and adjusted book value methods.

### **Investment Value Method**

Investment value is a method of valuation that attempts to make a reasonable and informed assessment of earnings capacity at the bank and then applies the market perception of the value of banking organizations with similar earnings potential. This two-step process requires the establishment of a peer group comprised of banking organizations with similar earnings potential for which market data is readily available, and an analysis of historical earnings data for the target bank. In practice, the investment value is calculated by multiplying a selected price to earnings ratio for the peer banks by the earnings capacity per share of the target bank.

The peer banks are selected based on location, size, and earnings patterns. In order to select a reasonable peer group when there are too few comparable independent banks in a location that are comparable to that of the subject bank, the pool of banks from which a peer group is selected may be broadened. For example, the peer group may be broadened to include one-bank holding company banks in a comparable location, or by selecting banks in less comparable locations that are similar in asset size and earnings' patterns to the subject bank. Once the peer banks are selected, the selected price to earnings

ratio of the peer banks is then applied to the earnings per share estimated for the subject bank to reach a fair estimate of value.

### **Adjusted Book Value Method**

The third method the OCC uses for reaching a fair estimate of value is the adjusted book value method. An adjusted book value is derived by multiplying the book value of the target bank's assets per share times a selected market price to book value ratio for a group of comparable banking organizations. The adjusted book value reflects the premium or discount to a bank's book value that is attributed to the condition and prospects of banking organizations in similar situations. The adjusted book value method is an asset-based method whose value is reflective of a bank in liquidation.

# Procedures

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## Prefiling

### Licensing Staff

1. Refers a bank that requests instructions to the [“General Policies and Procedures”](#) booklet, the [“Public Notice and Comments”](#) booklet, and this booklet of the *Comptroller’s Licensing Manual*. Refers the applicant to other booklets as appropriate (for example, [“Conversions,”](#) and [“Management Interlocks”](#)).
2. Arranges for prefiling discussions, if necessary, and invites appropriate OCC staff (for example, compliance, economics, legal, and supervision). If any prefiling discussion or meetings reveal significant policy, legal, Community Reinvestment Act (CRA), compliance, or supervisory issues, immediately contacts Headquarters Licensing (HQ LIC) to decide if and when:
  - To forward the application to HQ LIC for processing, or
  - To forward specific issues to HQ LIC for action (while continuing to process the application in the appropriate district office).
3. Prepares a summary of all prefiling meetings and records pertinent information from telephone calls. Retains the summary and other information in an official file.

## Filing and Publishing Notice of the Application

### Bank

4. Completes and forwards the [application](#) (original and two copies) and filing fee to the director for district licensing in the appropriate district office or to HQ LIC. The application can be filed on 3½-inch diskette or compact disk in a commonly used, word processing software, provided that any original pages requiring signatures also are submitted.
5. For combinations that require approval under the Bank Merger Act (BMA), arranges for newspaper publication of public notice on the filing date or as soon as practicable before or after the date of filing and two times thereafter. (See details on publishing in Public Notice and Comment Period in this booklet and the [sample notice](#).) If not submitted with the filing, submits a statement containing the name and address of the newspaper in which the notice was published and dates of publication to the director for district licensing in the appropriate district office or HQ LIC. (See the [“Public Notice and Comments”](#) booklet.)

If necessary, arranges for shareholder notice and meeting (see the Shareholder Notice and Meeting section of this booklet).

## Receipt

### Licensing Staff

6. Initiates and enters information into the Corporate Activities Information System (CAIS).
7. Establishes the official file to maintain all original documents.
8. If a fee is received, forwards it and the deposit memorandum (Form 6043-01) to the Comptroller of the Currency, Attention: Accounts Receivable, 250 E Street, S.W., MS 4-8, Washington, DC 20219. Retains a copy of the memorandum in the official file. Contacts the applicant if the filing fee is not received or is incorrect.

## Initial Review

### Licensing Staff

*Within five business days following receipt of the filing, acknowledges receipt, reviews, and forwards the application for comments.*

9. Reviews the application for accuracy and completeness. Determines if the filing contains all information necessary to reach a decision.  
  
If not complete, [requests](#) necessary information in writing from the contact person and establishes a specific due date to provide the information or returns the application. E-mails a copy of a request for additional information to the assistant deputy comptroller (ADC) and ADC analyst or large bank examiner-in-charge (EIC).
10. If applicant requests 10-day, 5-day processing under the BMA, confirms whether an emergency exists requiring expeditious action based on information provided by the primary supervisor of the insured depository institution that is experiencing financial difficulties. If Licensing authorizes 10-day, 5-day processing, skips to step 12.
11. Determines if the combination qualifies for expedited review and a streamlined application as provided by 12 CFR 5.33(i). (If the determination requires contact with another depository institution's primary supervisor, refer to step 17.)
12. For combinations that qualify for expedited review between nonaffiliated operating institutions, including situations where a bank holding company has requested that the Federal Reserve not require a related application:
  - Verifies the accuracy of the Herfindahl-Hirschman Index (HHI) calculations and validates the predefined relevant geographic banking markets by contacting the appropriate Federal Reserve Bank (Reserve Bank) or using its Internet site.

- If the filing contains an independent competitive analysis or the HHI within any relevant geographic banking market that increases by more than 200 with a post-acquisition HHI of at least 1800:
    - Seeks the director for district licensing’s approval to remove the filing from expedited review.
    - Discusses the competitive analysis in the confidential memorandum (CM). As necessary, seeks assistance from HQ LIC.
    - Documents the file, updates CAIS, and promptly notifies the contact person orally and in writing if application is [removed from expedited review](#) for competitive review.
13. Acknowledges receipt of the filing and advises the contact person of whether the transaction is eligible for expedited review (or 10-day, 5-day processing) and the target date for decision. If it does not qualify, identifies the specific reason in the letter. (Refer to [Acknowledgment of Receipt](#) in this booklet’s OCC samples).
- If applicable, the acknowledgment letter for combinations involving nonaffiliated depository institutions that are eligible for expedited review should indicate if the filing has been removed from expedited review to analyze competition or rapid growth. (Refer to step 12.)
  - If applicable, the acknowledgment letter also conveys preliminary approval for the interim national bank.
14. Notifies, by e-mail, the assistant deputy comptroller (ADC) and ADC analyst, or large bank examiner-in-charge (EIC) of the filing, providing a brief description including any issues identified.
- If a nonsubstantive combination, offers to provide a copy of the application and to request, if necessary,<sup>19</sup> additional information from applicant. For substantive combinations,<sup>19</sup> forwards a copy of the application to the supervisory office, and requests that the ADC or designee or large bank EIC sign-off on supervisory office comments, including any pre-merger examination or visitation memorandum of findings prepared as part of the combination (refer to step 20). Also requests:
- Comments on the filing by the 15<sup>th</sup> calendar day after the filing date (fifth calendar day for filings when Licensing has granted 10-day, 5-day processing).

