**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Parts 1, 5, and 7**

**[Docket No. 99–14]**

**RIN 1557–AB61**

## Investment Securities; Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is updating and clarifying its rules regarding investment securities, corporate activities, and bank activities and operations. Most of the changes involve the OCC's interpretations regarding national bank activities and operations. This final rule clarifies existing rules, adds new provisions based on recent statutory changes, judicial rulings, OCC decisions, and other developments, and makes technical changes. This final rule reflects the OCC's continuing commitment to assess the effectiveness of our rules and to make changes where necessary.

**EFFECTIVE DATE:** December 6, 1999.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline Lussier, Senior Attorney, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** The OCC published a notice of proposed rulemaking in the **Federal Register** on June 14, 1999 (64 FR 31749) inviting comments on proposed changes to several of the OCC's regulations. The OCC received a total of 16 comments, including seven from banks and banking industry representatives, three from states, four from community groups, and one from two individuals. Eight of the commenters favored all or some of the proposed changes, while eight opposed one or more of the proposal's provisions.

The final rule implements most of the initiatives contained in the proposal. However, the OCC has made a number of changes in response to the comments received and to further clarify the rules. The following discussion summarizes the proposed rule, the comments received, and describes the action the OCC has taken in the final rule.

### Part 7—Bank Activities and Operations

This final rule changes the name of part 7 from ''Interpretive rulings'' to ''Bank activities and operations'' to better describe the content of part 7.

*Messenger Service (§ 7.1012)*

The OCC proposed to amend § 7.1012 to conform to caselaw that streamlined the criteria for determining when a national bank is operating a branch. Under the current rule, in order to avoid being treated as a bank branch, a messenger service, including both a messenger service affiliated with a bank and a service that is independent of a bank, generally must both make its services available to the public, including other depository institutions, and retain the ultimate discretion to determine which customers and geographic areas it will serve. 12 CFR 7.1012(c)(2)(ii)(A) and (B).

The recent cases indicate that this test should apply differently depending on whether the service is affiliated with a bank.[1] Pursuant to these cases, a nonaffiliated service need show only that it has the discretion to determine, in its own business judgment, which customers it will serve and where. In contrast, an affiliated service, because it may be more likely to favor its affiliates as a result of its common ownership or control, must show that it actually serves the public generally, including nonaffiliated depository institutions.

The OCC proposed to combine the criteria in §§ 7.1012(c)(2)(ii)(A) and (c)(2)(ii)(B) into one new paragraph and apply the resulting criteria differently depending on whether or not the messenger service is affiliated with the bank. The OCC also proposed a stylistic amendment to § 7.1012(c)(2)(i).

The OCC received three comment letters addressing these proposed changes. Letters from two commenters supported adopting the changes. The third letter, representing the views of three commenters, opposed the changes on the ground that they would encourage national banks to make small loans with short maturities and high rates of interest. The commenters' discussion on this point relies on two premises; first, that the messenger service rule set forth in § 7.1012 authorizes national banks to make loans at non-branch facilities; and, second, that banks will therefore rely on the messenger service rule to make certain types of loans, including so-called payday loans, that would not be permissible if the branching laws applied. Both premises are incorrect.

First, the messenger service rule does not, and could not lawfully, authorize a national bank to conduct the core banking activities of taking deposits, paying checks, or lending money in a non-branch facility. By statute, a branch is defined, subject to certain specified exceptions, as an office or place of business where deposits are received, checks paid, or money lent. 12 U.S.C. 36(j). Section 7.1012 permits a national bank to use a messenger service—a courier, for example—to pick-up and deliver items related to transactions between a bank and its customer, but neither the existing rule, nor the amendment proposed by the OCC, expands the authority of a national bank to conduct core banking activities only at branches. Thus, a bank may find it convenient to use a messenger service to deliver loan proceeds to its customer, but its use of the service in that way

[1] In the proposal, the OCC cited two cases supporting the revision to § 7.1012: *Cades* v. *H&R Block,* 43 F.3d 869 (4th Cir. 1994), *cert. denied,* 515 U.S. 1103 (1995); *Christiansen* v. *Beneficial Nat'l Bank,* 972 F. Supp. 681 (S.D. Ga. 1997). *See* 64 FR at 31749 n.1. These cases held that a tax preparation firm that delivered tax refund anticipation loan (RAL) proceeds to mutual customers of the firm and a national bank was not a branch within the meaning of the branching laws. The standards articulated by both courts in reaching this conclusion formed the basis for the amendment to § 7.1012 that the OCC proposed, and the OCC continues to rely on those cases for that purpose. The principal issue in the cases, however, was the permissibility of certain fees charged by the national bank in connection with the RAL. The fee issue, which both courts resolved in the bank's favor based upon 12 U.S.C. 85, is not relevant to the OCC's amendment to § 7.1012.

does not mean that the loan is made at the offices of the messenger service or that the messenger service is a branch.

