
DEPARTMENT OF THE TREASURY**Office of the Comptroller of the
Currency****12 CFR Part 5****[Docket No. 04-02]****RIN 1557-AC11****Fundamental Change in Asset
Composition of a Bank****AGENCY:** Office of the Comptroller of the
Currency, Treasury.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its regulations to require a national bank to obtain the approval of the OCC before two types of fundamental changes in the composition of the bank's assets: (1) Changing the composition of all, or substantially all, of its assets through sales or other dispositions or, (2) after having sold or disposed of all or substantially all of its assets, subsequently purchasing or otherwise acquiring assets. The proposal also provides that, in the second case, the OCC will apply, among other factors,

the same factors as it applies to the establishment of a *de novo* bank. This new approval requirement will enable the OCC to better assess the bank's compliance with applicable law and safe and sound banking practices.

DATES: Comments must be received by March 8, 2004.

ADDRESSES: Please send your comments to: Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW., Mail Stop 1-5, Washington, DC 20219, Attention: Docket No. 04-02. Due to delays in paper mail delivery in the Washington, DC area, commenters are encouraged to submit their comments by fax or e-mail. You may fax your comments to (202) 874-4448 or electronic mail them to regs.comments@occ.treas.gov.

Comments may be inspected and photocopied at the OCC's Public Information Room, 250 E Street, and SW., Washington, DC. You can make an appointment to inspect and photocopy comments by calling (202)-874-5043.

FOR FURTHER INFORMATION CONTACT: Heidi M. Thomas, Special Counsel, Legislative and Regulatory Activities, at (202) 874-5090; or Jan Kalmus, NBE/Licensing Expert, Licensing Policy and Systems, at (202) 874-5060.

SUPPLEMENTARY INFORMATION:

I. Background

A national bank that divests itself of assets through sale or other disposition to become a "stripped" or "dormant" bank charter, or, having "stripped down," subsequently takes on new assets through purchases or acquisitions, raises significant supervisory concerns. These concerns include increased operations risk, increased concentration risk (especially where asset composition changes as a result of divestiture), and the ability of bank management to implement the new strategy successfully. In addition, the dormant bank being revived may propose to engage in activities that significantly deviate or are a change from the bank's original business plan or operations.¹ Ill-conceived, poorly

¹ The OCC defines a significant deviation from a bank's business plan or operations to include a material deviation or material change in the bank's: (1) Projected growth, such as planning significant growth in a product or service; (2) strategy or philosophy, such as significantly reducing the emphasis of its targeted niche (for example, small business lending) in favor of significant expansion of another area (for example, funding large commercial real estate projects); (3) lines of business, such as initiating a new program for subprime lending; (4) funding sources, such as shifting from core deposits to brokered deposits; (5) scope of activities, such as establishing transactional Internet banking or entering new, untested markets; (6) stock benefit plans for *de novo*

planned, or inadequately executed changes in a national bank's business can expose the bank to imprudent levels of risk, with the potential for adverse consequences for the bank's financial condition and, in the extreme situation, for its viability.² Even entry into lines of business that are traditional for national banks may present elevated levels of risk to a particular bank if the bank expands too quickly from a dormant status, misjudges its markets, or fails to ensure that bank management and internal control systems keep pace with the change. Moreover, the acquisition of a dormant charter by a third party raises concerns about the need to thoroughly review the nature of the services and products that might be initiated by an acquiring entity.

Our current regulations do not require the approval of the OCC before a bank "strips down" to a dormant bank charter, nor do they require our approval when a dormant bank increases its asset size to engage again in the business of banking. To better assess the bank's compliance with applicable law and safe and sound banking practices, we are proposing to amend our regulations to require prior OCC approval for two types of fundamental changes in the composition of a national bank's assets: (1) A change in composition of all or substantially all of a bank's assets resulting from a sale or other disposition of the bank's assets, or (2) an increase in the asset size of a national bank that had previously "stripped down" in a transaction described in item (1), regardless of existing or new ownership.