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<sup>19</sup> The director for district licensing determines whether a combination application is substantive and warrants review by or concurrence from the ADC. Examples of nonsubstantive combinations include: (1) corporate reorganizations solely to effect a structural change in an organization; (2) affiliated combinations under an existing bank holding company, provided that the institutions involved are rated CAMELS composite “1” or “2;” (3) combinations involving noncomplex target institutions that are small in relation to the size of the acquirer; or (4) purchase and assumption transactions involving the acquisition of noncomplex assets or liabilities that are small relative to the size of the purchasing bank.

- A conclusion about whether the acquiring national bank has sufficient plans and expertise to carry out the proposed systems integration. If warranted, consults with the IT specialist or HQ LIC.
  - Comments on the anti-money laundering efforts of any national bank involved in the combination and a detailed explanation for any negative information.
  - If a holding company reorganization is involved, provides the information concerning changes to the bank's strategic or operating plan.
  - Comments on the related request, if made, to decrease capital under 12 USC 59 and 12 CFR 5.46 (see "[Capital and Dividends](#)" booklet for additional information).
  - Decision on any related investment in bank premises if the bank's investment would exceed its capital stock or a level previously approved by the OCC, or if it has submitted an application under 12 CFR 5.37.
  - Decision on related request to declare a dividend that requires OCC prior approval under 12 USC 60(b) and 12 CFR 5.64 (see "[Capital and Dividends](#)" booklet for additional information).
  - For undercapitalized banks involved in the combination, information about the relationship of the combination to the bank's capital plan.
15. If the application includes community development investments which must be reviewed for compliance with 12 CFR 24 or approved by the Community Development Division (CDD), forwards relevant materials (for example, a description of the investment and covered activities, how the investment is consistent with Part 24's public welfare requirements, the dollar amount of the investment, the dollar amount of the applicant's aggregate investments under Part 24, including the subject investment, and other information, if known, such as public or private resources contributed to the investment and the investment's target area) to the CDD and requests a preliminary response by the 30<sup>th</sup> day after the filing date (fifth day for filings when Licensing has granted 10-day, 5-day processing.) The applicant may use the 12 CFR 24 form, [CD-1 – National Bank Community Development \(Part 24\) Investments](#), to provide the information about such investments.
  16. Notifies other OCC divisions of the filing, as appropriate, and requests preliminary response within 15 calendar days after the filing date (fifth calendar day for filings when Licensing has granted 10-day, 5-day processing.)
  17. Requests by e-mail or letter a response within 15 calendar days after the filing (five days for combinations in which Licensing has authorized 10-day, 5-day processing) the following information from the appropriate state and federal supervisor of each depository institution involved in the combination that is not a national bank:

- Copies of the most recent examinations and reports, as well as administrative agreement or enforcement orders to which the depository institution is subject.
- Comments on the anti-money laundering efforts of the depository institution.

Requests for information about state banks should be sent to the state chartering authority and the Reserve Bank for state member banks or the Federal Deposit Insurance Corporation (FDIC) for state non-member banks. Requests for information about federal thrifts should be sent to the Office of Thrift Supervision (OTS) (see text of [Anti-money Laundering Efforts Request](#) letter or [e-mail](#) samples).

18. Sends a copy of the application to the Department of Justice (DOJ) along with a request for the DOJ's comments (see [sample request](#)) on the competitive effects of the proposed combination within 30 days (10 days if the OCC has authorized 10-day, 5-day processing under the BMA).
19. If Licensing staff determines at any time that the filing presents significant policy, legal, compliance, or supervisory issues, including Bank Secrecy Act, CRA, or systems integration concerns, contacts HQ LIC to decide if and when:
  - To forward the application to HQ LIC for processing, or
  - To forward specific issues to HQ LIC for action (while continuing to process the application in the district office).
20. After consultation with the supervisory office regarding the institution's condition, determines if an OCC examination or visit is needed. If not needed, documents the decision in the file. If it is needed:
  - Requests the supervisory office to assign a national bank examiner (NBE) to the examination. Provides the NBE with relevant materials not already sent to the supervisory office (that is, charter number, contact person's name and phone number, any application amendments).
  - Coordinates with the supervisory office to set the scope of the exam and estimates the number of on-site hours it will require.
  - Notifies the contact person that an examination will be conducted and that the NBE will call to schedule the date. Advises the contact person of the approximate cost and that a letter will be forthcoming to that effect. Sends [Letter Advising of Examination Fee](#) with [Agreement to Pay for Examination](#) enclosure.
  - Receives the Agreement to Pay for Examination from the bank and notifies the ADC and NBE that we may proceed with the examination.
  - Obtains the number of hours spent on-site from the NBE, reduces it by 20 hours, and fills the hours in at the bottom of the Agreement to Pay for Examination. There is no charge for the first 20 hours of the exam. If



the total on-site hours are less than 20, there is no charge and no information should be sent to Financial Management.

- Forwards a copy of the completed Agreement to Pay for Examination with the [Cover Memo to Financial Management](#) to the Team Leader-Revenue in OCC Financial Management. Financial Management will prepare the invoice and return it.
- Sends the [Letter Forwarding the Examination Fee Invoice](#), along with the invoice received from Financial Management, to the applicant.

*Steps 21-23 only apply to combinations involving the formation of an interim national bank.*

## **Organizing the Interim Bank**

### **Sponsor**

21. Submits the Organization Certificate, Articles of Association, and Oath of Bank Directors for the interim national bank (see [Application: Interim National Bank Charter](#)).

### **Licensing Staff**

22. Reviews the Organization Certificate, Articles of Association, and Oath of Bank Directors for the interim national bank for accuracy and completeness. If complete, sends acknowledgment to the sponsor, accepting the Articles and declaring the interim bank a body corporate, and instructs bank to proceed with the interim bank's organization.

### **Sponsor**

23. Proceeds with the steps required to organize the interim national bank, filing the [Stock Payment Certificate and Oaths of Directors and Officers](#).

*Steps 24-25 only apply to combinations in which the OCC has received public comments or a request for hearings.*

## **Public Comments and Hearings**

### **Licensing Staff**

24. If copies of applications are requested, public comments filed, or hearings requested, refers to the "[Public Notice and Comments](#)" booklet.
25. Forwards comments to other units for evaluation and advice (for example, legal issues to the assigned legal division or office). If a CRA comment is received, promptly notifies HQ LIC.