Second, the messenger service rule does not control the loan terms, such as maturity or interest rate, that a national bank may offer. The rate of interest a national bank may charge, for example, is governed by 12 U.S.C. 85. The applicability of such laws is unaffected by the OCC's proposed amendment to § 7.1012, which has the distinctly different purpose of conforming to recent judicial precedents the tests used to distinguish affiliated non-branch messenger services from unaffiliated non-branch messenger services in order to ensure that the branching laws are not evaded.

For these reasons, the amendment to § 7.1012 cannot be viewed as affecting payday lending. Accordingly, the OCC believes the concerns of the commenters opposing the amendment are misplaced. The amendment is adopted as proposed.

*Independent Undertakings To Pay Against Documents (§ 7.1016)*

Section 7.1016 codifies interpretations concerning the issuance by national banks of letters of credit and other independent undertakings. The proposal suggested five technical amendments to update this section.

Two commenters addressed these proposed changes. Both supported adopting the changes. One commenter suggested several additional technical amendments to clarify certain references contained in footnote 1 to § 7.1016 and to make the text of the regulation more precise. For instance, the commenter noted that it is appropriate to refer to the Convention on Independent Guarantees and Stand-by Letters of Credit as a United Nations convention, rather than as a United Nations Commission on International Trade Law convention.

The OCC agrees with the commenter's suggestions for clarifying the rule and adopts them in the final rule. The OCC adopts § 7.1016 as proposed, but with the modifications suggested by the commenter.

*National Bank as Guarantor or Surety on Indemnity Bond (§ 7.1017)*

The OCC proposed adding a cross-reference in § 7.1017 to § 28.4(c), which states that a national bank may guarantee the liabilities of its foreign operations. This change was proposed in order to remove whatever doubt that may have been created by the relocation [2] of the foreign operations guarantee provision from part 7 to part 28.

The OCC received one comment on this proposed change, from a commenter favoring adoption of the change. The OCC adopts § 7.1017 as proposed.

*Ownership of Stock Necessary To Qualify as Director (§ 7.2005)*

The OCC proposed revising § 7.2005(b)(4) to codify guidance provided in OCC interpretive letters [3] approving buyback or repurchase agreements between shareholders and prospective directors. This guidance, proposed to be added in new paragraphs (b)(4)(ii), (iii), and (iv) of § 7.2005, states that a buyback agreement may give a director the option of transferring shares back to the transferring shareholder if the director no longer needs those shares to satisfy the ownership requirement. The transferring shareholder may retain a right of first refusal to reacquire the shares if the director seeks to transfer ownership to a third person. Further, a director may assign the right to receive dividends or distributions on the shares back to the original shareholder and execute an irrevocable proxy authorizing the original shareholder to vote the shares. This change was proposed to make it easier for banks, especially community banks, to attract qualified persons to serve on bank boards of directors.

Three commenters addressed this proposed change. All supported its adoption. One commenter requested the OCC to go further and examine whether it is necessary to maintain the qualifying share requirement. However, this requirement is imposed by statute (12 U.S.C. 72). The OCC has recently recommended to Congress that the Comptroller be given the authority to waive the qualifying share requirement, in whole or in part, in the case of national banks that elect Subchapter S status in order to facilitate this form of corporate organization for national banks.[4] In light of the comment received, the OCC will evaluate whether it should recommend to Congress additional changes to section 72.

The OCC adopts § 7.2005(b)(4) as proposed.

*Oath of Directors (§ 7.2008)*

The OCC proposed adding new paragraph (c) to § 7.2008 and revising the last sentence of § 7.2008(b) to inform national banks that they are to file original executed oaths with the OCC and retain a copy in the bank's records in accordance with the instructions set forth in the Comptroller's Corporate Manual. This guidance is consistent with 12 U.S.C. 73, which states that each director's executed and subscribed oath must be transmitted to the Comptroller of the Currency and filed and preserved in the Comptroller's office for a period of 10 years.

One commenter addressed these proposed changes. This commenter supported their adoption. The OCC adopts § 7.2008(b) and (c) as proposed.