In addition, because a "stripped" or dormant charter that subsequently increases in asset size fundamentally resembles a new entrant obtaining a new charter, transactions described in item (2) will be evaluated under the same standards that the OCC applies to a *de novo* national bank charter proposal.

banks, including the introduction of plans that were not previously reviewed during the chartering process with no objection by the OCC; and (7) relationships with a parent company or affiliate, such as a shift to significant reliance on a parent or affiliate as a funding source or provider of back office support. See OCC's Significant Deviation Policy, as posted as a supplemental policy document to the Charters Booklet of the Comptroller's Licensing Manual, <http://www.occ.treas.gov/corpbook/forms/SigDevPolicy8-03.pdf>.

² In the past few years, for example, some national banks have materially changed the general character of their business by shifting to a concentration of subprime loans or relying on technology-based product and service delivery systems. In some cases, the safety and soundness of these banks was adversely affected because bank management did not fully understand or effectively control the risks associated with the changes.

II. Description of the Proposal

Approval requirements. This proposal would add a new § 5.53 to subpart D of 12 CFR part 5. Proposed § 5.53(c) requires that a national bank obtain the OCC's prior written approval before changing the composition of all, or substantially all, of its assets through (1) sales or other disposition or, (2) after having sold or disposed of all or substantially all of its assets, through purchases or other acquisitions. A bank that has disposed of all or substantially all of its assets before the effective date of this regulation must comply with the prior approval requirement if it purchases or otherwise acquires or takes on new assets after the regulation takes effect. Proposed § 5.53(d) specifies that this approval requirement does not apply to a change in composition of all, or substantially all, of a bank's assets that the bank undertakes in response to direction from the OCC (e.g., in an enforcement action pursuant to 12 U.S.C. 1818) or pursuant to a statute or regulation that requires OCC review or approval (e.g., a voluntary liquidation pursuant to 12 U.S.C. 181 and 12 CFR 5.48).

We note that the acquisition of deposits by a dormant bank raises the presumption that the bank intends to use the deposits to fund an increase in assets, which would trigger this proposal's application requirement. A dormant bank should not gather deposits to fund its asset acquisition without first seeking the approval of the OCC pursuant to this proposal.

In reviewing applications filed under § 5.53, we will consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers. Relevant to our consideration of an application to dispose of all or substantially all of the bank's assets will be the reasons for the proposed decrease in asset size and future plans for the bank charter (including any plans for liquidation), future asset growth, future plans to market or sell the charter, and future business plans, as applicable. Depending on the circumstances presented in the bank's application, our approval of the bank's disposition of all or substantially all of its assets will address how long the dormant charter may continue, and could include a requirement that the bank submit a plan of liquidation.

In reviewing an application in connection with an increase in the assets of a stripped charter, we will consider the bank's future business plan and whether this plan involves activities that significantly deviate from

the bank's original business plan or operations prior to its stripped status. We also will consider the applicant's staffing plans, plans for oversight of the activity within the bank, and accountability to the board of directors, along with the applicant's plans to acquire, develop, or modify internal control systems adequate to monitor the new activity.

This proposal also provides that, where a national bank has sold or otherwise disposed of its assets in a transaction requiring approval pursuant to this new § 5.53, our review of any subsequent growth in assets pursuant to this proposal will include, among other things, the factors governing the organization of a *de novo* bank under 12 CFR 5.20. In evaluating an application to establish a *de novo* bank, we consider whether the proposed bank: (1) Has organizers who are familiar with national banking laws and regulations; (2) has competent management, including a board of directors, with ability and experience relevant to the types of services to be provided; (3) Has capital that is sufficient to support the projected volume and type of business; (4) Can reasonably be expected to achieve and maintain profitability; and (5) Will be operated in a safe and sound manner. In addition, § 5.20(f) provides that we also may consider additional factors listed in section 6 of the Federal Deposit Insurance Act, 12 U.S.C. 1816, including the risk to the Federal deposit insurance fund, and whether the proposed bank's corporate powers are consistent with the purposes of the Federal Deposit Insurance Act and the National Bank Act.

Reference to "business plan." This proposal makes a conforming change to § 5.20 to provide that any use of the term "operating plan" or "operating plans" will be changed to "business plan or operating plan" or "business plans or operating plans," as appropriate. Currently, § 5.20 only uses the term "operating plan" when referring to the document that describes a national bank's management goals, earnings objectives, and lines of business. However, the banking industry, as well as the OCC and the other Federal financial institution agencies in policy statements, applications, and internal documents, more commonly use the term "business plan." The OCC has made this change to avoid any confusion about whether a substantive difference between the two terms is intended. Thus, the OCC intends that both terms may be used interchangeably.