## Analysis and Recommendation

### Licensing Staff

26. Gathers and reviews comments received from the supervisory office, compliance, community affairs officer, CDD, and others.
27. Consults with the supervisory office if a significant deviation condition is being considered.
28. If the Licensing staff, at any time, determines that issues exist that might require removing the application from expedited review, contacts HQ LIC for guidance. If the application is removed from expedited review, the Licensing staff promptly notifies the contact person orally and in writing, identifying the specific reason. Updates CAIS and the official file.
29. Prepares the [CM](#) or, if applicable, the [Expedited Business Reorganization Decision](#) form. For combinations under the Riegle-Neal Act, completes the Riegle-Neal Supplement to the Expedited Business Reorganization Decision form.
30. Prepares a [decision letter](#) or, for significant decisions as defined in PPM 1000-15, prepares a decision [statement or document](#) (decision document). The decision document or transmittal letter should reference related decisions made, such as those concerning branches, investments in operating subsidiaries and financial subsidiaries, noncontrolling investments, community development investments, investment in bank premises, fiduciary powers, request to issue dividend, decrease or increase capital, or the effect of the transaction on any undercapitalized bank involved in the combination.
31. For substantive combinations:
  - Forwards CM, draft decision letter, and, if applicable, decision document to the ADC and ADC analyst or large bank EIC, and requests that the ADC or large bank EIC provide final comments within five business days.
  - For transactions that the district deputy comptroller (DDC) or deputy comptroller for Midsize Banks (MDC) decides to review, forwards the CM, draft decision letter, and decision document, if applicable; and the supervisory office and ADC comments to the DDC or MDC, requesting that the DDC or MDC provide comments within five business days.

If there is a difference of opinion between the DDC or MDC comment and the director for district licensing's recommendation, Licensing staff notifies HQ LIC. HQ LIC notifies the Senior Deputy Comptroller for Midsize and Community Bank Supervision, works to resolve the difference, and documents the final resolution in the official file.

## Issues Directed to HQ LIC

### HQ LIC

32. Receives and reviews files the Licensing staff forwards, and solicits comments from other OCC divisions or supervisory agencies, if any. Makes CAIS entries.
33. Prepares and forwards a memorandum concerning the issues and, if appropriate, language to insert into the decision letter or, if applicable, decision document, to the district Licensing staff.

## Decision

### Licensing Staff

34. Deciding official [decides](#) the application under delegated authority, including, as appropriate, language received from HQ LIC in the decision document or approval letter (for example, language about the competitive effects of the combination).
35. Notifies the following of the decision:
  - The contact person by telephone. If the contact person requests, sends a facsimile copy of the decision letter and, if applicable, the decision document.
  - The ADC or large bank EIC by sending e-mail comments and a copy of the decision letter and, if applicable, the decision document.
  - The Securities and Corporate Practices Division (SCP) by e-mail if the bank is subject to 12 CFR 11.
36. Mails the decision letter and, if applicable, the decision document, to the contact person, along with a satisfaction survey.
37. For nonaffiliated combinations, notifies the DOJ by [letter](#) of the decision.
38. Notifies by [letter](#) other interested parties of the decision, enclosing a copy of the decision document, if applicable.
39. If a decision document or decision letter includes conditions imposed in writing under 12 USC 1818 or as HQ LIC directs, forwards a copy of the decision document or decision letter to the secretary to the director, Licensing Activities.
40. Makes CAIS entries.

## HQ LIC

41. Receives the official file, including CM, from the district Licensing staff. Makes CAIS entries.
42. Reviews the file, and:
  - Solicits comments from other OCC divisions or supervisory agencies.
  - Makes a recommendation. If Licensing recommends denial, contacts ,and seeks concurrence of, the Litigation Division.
  - Routes the official file to the deciding official.
43. Deciding official [decides](#) the application and returns the file to the HQ LIC staff.
44. Notifies the contact person of the decision by telephone. If the contact person requests, sends a facsimile copy of the decision letter and, if applicable, the decision document.
45. Notifies Licensing staff and the ADC and ADC analyst or large bank EIC of the decision by sending e-mail comments and attaching a copy of the decision letter and, if applicable, the decision document. Also notifies SCP of the decision by e-mail if the bank is subject to 12 CFR 11.
46. Mails the decision letter and, if applicable, the decision document, to the contact person, along with a satisfaction survey.
47. For nonaffiliated combinations, notifies the DOJ by [letter](#) of the decision.
48. Notifies by [letter](#) other interested parties of the decision, enclosing a copy of the decision document, if applicable.
49. If the decision document or decision letter includes conditions imposed in writing under 12 USC 1818 or as HQ LIC directs, forwards a copy of the decision document or decision letter to the secretary to the director, Licensing Activities.
50. Makes CAIS entries.

## Disclosure

### Bank

51. If the bank is subject to 12 CFR 11, files preliminary proxy materials or information statements with SCP in Washington.

### SCP

52. Reviews proxy materials or information statements and, if warranted, does not object to distribution to the shareholders. Notifies the bank.

## Shareholder Approval

### Bank

53. Publishes notice of shareholders' meeting on the same day of the week for four consecutive weeks (see Shareholder Considerations section for discussion).
54. Mails notice of shareholders' meeting, with accompanying proxy materials or information statements, to all shareholders by certified or registered mail at least 10 days prior to the meeting, or earlier, if required. Also sends definitive copies of the shareholders' materials to the director for district licensing.
55. Mails proxy materials or information statements to the appropriate district office.
56. Obtains shareholders' approval of the combination.

## Consummation

### Bank

57. Notifies the director for district licensing by e-mail or letter of the date that the bank plans to consummate the combination at least 10 days in advance (five days in advance for a combination processed under 10-day, 5-day procedures).
58. If not previously done, submits the Secretary's Certificates of the board of directors approval; the executed combination agreement; the Articles of Association for consolidations and mergers in which the Articles of Association changes are made, for the resulting bank; and, if applicable, the Secretary's Certificates of shareholders' ratification.
59. Prepares and submits an updated [Annual Report on Operating Subsidiaries](#). Also refer to the [Annual Report Guidelines](#) for preparation instructions.

## Licensing Staff

60. Reviews the bank's consummation notice and verifies that all required actions have been completed. Verifies that SCP has reviewed the final proxy materials to make sure no significant inconsistencies exist between the proxy materials and the application. Notifies the applicant by telephone of any problems.
61. Prepares the certification letter and mails it to the resulting bank. Includes appropriate authorization or certification for branches, investment in operating or financial subsidiaries, community development investments, investment in bank premises, dividend declaration, fiduciary powers, and increase or decrease in capital, if applicable, in the certification letter. Mails

the certification letter following consummation of the combination. Forwards the updated “Annual Report on Operating Subsidiaries” to HQ LIC.