*Acquisition and Holding of Shares as Treasury Stock (§ 7.2020)*

The OCC proposed amending § 7.2020 to provide examples of legitimate corporate purposes justifying the acquisition by a national bank of its outstanding shares and holding them as treasury stock. These examples include: (a) holding shares in connection with an officer or employee stock option, bonus or repurchase plan; (b) holding shares for sale to a potential director to meet ''qualifying share'' requirements; (c) purchasing a director's qualifying shares upon his or her resignation or death if there is no ready market for the shares; (d) reducing the number of shareholders in order to qualify the bank for reorganization as a Subchapter S corporation; and (e) reducing the number of shareholders to lower the bank's costs associated with shareholder communications and meetings.

As noted in the preamble to the proposed rule, [5] while the OCC expects that this guidance will benefit all national banks, certain of the examples listed as legitimate purposes (namely, purchasing shares upon a director's resignation or death if there is no ready market for the shares and to aid in qualifying the bank for treatment under the tax laws as a Subchapter S

[2] 61 FR 4849 (Feb. 9, 1996) (amending part 7); 61 FR 19524 (May 2, 1996) (amending 12 CFR part 28).

[3] *See, e.g.,* Letter from Julie L. Williams, Chief Counsel (Mar. 31, 1997) (unpublished); Letter from Jonathan Rushdoony, Attorney (Mar. 27, 1986) (unpublished); Letter from Leslie G. Linville, Senior Attorney (Jan. 9, 1986) (unpublished). You can inspect and photocopy the unpublished OCC staff interpretive letters cited in this preamble (in redacted form) at the OCC's Public Disclosure Room, First Floor, 250 E Street, SW, Washington, DC 20219. You can make an appointment to inspect the letters by calling (202) 874–5043.

[4] *See* Testimony of John D. Hawke, Jr., Comptroller of the Currency, Before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services, U.S. House of Representatives, May 12, 1999. You can inspect and photocopy the Comptroller's testimony at the OCC's Public Disclosure Room, First Floor, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the testimony by calling (202) 874–5043. The testimony is also available on the OCC's web site at http://www.occ.treas.gov/ftp/release/99–44a.pdf.

[5] 64 FR 31749, 31751 (June 14, 1999).

corporation) are expected to provide a particular benefit to community banks.

The OCC received three comments on this proposed change, all of which supported its adoption. One commenter suggested that the text of the regulation be modified slightly to clarify that approval of the OCC under 12 U.S.C. 59 is required before a bank may acquire and hold its shares. The OCC agrees that this clarification is helpful and adopts it in the final rule by modifying the first sentence of proposed § 7.2020(a).

The examples listed as legitimate corporate purposes are non-exclusive, and the OCC included paragraph (c) in proposed § 7.2020 stating that purposes other than those enumerated in paragraph (b) of proposed § 7.2020 may satisfy the legitimate corporate purpose test. The OCC will continue its practice of evaluating other purposes for the acquisition and retention of a bank's shares on a case-by-case basis. In addition, the OCC notes that the word ''include'' in paragraph (b) of proposed § 7.2020 is not exhaustive and therefore believes that paragraph (c) is redundant. In the final rule, the OCC removes paragraph (c) from § 7.2020 as proposed and renumbers paragraph (d) of proposed § 7.2020 as § 7.2020(c). The OCC also makes a technical change substituting the word ''and'' for ''or'' in paragraph (b) of proposed § 7.2020.

The OCC adopts § 7.2020 as proposed, but with the modifications discussed.

*Reverse Stock Splits (New § 7.2023)*

The OCC proposed adding new § 7.2023 codifying the OCC's interpretation that a national bank may engage in a reverse stock split, as long as the bank provides adequate protection for dissenting shareholders' rights and the transaction serves a legitimate corporate purpose.[6] A ''reverse stock split'' is a restructuring of ownership interests in which a national bank reduces the number of its outstanding shares of stock by, for instance, replacing outstanding shares with fewer shares of a new issuance and paying cash to the minority shareholders for their fractional interests. This codification clarifies the flexibility national banks have to restructure their ownership interests, and benefits particularly community banks that desire, for instance, to restructure in order to qualify as a Subchapter S corporation.

Three commenters addressed the proposed change. All supported adoption in its entirety.

In the final rule, the OCC is making a technical change substituting the word ''and'' for ''or'' in § 7.2023(b) as proposed. The OCC adopts § 7.2023 as proposed, but with the modification discussed.

The examples listed in § 7.2023(b) as legitimate corporate purposes are non-exclusive, and the OCC will continue its practice of evaluating other purposes for reverse stock splits on a case-by-case basis.