III. Comment Solicitation

The OCC requests comment on all aspects of this proposal, including the specific issues that follow.

Community Bank Comment Request

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

Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, section 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

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

IV. Regulatory Analysis

A. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Comptroller of the Currency certifies that this proposal will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before

promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this proposal will not result in expenditures by State, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

C. Executive Order 12866

The Comptroller of the Currency has determined that this rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

D. Paperwork Reduction Act of 1995

In accordance with the requirements of the Paperwork Reduction Act of 1995, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this notice of proposed rulemaking have been submitted to OMB for review and approval under OMB Control Number 1557-0014.

This proposal is expected to increase annual paperwork burden for respondents by adding certain application requirements. The information collection requirements are contained in § 5.53. Section 5.53 requires a national bank to submit an application to the OCC before changing the composition of all, or substantially all, of its assets through sales or other dispositions or, having sold or disposed of all or substantially all of its assets, through subsequent purchases or other acquisitions. The time per response to complete an application is estimated to be five hours and the number of respondents is estimated to be five national banks. The likely respondents are national banks.

Estimated number of respondents: 5.
Estimated number of responses: 5.
Estimated total burden hours per response: 5 hours.

Estimated total annual burden hours: 25 hours.

The OCC invites comments on: (1) Whether the collection of information contained in the proposed rulemaking is

necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(2) The accuracy of the OCC's estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collection on respondents; including the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments should be sent to: John Ference, Clearance Officer, Office of the Comptroller of the Currency, Legislative and Regulatory Activities Division, Attention: 1557-0194, 250 E Street, SW., Mailstop 8-4, Washington, DC 20219. Due to delays in paper mail in the Washington area, commenters are encouraged to submit their comments by fax to (202) 874-4889 or by e-mail to camille.dixon@occ.treas.gov. Joseph F. Lackey, Jr., Desk Officer, Office of Information and Regulatory Affairs, Attention: 1557-0014, Office of Management and Budget, Room 10235, Washington, DC 20503. Comments may also be sent by e-mail to jlackeyj@omb.eop.gov.

List of Subjects in 12 CFR Part 5

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

Authority and Issuance

For reasons set forth in the preamble, the OCC proposes to amend part 5 of chapter I of title 12 of the Code of Federal Regulations as follows:

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

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

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

2. In § 5.20, revise all references to “operating plan” or “operating plans” to read “business plan or operating plan” or “business plans or operating plans,” as appropriate.

3. In Subpart D—Other Changes in Activities and Operations, a new § 5.53 is added to read as follows:

§ 5.53 Change in asset composition.

(a) *Authority.* 12 U.S.C. 93a, 1818.

(b) *Scope.* This section requires a national bank to obtain the approval of the OCC before changing the composition of all, or substantially all, of its assets through sales or other dispositions or, having sold or disposed of all or substantially all of its assets, through subsequent purchases or other acquisitions.

(c) *Approval requirement.* (1) A national bank must file an application and obtain the prior written approval of the OCC before changing the composition of all, or substantially all, of its assets (i) through sales or other dispositions or, (ii) having sold or disposed of all or substantially all of its assets, through subsequent purchases or other acquisitions.

(2) In determining whether to approve an application under paragraph (c)(1) of this section, the OCC will consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers, and may deny the application if the transaction would have a negative effect in any such respect. Where a national bank has sold or otherwise disposed of all or substantially all of its assets in a transaction requiring approval under paragraph (c)(1)(i) of this section, the OCC's review of any subsequent change in asset composition through purchase or other acquisition will include, in addition to the foregoing factors, the factors governing the organization of a bank under § 5.20.

(d) *Exception.* This section does not apply to a change in composition of all, or substantially all, of a bank's assets that the bank undertakes in response to direction from the OCC (*e.g.*, in an enforcement action pursuant to 12 U.S.C. 1818) or pursuant to a statute or regulation that requires OCC review or approval (*e.g.*, a voluntary liquidation pursuant to 12 U.S.C. 181 and 12 CFR 5.48).

Dated: December 30, 2003.

John D. Hawke, Jr.,

Comptroller of the Currency.

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