62. Makes CAIS entries.

## **Close Out**

### **HQ LIC**

63. Reviews the file for completeness, separates documents, and sends the official file and documents to Central Records.
64. Makes CAIS entries.
65. Notifies the ADC and ADC analyst or large bank EIC of the opening date by sending an e-mail and, if warranted, other materials.

## **Post Consummation**

### **Bank**

66. Files a list of directors and directors’ oaths for all new directors who have not previously taken the oath.
67. Surrenders any national bank charter certificates that are no longer valid.
68. Surrenders any branch certificates or authorizations for national bank branches to be closed as a result of the transaction.

## **Dissenters’ Rights**

### **Bank or Dissenters**

69. Submits a request for a stock appraisal directly to HQ LIC in accordance with 12 USC 214, 215, 215a, 215a-2, 215a-3, 215c, or 12 CFR 5.33.

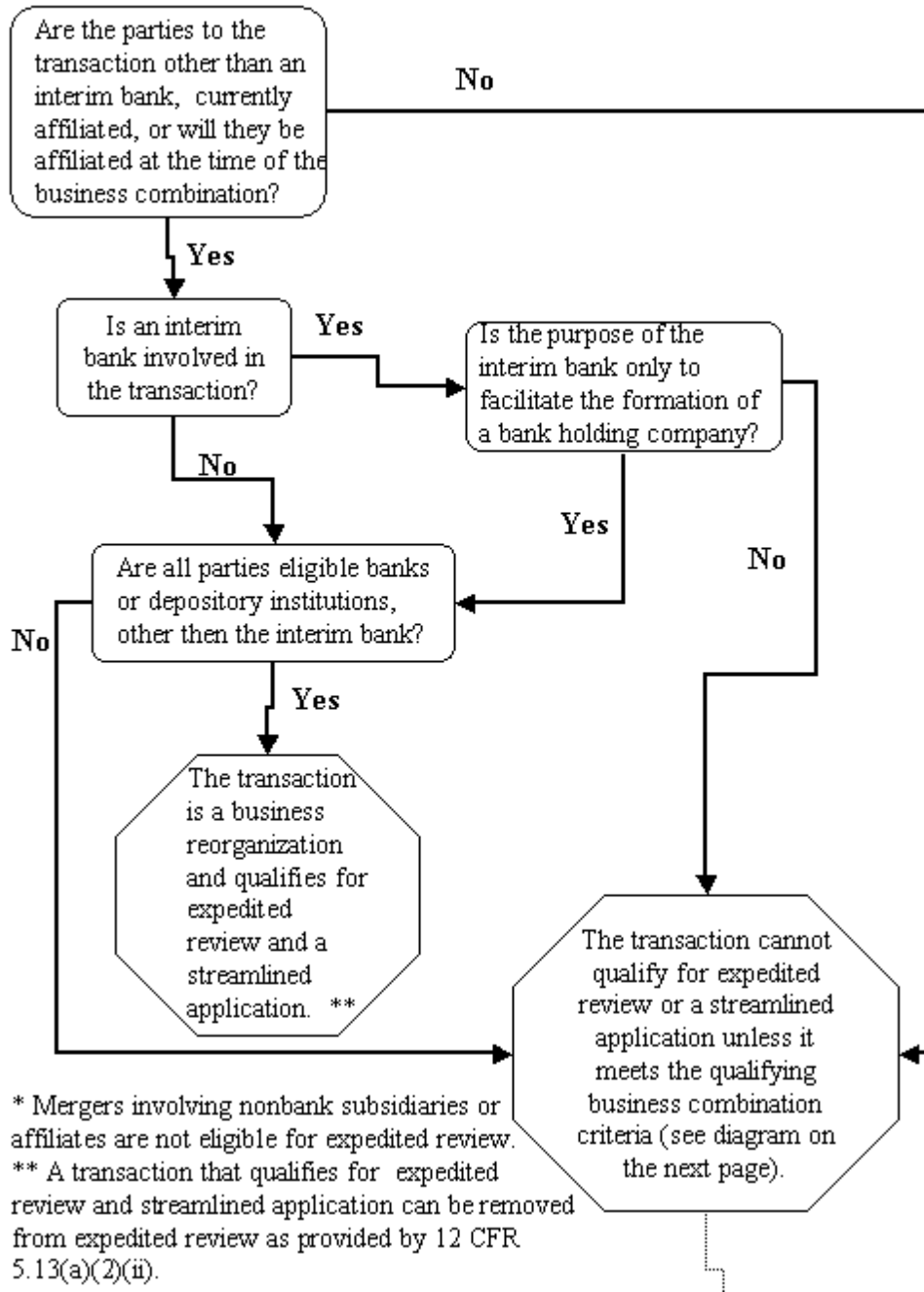
### **HQ LIC**

70. Initiates a stock appraisal in CAIS and enters the appropriate information.
71. Establishes the official file to maintain all original documents.
72. Sends [acknowledgment letter](#) and requests the dissenting shareholder(s) to provide any additional information that the OCC should consider.
73. Sends [letter](#) to resulting bank requesting information to confirm that dissenters’ rights were perfected and to obtain relevant information.
74. Upon receipt of the information from the bank, completes checklist for determining whether dissenting shareholders’ rights were perfected. (See