*Visitorial Powers (§ 7.4000)*

The OCC proposed to revise § 7.4000, ''Books and records of national banks,'' to clarify the extent of the OCC's visitorial powers under 12 U.S.C. 484 and other federal statutes. As proposed, § 7.4000 codified the definition of visitorial powers and illustrated what visitorial powers include by providing a non-exclusive list of these powers. These powers include: (a) examination of a bank; (b) inspection of a bank's books and records[7]; (c) regulation and supervision of activities authorized or permitted under federal banking law; and (d) enforcing compliance with any applicable federal or state laws concerning those activities. The proposal also reorganized § 7.4000 by grouping together, in proposed paragraph (b), the exceptions noted in several different places in the current rule that are explicitly provided by federal law to the OCC's exclusive visitorial powers.

Eight commenters addressed this proposed change. The commenters were evenly split between those favoring adoption of the change and those opposed. Of those favoring adoption of the proposed change, two supported its adoption without any changes to the proposal, while two others suggested edits to the proposed text to elaborate on the extent of the visitorial powers listed in proposed § 7.4000(a)(2) and the general exceptions to those powers listed in proposed § 7.4000(b). Those opposing the proposed change maintained that 12 U.S.C. 484 does not preclude a role for the states, particularly in the area of consumer protection.[8]

The OCC agrees that Congress did not intend to preclude any role for the states by enacting 12 U.S.C. 484. As noted in the preamble to the proposal,[9] there are instances where federal statutory authority provides for a state agency to inspect a national bank's books and records (as is the case, for instance, with state escheat laws). The OCC does not object to state insurance regulators inspecting the records of national banks related to their insurance activities that are regulated under applicable state law, and the pending Gramm-Leach-Bliley Act would clarify that authority.[10]

However, Congress clearly intended for the role of states to be defined by those instances authorized by federal law. *See* 12 U.S.C. 484(a). Except where so authorized, the exclusive visitorial authority with respect to national banks has been vested in the OCC. *Id. See also* 12 U.S.C. 1813(q)(1); 1818(b) *et seq.; Guthrie* v. *Harkness,* 199 U.S. 148, 159 (1905); and *National State Bank, Elizabeth, N.J.* v. *Long,* 630 F.2d 981, 988–89 (3d Cir. 1980).

Congress recently reaffirmed the exclusive visitorial authority of the OCC in the context of interstate branching. *See* the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act),[11] which amended 12 U.S.C. 36, among other statutes, to permit interstate branching. In the Interstate Act, Congress provided that

[6] Interpretive Letter No. 786 (June 9, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–213. This conclusion is consistent with the recent court decision, *NoDak Bancorp.* v. *Clarke,* 998 F.2d 1416 (8th Cir. 1993), in which the court upheld the OCC's approval of a cash-out merger where the OCC found that there was a valid corporate purpose for the transaction and that minority shareholders were entitled to dissenters' rights. An earlier decision reversed an OCC approval of a reverse stock split. *See Bloomington Nat'l Bank* v. *Telfer,* 916 F.2d 1305 (7th Cir. 1990). However, that case is distinguishable on the grounds that the court reached its decision after concluding that the transaction had no legitimate business purpose and failed to provide for dissenters' rights. The court expressly declined to answer whether 12 U.S.C. 83 (the statute at issue in the case) prohibits all reverse stock split transactions, noting that its opinion was limited to the facts of the case. *Id.* at 1308 n.4, 1309. *See also Lewis* v. *Clark,* 911 F.2d 1558 (11th Cir. 1990) (concluding that minority shareholders in a merger could not be required to accept cash rather than stock in the new bank).

[7] The rule recognizes that bank-created records may be obtained through normal judicial processes. However, ''non-public OCC information,'' as defined in 12 CFR § 4.32(b), held by a bank may be obtained only by following the procedures set forth in 12 CFR part 4, subpart C. This final rule revises the last sentence of § 7.4000(a) by adding a parenthetical statement that non-public OCC information in the possession of a bank, such as the bank's examination report and supervisory correspondence, may be obtained by complying with the procedures set forth in 12 CFR part 4, subpart C.

[8] Three commenters supported this position by suggesting that the proposed interpretation is inconsistent with the holding of the federal district court in *Bank One, Utah* v. *Guttau,* No. 4–98–CV–10247 (D. Iowa July 24, 1998), that a state ATM law is not preempted by the National Bank Act. However, the Court of Appeals for the Eighth Circuit subsequently reversed the district court's decision and upheld the position of the bank and the OCC in that case. *Bank One, Utah* v. *Guttau,* No. 98–3166, slip op. 8–9, 10 (8th Cir. Sept. 2, 1999) (pet. for rehearing en banc pending) (Eighth Circuit's opinion hereinafter cited as *Guttau*).

[9] 64 FR 31749, 31751 n.9 (June 14, 1999).

[10] *See* H.R. 10, 106th Cong., 1st Sess. § 303 (functional regulation of insurance); S. 900, 106th Cong., 1st Sess. § 201 (same).

[11] Pub. L. 103–328, 108 Stat. 2338, enacted Sept. 29, 1994.

certain types of state laws apply to interstate branches of national banks. 12 U.S.C. 36(f)(1)(A). However, at the same time, Congress also expressly granted to the OCC the exclusive enforcement authority over interstate branches' compliance with those state laws. 12 U.S.C. 36(f)(1)(B).

As discussed in the preamble to the proposed rule,[12] courts have defined ''visitation'' expansively to include the inspection, regulation, or control of the operations of a bank to enforce the bank's observance of the law. *See First National Bank of Youngstown* v. *Hughes,* 6 F. 737, 740 (6th Cir. 1881), *appeal dismissed,* 106 U.S. 523 (1883); *Peoples Bank* v. *Williams,* 449 F. Supp. 254 (W.D. Va. 1978) (visitorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs). This expansive definition is consistent with the intent of creating a national banking system that is subject to cohesive, uniform supervision by the primary regulator of national banks.

One commenter contended that, because the federal Electronic Funds Transfer Act (15 U.S.C. 1693–1693r) (EFTA) expressly states that it does not preempt state electronic funds transfer (EFT) laws that provide consumers greater protections than those provided by the federal EFTA, the OCC may not preempt consumer protections afforded by a state's EFT laws.[13] The OCC agrees that the *federal EFTA* does not preempt state EFT laws that afford greater consumer protections than does the federal EFTA. However, as the OCC concluded in a previous interpretation, a state EFT law that impairs or impedes a national bank's ability to engage in an activity that is authorized under another federal law could be preempted by that federal law.[14] The Eighth Circuit recently upheld this position in *Guttau.* In addressing the State of Iowa's contention that the federal EFTA permits the states to regulate the electronic transfer of funds, the court stated:

Despite the State's claims, this anti-preemption provision [in the federal EFTA] is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks. State regulation of national banks is proper where ''doing so does not prevent or significantly interfere with the national bank's exercise of its powers.'' *Barnett Bank* [v. *Nelson*], 116 S. Ct. [1103, 1996] at 1109. Congress has made clear in the [National Bank Act] its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with [the national bank's] placement and operation of its ATMs must be held to be preempted. Slip op. at 9.

Three commenters suggested that, because the question of whether states may enforce compliance with their consumer protection laws by national banks is the subject of pending litigation,[15] it is inappropriate for the OCC to promulgate a rule at this time related to the OCC's visitorial powers.[16] However, an agency is not precluded from issuing a rule that affects a provision that is the subject of ongoing litigation. *See Smiley* v. *Citibank,* 517 U.S. 735, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996).

Based on the statutory authority and the caselaw discussed earlier, the OCC concludes that proposed § 7.4000 contains an accurate statement of the OCC's exclusive visitorial authority.

One commenter who favored adoption of the rule suggested that the OCC clarify that its exclusive visitorial powers extend to operating subsidiaries of national banks. As stated in 12 CFR 5.34(d)(3), each operating subsidiary is subject to examination and supervision by the OCC. This does not mean, however, that the OCC's jurisdiction necessarily is exclusive over a given subsidiary, and many subsidiaries have ''functional'' regulators, such NASD Regulation, Inc., the Securities and Exchange Commission, or a state insurance department.

Another commenter who favored adoption of the rule requested that the OCC add to the text of the final rule the statement that the list of visitorial powers in proposed § 7.4000(a)(2) is non-exclusive. This commenter pointed out that the preamble to the proposed rule stated that this list was illustrative of what visitorial powers include and was non-exclusive. The commenter urged the OCC to add this clarification to the regulation to avoid any ambiguity that might result from the statements in the proposal. The OCC notes that the word ''include'' is not exhaustive and therefore believes the recommended clarification is not necessary.

The same commenter also suggested another technical change relating to the rule's exceptions. The regulatory text in proposed § 7.4000(a) provided that state officials may not exercise visitorial powers with respect to national banks ''except in limited circumstances authorized by federal law.'' Similar language was used in proposed § 7.4000(b). The commenter suggested that the language in paragraph (a) of § 7.4000 refer the reader to paragraph (b), so that the language in paragraph (a) would read ''except as provided in paragraph (b) of this section.'' The commenter stated that this change would clarify the regulation by demonstrating that the two paragraphs are interrelated. The OCC agrees that this suggestion would add clarity to the regulation and adopts this recommendation in the final rule.

Finally, the OCC is making a technical change substituting the word ''and'' for ''or'' in paragraphs (a) and (b) of proposed § 7.4000.