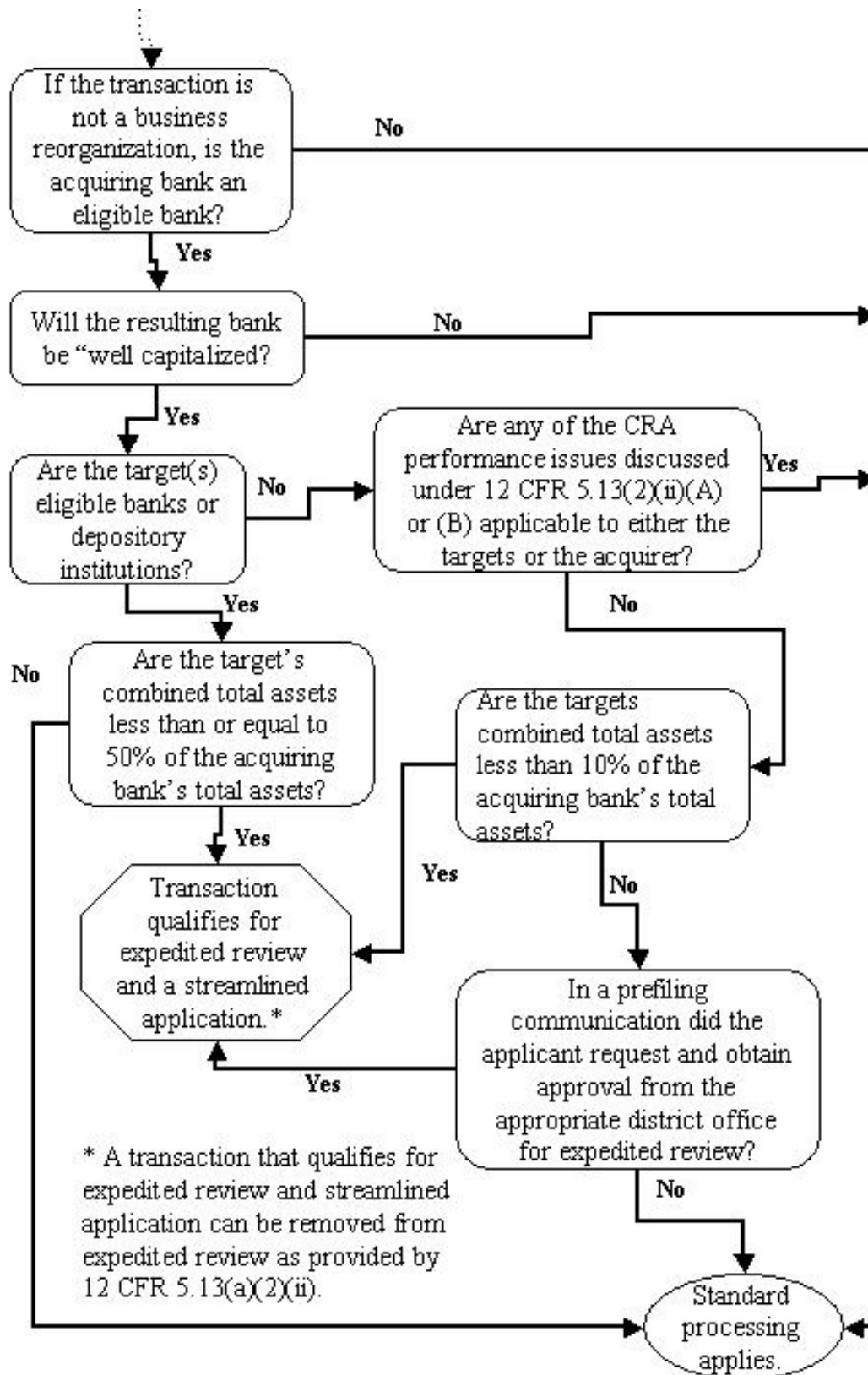
“Perfection of Dissenting Shareholder Rights for OCC Appraisal” - [Checklist](#).  
Seeks Bank Activities and Structure’s (BAS) advice, as necessary, in determining whether dissenters’ rights were perfected.)

75. If dissenting shareholder rights were not perfected, confirms such determination with BAS. Advises dissenting shareholder and bank in writing that dissenters’ rights were not perfected and that the OCC will not conduct an appraisal. Goes to step 80.
76. Prepares appraisal of the shares and forwards to deciding official.
77. Deciding official approves appraisal by signing the last page.
78. Prepares transmittal letters to [dissenting shareholder\(s\)](#) and [resulting bank](#) with a copy of appraisal enclosed in each. Also, prepares invoice for cost of appraisal and sends with transmittal letter(s), as appropriate. Provides copies of invoice(s) to Policy and Treasury, Financial Management.
79. Provides Communications with copy of appraisal.
80. Makes CAIS entries.
81. Sends official file to Central Records.

**Appendix A: Expedited Review and Streamlined Application Eligibility  
Criteria for Combinations Involving Banks or Depository Institutions \***







## Appendix B: Bank Merger Competitive Review (1995)

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### Introduction and Overview

The banking agencies and the Department of Justice (DOJ) review the competitive impact of bank and bank holding company mergers under the banking and antitrust laws to proscribe mergers that would tend to substantially lessen competition. To speed this competitive review and reduce regulatory burden on the banking industry, the banking agencies and the Department have developed screens (attached as Screens A and B) to identify proposed mergers that clearly do not have significant adverse effects on competition. In addition to the screens, the banking agencies and the DOJ have identified information, described in Section 2, which has proven to be useful in analyzing the competitive effects of proposed mergers highlighted by Screen A or Screen B.

Parties planning a merger transaction may wish to consult with the relevant banking agency or the DOJ before submitting an application. When a proposed merger causes a significant anticompetitive problem, it is often possible to resolve the problem by agreeing to make an appropriate divestiture. In such cases, it may be useful to discuss the matter with the DOJ and the relevant regulatory agency. The DOJ seeks divestitures that will resolve the loss of competition in the market. A divestiture will resolve the problem if it ensures the presence of a strong and vigorous competitor that replaces the competition lost because of the merger.

### Section 1 – Screening

#### Banking Agencies

The banking agencies rely primarily on Screen A, which looks at competition in predefined markets developed by the Federal Reserve. If the calculation specified in Screen A does not result in a post merger HHI over 1800 and an increase of more than 200, the banking agencies are unlikely to further review the competitive effects of the merger. If the result of the calculation specified in Screen A exceeds the 1800/200 threshold, applicants may consider providing additional information. See Section 2 for a description of the types of information that may be relevant. Providing such information with a merger application can eliminate delays in the review process and may avoid special requests for additional information.

#### DOJ

The DOJ initially reviews transactions using data from the banking agencies' screen, Screen A. If a proposed merger exceeds the 1800/200 threshold in Screen A, applicants should consider submitting the calculations set forth in Screen B.

In some cases, the DOJ may further review transactions that do not exceed the 1800/200 threshold in Screen A. This is most likely when Screen A does not reflect fully the competitive effects of the transaction in all relevant markets, in particular lending to small and medium-sized businesses. For example, the DOJ is more likely to review a transaction involving two commercial banks if the post merger Herfindahl-Hirschman Index (HHI) approaches 1800 and the HHI increase approaches 200, and Screen A includes thrifts which are not actively

engaged in commercial lending. In addition, the DOJ is more likely to review a transaction if the predefined market in which the applicants compete is significantly larger than the area in which small business lending competition may exist (for example, the predefined market includes multiple counties, or is significantly larger than an RMA in which the applicants are located). In such a case, applicants should consider submitting the calculations set forth in Screen B. Often, the DOJ will review the information in Screen B and find no need for further review of the proposed merger.

If the calculation specified in Screen B results in an HHI over 1800 and an increase of over 200, applicants may consider providing additional information. (See Section 2 for a description of the types of information that may be relevant. Providing such information with a merger application can eliminate delays in the review process and may avoid special requests for additional information.)

In some limited instances, the DOJ may examine a transaction in further detail, even though Screen A and Screen B do not identify anticompetitive problems. This is most likely to occur when it appears that:

*The screens' market area does not fit the transaction.* Sometimes the geographic market used in the screens may not be an appropriate choice for analyzing the particular merger involved. For example, the screens' market area is a county, and one merging institution is at the east end of one county and the other merging institution is at the west end of the adjacent county. The institutions may in reality be each other's most important competitors, but the screens would not reflect that fact. Or the screens' market area may be quite large, but the merger involves two institutions at the center of the market. Institutions at the periphery of the market area may be improbable substitutes for the competition that would be lost in the transaction and thus the transaction should be scrutinized in a narrower area to ensure that the relevant geographic market is considered.

*Specialized products are involved.* Sometimes the merging institutions are competitors for a specialized product and few of the institutions included in the screens compete in offering that product. For example, the screens likely would not identify a concentrated market for working capital loans to medium-sized commercial customers, if the market area has many institutions but the merging institutions are two of only a few institutions able to compete for such business.

In such cases, applicants may wish to submit additional information. (See Section 2 for a description of the types of information that may be relevant. Providing such information with a merger application can eliminate delays in the review process and may avoid special requests for additional information.)

## Section 2 -- Additional Analysis

The DOJ and the banking agencies are likely to examine a transaction in more detail if it exceeds the 1800/200 threshold in Screen A. The DOJ is also likely to examine the effect of a proposed merger on competition for commercial loans if the transaction exceeds the 1800/200 threshold in Screen B. In instances when a screen highlights a transaction for further review, the applicant may present additional information not considered in the screen.

In cases when either Screen A or Screen B highlights a transaction for further scrutiny, additional information may establish a clearer picture of competitive realities in the market. Such information may include:

Evidence that the merging parties do not significantly compete with one another;

Evidence that rapid economic change has resulted in an outdated geographic market definition, and that an alternate market is more appropriate;

Evidence that market shares are not an adequate indicator of the extent of competition in the market, such as:

Evidence that institutions in the market would be likely to expand current levels of commercial lending. Such evidence might include current loan-to-deposit ratios, recent hiring of new commercial loan officers, pending branch applications or significant out-of-market resources that would be shifted into the market in response to new loan opportunities;

Evidence that a particular institution's market share overstates or understates its competitive significance (such as evidence that an institution is rapidly gaining or losing market share or that the institution is not competitively viable or is operating under regulatory restrictions on its activities);

Evidence concerning entry conditions, including evidence of entry by institutions within the last two years and the growth of those institutions that have entered; evidence of likely entry within the next two years, such as pending branch applications; and expectations about potential entry by institutions not now in the market area and the reasons for such expectations, including legal requirements for entry.

In cases where Screen B highlights a transaction for further scrutiny, applicants may consider preparing an HHI worksheet for the market area using, instead of deposits, data from the relevant Reports of Condition on commercial and industrial loans: a) below \$250,000 and b) between \$250,000 and \$1,000,000. Such information can be a useful assessment of actual competition for small business lending.

Additional information that may be relevant includes evidence of competition from sources not included in Screen B, such as:

Evidence that a thrift institution is actively engaged in providing services to commercial customers, particularly loans for business startup or working capital purposes and cash management services;

Evidence that a credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market;

Evidence of actual competition by out-of-market institutions for commercial customers, particularly competition for loans for business startup or working capital purposes;

Evidence of actual competition by nonbank institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.

If the applicants believe that Screen B does not accurately reflect market concentration and competitive realities in a particular area, they are encouraged to submit additional information explaining the reasons for their belief. This information should include an HHI worksheet that indicates the geographical area that should be covered, the institutions that should be included, the method of calculating the market share of each institution (for example, deposits, branches, loans), and the reasons why this information is preferable to the information supplied in Screen B. Inclusion of institutions outside the areas identified in Screen B should be supported, wherever possible, by evidence of actual competition by these institutions. Such alternative worksheets should be submitted in addition to, rather than in lieu of, the HHI worksheets from Parts A and B.

## Glossary

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An **affiliate** generally means any company, including a bank or other depository institution, which controls or is under common control with a national bank. Certain other entities also are affiliates for purpose of sections 23A and 23B of the Federal Reserve Act (12 USC 371c and 371c-1) and Regulation W (12 CFR 223).

The **applicant** refers to either the acquiring or target depository institutions.

The **appropriate district office** means: (1) headquarter's Licensing (HQ LIC) for all national bank subsidiaries of certain holding companies assigned to the Washington, DC, licensing unit; (2) the appropriate OCC district office for all national bank subsidiaries of certain holding companies assigned to a district office licensing unit; or (3) the OCC's district office where the national bank's supervisory office is located for all other banks.

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

A **business reorganization** means either:

- (i) a business combination between eligible banks, or between an eligible bank and an eligible depository institution, that are controlled by the same holding company, or that will be controlled by the same holding company prior to the date of the combination, or
- (ii) a business combination between an eligible bank and an interim bank chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank for those of a newly formed holding company and receives, after the transaction, substantially the same proportional share interest in the holding company as it held in the eligible bank (except for changes in interest resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank.<sup>20</sup>

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

**Consolidation**, under 12 USC 215 and 1828(c), refers to the combination of existing depository institutions into a new entity under a national bank charter, or under the charter of an existing national bank, when at least one institution is a national bank. Shareholders of the consolidating institutions surrender their equity in return for either equity in the consolidated bank or another form of consideration. Shareholders of the consolidating depository institutions must

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<sup>20</sup>A business combination involving a merger with an interim bank to eliminate minority shareholders (that is, "freeze out" transaction) does not meet the definition of a business reorganization.

approve the transaction under 12 USC 215, which provides dissenters' rights to shareholders of all consolidating institutions.

**Control** refers to when a company or shareholder (i) directly or indirectly, or acting through one or more other persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other company, or (ii) controls in any manner the election of a majority of the directors or trustees of the other company. No company shall be deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity. Regulation W expands the statutory definition of control significantly in two respects. First, it provides a rebuttable presumption that a shareholder that owns or controls 25 percent or more of a company's nonvoting equity capital controls that company. Second, it provides a rebuttable presumption that a shareholder that owns or controls instruments (including warrants and options) that are convertible or exercisable at the option of the holder into other securities (such as common stock), controls those other securities.

A **depository institution** is any bank or savings association.

A **dormant bank** is a bank that is no longer engaged in core banking activities other than on a *de minimis* basis. This definition includes, for example, a bank that has significantly reduced its activities and services or that has contracted out significant portions of its operations to third party service providers, other than in the ordinary course of the bank's ongoing business.

An **eligible bank** is a national bank that:

- Has a composite CAMELS rating of 1 or 2.
- Has an "outstanding" or "satisfactory" CRA rating. (This factor does not apply to an uninsured bank or branch or a special purpose bank covered by 12 CFR 25.11(c)(3)).
- Is well capitalized as defined at 12 CFR 6.4(b)(1).
- Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive or, if subject to any such order, agreement or directive, is informed in writing by the OCC that the bank may be treated as an "eligible bank."