The OCC adopts § 7.4000 as proposed, but with the modification suggested by the commenter, the change to the last sentence of paragraph (a) of proposed § 7.4000 concerning the procedure for obtaining non-public OCC information in accordance with 12 CFR part 4, subpart C, and the technical changes discussed.

*Establishment and Operation of Remote Service Units (New § 7.4003)*

The OCC proposed to add a new § 7.4003 codifying the OCC's interpretations that, because automated teller machines (ATMs) and other remote service units (RSUs)[17] are expressly excluded from the definition of ''branch'' in 12 U.S.C. 36(j), an ATM or RSU established by a national bank is not subject to any state-imposed

[12] 64 FR 31749, 31751 (June 14, 1999).

[13] This position also was advanced by two commenters in response to the proposed amendments to § 7.4003.

[14] *See* Interpretive Letter No. 789 (June 27, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–216.

[15] *See First Union Nat'l Bank* v. *Burke,* 48 Fed. Supp. 2d 132 (D. Conn. 1999) (in which a federal district court upheld, in its Ruling on Motion for Preliminary Injunction, the OCC's right to exercise exclusive regulatory authority to enforce applicable state law against national banks when it enjoined a state banking authority's administrative enforcement proceeding against three national banks) (further proceedings stayed pending state court interpretation of state law); and *First Nat'l Bank of McCook* v. *Fulkerson,* No. 98–D–1024 (D. Colo. filed April 28, 1998) (action for declaratory judgment and injunction against state banking authority's administrative enforcement action against combination loan production office, deposit production office, and ATM on ground that the combination constitutes a branch). The commenters also cited the federal district court decision in the *Guttau* case. However, as previously noted, the Court of Appeals for the Eighth Circuit recently reversed the district court's holding, and found that federal law preempts state law restrictions on national bank ATMs. *Guttau,* slip op. at 8–9.

[16] This point also was made in comments concerning proposed §§ 7.4003, 7.4004, and 7.4005.

[17] An RSU is an automated facility, operated by a customer of a bank, that engages in one or more of the core banking functions of receiving deposits, paying checks, or lending money. An RSU includes ATMs, automated loan machines, and automated devices for receiving deposits, and may be equipped with a telephone or televideo device that allows contact with bank personnel.

geographic or operational restrictions or licensing laws.[18]

The OCC received seven comments on this proposed new rule. Commenters who favored adoption of the rule suggested that it was appropriate in light of the amendment to section 36(j). One commenter stated that the interpretation would add clarity and guidance to national banks in their deployment of ATMs and RSUs. None of the commenters who favored adoption of the rule suggested changes to the proposed language.

Three commenters opposed adoption of the rule. One maintained that, because 12 U.S.C. 93a[19] states that the authority it confers does not apply to 12 U.S.C. 36, the OCC is precluded from adopting the rule as proposed. However, the language to which the commenter referred is not a bar to the OCC's authority. Rather, it simply makes clear that, whatever authority the OCC has pursuant to other statutes to adopt regulations affecting national bank branching, 12 U.S.C. 93a does not expand that authority.[20] Moreover, even if 12 U.S.C. 93a were to preclude the OCC from issuing rules under section 36, the fact that section 36(j) expressly excludes ATMs and RSUs from the scope of section 36 leads to the conclusion that any rulemaking clarifying the status of ATMs and RSUs as not constituting branches is a rulemaking concerning a matter explicitly outside 12 U.S.C. 36.

Two commenters who opposed adoption of the rule concluded that the proposal was defective because it did not list each state law that is proposed to be preempted, as they maintain is required by section 114 of the Interstate Act (codified at 12 U.S.C. 43) (section 114).[21] Section 114 was designed to supply a public comment process in situations where preemption decisions would otherwise be announced without notice of the issue and an opportunity for public comment. Thus, section 114 does not apply to rulemakings, including this rulemaking, conducted pursuant to the notice-and-comment procedures prescribed by the Administrative Procedure Act (APA). 5 U.S.C. 553. Rules adopted pursuant to 5 U.S.C. 553 provide interested parties with the notice and opportunity to comment that section 114 is intended to ensure, making it unnecessary to subject them to duplicative publication requirements under section 114.

In light of the express exclusion of ATMs and RSUs from the definition of ''branch'' in 12 U.S.C. 36(j) and the comments received in response to proposed § 7.4003, the OCC adopts § 7.4003 as proposed.

*Deposit Production Offices (New § 7.4004)*

The OCC proposed to codify its interpretation,[22] in new § 7.4004, that a national bank deposit production office (DPO) is not a branch because it does not engage in any of the core banking functions that would cause it to be a branch under 12 U.S.C. 36. Paragraph (a) of proposed § 7.4004 states that a DPO must not receive deposits in order for it to be excluded from 12 U.S.C. 36(j)'s definition of ''branch,'' and that all deposit and withdrawal transactions by customers using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer. Paragraph (b) of proposed § 7.4004 states that a national bank may use the services of, and compensate, persons not employed by the bank for its deposit production activities.