An **eligible depository institution** means a state bank or a federal or state savings association that is FDIC-insured and that meets the eligible bank criteria.

**Fair value** is the amount at which an asset (or liability) could be bought (or incurred) or sold (or settled) in a current transaction between willing parties, other than in a forced or liquidation sale.

The **Herfindahl-Hirschman Index (HHI)** is a statistical measure of market concentration. It is used as the principal measure of market concentration in the Merger Screen. The HHI for a given market is calculated by squaring each individual competitor's share of total deposits within the market and summing the squared market share products. The more concentrated a specific market becomes the higher the HHI. For example, for a market with four competitors

with equal market shares, the HHI would be:  $25^2+25^2+25^2+25^2=2,500$ ; however, for a market with two banks having 40 percent of the deposits and two banks having 10 percent of the deposits, the HHI would be:  $40^2+40^2+10^2+10^2=3,400$ . For a more concentrated market with one bank having 60 percent of the deposits and two banks having 20 percent of the deposits, the HHI would be:  $60^2+20^2+20^2=4,400$ .

**Home state**, as applied to a national bank under the Riegle-Neal Act, is the state in which the main office of the bank is located. For a state bank, it is the state by which the bank is chartered.

**Host state**, as applied to both a national and a state bank under the Riegle-Neal Act, is any state other than its home state, in which the bank maintains, or seeks to establish and maintain, a branch (or branches).

An **interim bank** is a national bank that does not operate independently, but exists solely as a vehicle to accomplish a business combination.

**Lending limit** means the legal limit on the aggregate amount of credit that a bank can extend to a single borrower. In certain circumstances loans to separate borrowers are combined for purposes of applying the limit. The limit is calculated as a percentage of the bank's capital and surplus.

**Low-quality assets**, as defined under Regulation W, includes: (1) an asset (including a security), classified as "substandard," "doubtful," or "loss," or treated as "special mention;" or "other transfer risk problems," either in the most recent report of examination or in any internal classification system used by the member bank or the affiliate (including an asset that receives a rating that is substantially equivalent to "classified" or "special mention" in the internal system of the member bank or affiliate); (2) an asset in nonaccrual status; (3) an asset on which principal or interest payments are more than 30 days past due;(4) an asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor; and (5) assets acquired DPC that have not yet been reviewed in an examination or inspection.

**Merger**, under 12 USC 215a, 215c, 1828(c), and 12 CFR 5.33, generally refers to the acquisition of one or more depository institutions by an existing national bank or interim national bank. The shareholders of the target institution surrender their equity in return for either equity in the acquiring bank or another form of consideration.

The **Merger Screen** is a screening device based on the HHI used primarily by the OCC and the Department of Justice (DOJ) to identify quickly proposed business combinations that do not present anticompetitive concerns. The screen also includes a description of the DOJ's antitrust review process. The applicant for a nonaffiliated business combination should submit the Merger Screen.

**National bank** means any national banking association operating under the OCC's supervision.

**Nonbank affiliate** of a national bank, for purposes of 12 USC 215a-3, means any company, other than a bank or federal savings association that controls, is controlled by, or is under common control with the national bank.



A **qualifying business combination** is a transaction that satisfies one of the following standards:

- (i) At least one party to the transaction is an eligible bank, and all other parties to the transaction are eligible banks or eligible depository institutions; the resulting national bank will be well capitalized immediately following consummation of the transaction; and the total assets of the target institution[s] are no more than 50 percent of the total assets of the acquiring bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;
- (ii) The acquiring bank is an eligible bank; the target bank is not an eligible bank or an eligible depository institution; the resulting national bank will be well capitalized immediately following consummation of the transaction; and the applicants in a pre-filing communication request and obtain approval from the appropriate district office to use the streamlined application;<sup>21</sup> or
- (iii) The acquiring bank is an eligible bank; the target bank is not an eligible bank or an eligible depository institution; the resulting bank will be well capitalized immediately following consummation of the transaction; and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

A **significant deviation or change** means a material variance from the bank's business plan or operations that occurs after the proposed transaction has consummated.

An **undercapitalized bank** is an FDIC-insured depository institution that meets the criteria established in 12 CFR 6.4(b)(3), (4), or (5), for an undercapitalized, significantly undercapitalized, or critically undercapitalized bank, respectively.

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<sup>21</sup> Expedited review and use of the streamlined business combination application under this standard are not available for a transaction that fails the size test in standard (i). Expedited processing also is not available under this standard or standard (iii) for a transaction in which the target institution has a CRA rating of less than satisfactory institution-wide, or in a state or multistate Metropolitan Statistical Area (MSA)(12 CFR 25.12), or the performance of either the acquirer or the target is less than satisfactory in any MSA or in the non-MSA portion of a state, in which the acquiring bank seeks to expand through the business combination.

## References

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| <b>Accounting</b>                                 |  |
| Accounting Issuances                              | Accounting Principles Board Opinion<br>Numbers 16 and 17<br>AICPA Accounting Interpretation Number 39;<br>Statement of Financial Accounting Standards<br>Number 72 |
| Issuances   | OCC<br>Banking Circular 240<br>and OCC Bulletin 94-23  |
| <b>Assessment Schedule</b>                        |  |
| Issuance  | OCC Bulletin 2005-40 (or see annual update)  |
| <b>Asset Composition</b>                          |  |
| Regulation  | 12 CFR 5.53  |
| <b>Authorization to Commence Banking Business</b> |  |
| Laws  | 12 USC 26 and 27   |
| <b>Bank Holding Company Act</b>                   |  |
| Law   | 12 USC 1841  |
| Regulation  | 12 CFR 225   |
| <b>Bank Merger Act</b>                            |  |
| Law   | 12 USC 1828(c)   |
| Regulation  | 12 CFR 5.33  |
| <b>Bank and Thrift Combinations</b>               |  |
| Laws  | 12 USC 215, 215a, 215a-1, 215c,<br>1467(a)(5), 1815(d)(3), 1828(c), 1831u,<br>1842(d)  |
| Regulation  | 12 CFR 5.33  |
| <b>Bank Secrecy Act</b>                           |  |
| Laws  | 31 USC 5311-5328   |
| Regulations                                       | 12 CFR 21.21, 31 CFR 103   |
| <b>Branch and Subsidiary Authorization</b>        |  |
| Laws  | 12 USC 24(7), 36   |
| Regulations                                       | 12 CFR 5.30, 5.33, 5.34  |
| <b>Branch Closings</b>                            |  |
| Law   | 12 USC 1831r-1   |
| Issuance  | Joint Policy Statement on Branch Closing<br>Notices and Policies, June 3, 1999   |
| <b>Business Combinations</b>                      |  |
| Laws  | 12 USC 24(7), 215, 215a, 215a-1, 215a-2,<br>215a-3, 215c, 1828(c)  |
| Regulation  | 12 CFR 5.33  |

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| <b>Business Valuation</b>                                      |   |
| Publications   | “PPC’s Guide to Business Valuations,”<br>Fishman, Pratt, Griffith, Wilson; 13 <sup>th</sup> Edition<br>(Jan.2003)<br>“Valuing a Business,” Pratt, Reilly, Schweih   |
| <b>Capital Requirements</b>                                    |   |
| Laws   | 12 USC 92a, 36(c), 3907   |
| Regulations  | 12 CFR 5.20, 5.33   |
| <b>Capital Stock</b>   |   |
| Laws   | 12 USC 51c, 52, 53, 55  |
| <b>Capital Structure Change</b>                                |   |
| Laws   | 12 USC 57, 59   |
| Regulations  | 12 CFR 5.46, 5.47, 7.2020, 7.2023   |
| <b>Certificate Authorizing Transaction of Banking Business</b> |   |
| Laws   | 12 USC 27, 1814   |
| <b>Community Reinvestment Act of 1977</b>                      |   |
| Laws   | 12 USC 2901 to 2908   |
| Regulation   | 12 CFR 25   |
| <b>Competitive Analysis</b>                                    |   |
| Law  | 12 USC 1828(c)(4)   |
| Regulation   | 12 CFR 5.33(e)(1)(i)  |
| <b>Consolidation</b>   |   |
| Laws   | 12 USC 215, 1828(c)   |
| Regulation   | 12 CFR 5.33   |
| <b>Depository Institution Management Interlocks Act</b>        |   |
| Law  | 12 USC 3201   |
| Regulation   | 12 CFR 26   |
| <b>De Minimis Market Test</b>                                  |   |
| Issuance   | OCC<br>Decision, April 8, 1983, Application to merge<br>The National Bank and Trust Company of<br>Norwich, Norwich, NY, with National Bank of<br>Oxford, Oxford, NY |
| <b>Directors</b>   |   |
| Laws   | 12 USC 71 - 76  |
| <i>Number of</i>   |   |
| Law  | 12 USC 71a  |
| <i>Oath of</i>   |   |
| Law  | 12 USC 73   |

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| <i>President as</i>                       |  |
| Law                                       | 12 USC 76  |
| <i>Purchases from and Sales to</i>        |  |
| Law                                       | 12 USC 375   |
| <i>Qualification of</i>                   |  |
| Law                                       | 12 USC 72  |
| Regulation                                | 12 CFR 7.2005  |
| <b>Examination of National Banks</b>      |  |
| Law                                       | 12 USC 481   |
| <b>Filing Fees</b>                        |  |
| Regulation                                | 12 CFR 5.5   |
| <b>Fiduciary Powers</b>                   |  |
| Law                                       | 12 USC 92a   |
| Regulation                                | 12 CFR 5.26  |
| Issuance                                  | Interpretive Letter 695, December 8, 1995  |
| <b>Interstate Combinations</b>            |  |
| Laws                                      | 12 USC 24(Seventh), 30, 36, 215, 215a, 215a-1, 215c, 1815(d)(3), 1823(c), 1828(c), 1831o(b)(1)(B), 1831u, 1835a, 1842(d) |
| Regulation                                | 12 CFR 5.33  |
| <b>Intrastate Combinations</b>            |  |
| Laws                                      | 12 USC 24 (Seventh), 215, 215a, 215c, 1828(c)  |
| Regulation                                | 12 CFR 5.33  |
| <b>Investment in Bank Premises</b>        |  |
| Law                                       | 12 USC 371d  |
| Regulations                               | 12 CFR 5.37, 7.1000  |
| <b>Lending Limit Calculation</b>          |  |
| Law                                       | 12 USC 84  |
| Regulations                               | 12 CFR 3, 6, 32  |
| <b>Liquidation</b>                        |  |
| Laws                                      | 12 USC 181, 182  |
| Regulation                                | 12 CFR 5.48  |
| <b>Merger</b>                             |  |
| Laws                                      | 12 USC 215, 215a, 215c, 215a-1, 215a-3, 1828(c)  |
| Regulation                                | 12 CFR 5.33  |
| <b>Meetings and Hearings</b>              |  |
| Regulation                                | 12 CFR 5.11  |
| <b>Operating Subsidiary Annual Report</b> |  |
| Regulation                                | 12 CFR 5.34(e)(6)  |
| Issuance                                  | OCC Bulletin 2004-55   |

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| <b>Place of Business</b>   |   |
| Laws   | 12 USC 22, 81   |
| <b>Proxy or Information Statement</b>                                      |   |
| Law  | 15 USC 78   |
| Regulations  | 12 CFR 5.33, 11   |
| <b>Public Comments</b>   |   |
| Regulation   | 12 CFR 5.10   |
| Issuance   | <i>Comptroller's Licensing Manual</i> , Public Notice and Comments booklet              |
| <b>Publication of Application (Public Notice)</b>                          |   |
| Law  | 12 USC 1828(c)  |
| Regulations  | 12 CFR 5.33, 5.8  |
| <b>Publication of Significant Corporate Decisions</b>                      |   |
| Issuance   | PPM 1000-15, September 5, 2001  |
| <b>Purchase and Assumption</b>   |   |
| Laws   | 12 USC 24(7), 1828(c)   |
| Regulation   | 12 CFR 5.33   |
| <b>Regulation W</b>  |   |
| Regulation   | 12 CFR 223  |
| <b>Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994</b> |   |
| Laws   | 12 USC 36(d), (e), (f); 215a-1: 1823(c), 1828(d); 1831u; 1835a; 2906(b)(1)(B), (d), (e) |
| Regulation   | 12 CFR 5.33   |
| Issuance   | OCC Bulletin 2003-6   |
| <b>Savings Associations</b>  |   |
| Laws   | 12 USC 215c, 1828(c), 1815(d)(3)  |
| <b>Shareholders' List</b>  |   |
| Law  | 12 USC 62   |
| <b>Shareholders' Meeting</b>   |   |
| Laws   | 12 USC 214a(a), 215a(a)(2)  |
| <b>Systems Integration</b>   |   |
| Issuance   | OCC AL 98-1   |
| <b>Transactions with Affiliates, Restrictions</b>                          |   |
| Laws   | 12 USC 371c (Section 23A), 371c-1 (Section 23B)   |
| Regulation   | 12 CFR 223 (Regulation W)   |