Three commenters addressed this proposed new section. Of the two commenters supporting adoption, one questioned the appropriateness of permitting, as paragraph (b) of proposed § 7.4004 does, a national bank to use persons not employed by the bank in its DPOs. The OCC notes that the provision in question merely permits a national bank the flexibility to use agents in its DPOs; a bank remains free to use its employees if it so chooses. This flexibility is the same as has been available for national banks using loan production offices (LPOs), which has not resulted in supervisory concerns.

The commenter opposed to proposed new § 7.4004 stated that it, along with proposed new § 7.4005, circumvents the intent of Congress as articulated in the Interstate Act to require national banks to adhere to state laws governing the establishment and operation of interstate branches. The OCC agrees that national banks' interstate branches are to comply with those state laws.[23] However, since a DPO does not perform any of the activities listed in 12 U.S.C. 36(j) that would cause it to be a ''branch,'' the provisions of those state laws do not apply.

The OCC adopts § 7.4004 as proposed.

*Combination of LPO, DPO, and RSU (New § 7.4005)*

The OCC proposed to add a new § 7.4005 to codify its interpretation that a facility that combines the non-branch functions of an LPO, DPO, and RSU is not a branch by virtue of that combination.[24]

Eight commenters addressed this proposed new section. Those favoring its adoption agreed with the OCC that the combination of facilities that individually are not branches would not create a branch. Those opposed maintained that the combined functions would create what is effectively a

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[18] *See, e.g.*, Interpretive Letter No. 838 (April 15, 1998), *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–293; Interpretive Letter No. 821 (Feb. 17, 1998), *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–271; Interpretive Letter No. 789 (June 27, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–216; Interpretive Letter No. 772 (Mar. 6, 1997), *reprinted in* [1996–97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–136. The OCC's interpretation recently was upheld by the Court of Appeals for the Eighth Circuit. *Bank One, Utah* v. *Guttau*, No 98–3166 (8th Cir. Sept. 2, 1999), *rev'g* No. 4–98–CV–10247 (D. Iowa July 24, 1998) (which had held that Iowa's ATM law is not preempted by the National Bank Act).

[19] 12 U.S.C. 93a states: ''Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of [Title 12] or to securities activities of National Banks under the Act commonly known as the ''Glass-Steagall Act'.''

[20] The legislative history of the statute that added 12 U.S.C. 93a to the federal banking law supports this reading. *See, e.g.*, House Conf. Rep. No. 96–842, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 313 (''[T]he rulemaking provision carries no authority to permit otherwise impermissible activities of national banks with specific reference to the provisions of the McFadden Act [12 U.S.C. 36].'').

[21] Section 114 requires the OCC, before issuing an opinion letter or interpretive rule that concludes that federal law preempts any state law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, to publish notice in the **Federal Register** of the preemption issue that the OCC is considering (including a description of each state law at issue), and give interested parties at least 30 days in which to comment. Section 114 by its terms does not require a listing of each state law that may be preempted.

[22] Interpretive Letter No. 691 (Sept. 25, 1995), *reprinted in* [1995–96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–006 (deposit production offices are not branches as long as deposits are not accepted at the DPO but rather are mailed by the customer to the bank after filling out preliminary forms at the DPO); Interpretive Letter No. 638 (Jan. 6, 1994), *reprinted in* [1993–94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,525 (a non-branch facility may perform deposit origination functions such as providing information on deposit products or handling application forms, as long as the activity stops short of actually receiving deposits).

[23] In the Interstate Act, Congress expressly authorized the OCC to enforce the provisions of state law to which a branch of a national bank is subject. 12 U.S.C. 36(f)(1)(B).

[24] The proposal cites Interpretive Letter No. 843 (Sept. 29, 1998), *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–298 (IL 843). The proposal also cites the position the OCC has taken as *amicus curiae* in litigation pending in the federal district court of Colorado in a case with substantially similar facts as those in IL 843. *See* OCC's Brief *Amicus Curiae* filed in *First Nat'l Bank of McCook* v. *Fulkerson*, Civil Action No. 98–D–1024 (brief filed Jan. 4, 1999).

branch, thereby enabling banks to circumvent branching laws. Two of these commenters also suggested that, by permitting banks to set up a combined LPO, DPO, and RSU in one facility without first applying to the OCC for approval pursuant to 12 CFR 5.30, the OCC would undermine the Community Reinvestment Act (12 U.S.C. 2901–2907) (CRA) by legitimizing narrower assessment areas.[25]

After carefully considering all the comments, the OCC remains of the view that the combination of facilities that separately are not branches does not transform the whole into something greater than its parts. ATMs and RSUs are expressly excluded from the definition of ''branch'' in 12 U.S.C. 36(j). Similarly, LPOs and DPOs do not engage in activities that would cause them to be branches under section 36(j). Combining these entities does not change this fact. As long as a national bank operates the facilities within the limits identified in the interpretations concerning LPOs (12 CFR 7.1004), RSUs (*id.* at § 7.4003), and DPOs (*id.* at § 7.4004), the combined activities still will not meet the definition of ''branch'' in section 36(j).[26]

The OCC recognizes that national banks that are predominantly non-branch based present unique supervisory and regulatory issues in several areas, including the CRA. The OCC and other banking agencies have addressed certain of these issues already. For instance, the agencies require a bank with a deposit-taking ATM to delineate an assessment area around the ATM to ensure that the bank is meeting the needs of the community from which it is receiving deposits. *See* 12 CFR 25.41(b) and (c).[27] Remaining issues affecting non-branch based institutions will require further analysis by the OCC and other banking agencies, but exceed the scope of this rulemaking.

The OCC adopts § 7.4005 as proposed.

**Part 1—Investment Securities**

The OCC proposed amending 12 CFR 1.3(e)(1) to clarify a provision that has led to some confusion. Current § 1.3(e)(1) sets forth the regulatory treatment of Type IV securities that are fully secured by Type I securities. The OCC proposed to eliminate the statement in § 1.3(e)(1) that a national bank may deal in Type IV securities that are fully secured by Type I securities, because that language has created issues about the treatment of Type V securities and about the relationship of the current provision with § 1.3(g) regarding securitization. As noted in the preamble to the proposed rule, the OCC, consistent with previous judicial rulings and OCC decisions,[28] proposed to clarify that it will continue to apply its long-standing regulatory treatment of asset-backed instruments that are fully secured by Type I securities and treat those instruments as Type I securities.

Two commenters addressed this proposed change. Both favored adoption without suggesting any changes.

The OCC adopts proposed § 1.3(e)(1) as proposed.

**Part 5—Rules, Policies, and Procedures for Corporate Activities**

The OCC proposed to conform references to the interagency Uniform Financial Institutions Rating System—commonly referred to as the CAMELS rating—to reflect the addition of a sixth component, ''sensitivity to market risk.'' [29] The OCC also proposed technical amendments to several sections in part 5 to conform them to provisions in the Comptroller's Corporate Manual that have been revised since part 5 last was amended and to amend an incorrect reference that currently appears in § 5.35(g)(3).

One commenter addressed these proposed changes. This commenter favored adoption of these changes to part 5.

The OCC adopts the proposed amendments without change.

**Effective Date**

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553, this final rule has a 30-day delayed effective date. The Community Development and Regulatory Improvement Act of 1994 (CDRI Act) separately requires that the OCC's regulations take effect on the first day of the first calendar quarter following publication if the regulations impose additional reporting, disclosures, or other new requirements on national banks. *See* 12 U.S.C. 4802(b). The final rule imposes no new requirements on national banks. Therefore, the CDRI Act delayed effective date provision does not apply.

**Regulatory Flexibility Act**

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This final rule is clarifying in nature and will reduce somewhat the regulatory burden on national banks.

**Executive Order 12866**

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

**Unfunded Mandates Act of 1995**

Section 202 of the Unfunded Mandates Act of 1995 (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 the annual expenditure of $100 million or more in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act requires an agency to identify and consider a reasonable number of alternatives before promulgating a rule.

The OCC has determined that the final rule does not include a federal mandate that will result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly,

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[25] As a general matter, financial institutions subject to the CRA are required to delineate one or more assessment areas within which an institution's primary regulator evaluates that institution's record of helping to meet the credit needs of its community. For the requirements applicable to national banks' delineation of assessment areas, see 12 CFR 25.41.

[26] *See, e.g.*, OCC Conditional Approval No. 313, Decision of the OCC on the Application by Canadian Imperial Bank of Commerce to Charter CIBC National Bank, Maitland, Fla., dated July 9, 1999. This conditional approval was published in the OCC's ''Interpretations and Actions'' for July, 1999.

[27] *See also* 64 FR 23618, 23647–48 (May 3, 1999) (in which the OCC and other banking agencies published a question and answer in which the agencies discuss how CRA ratings will be assigned in a situation in which a bank uses non-branch delivery systems to obtain deposits and deliver loans).

[28] *See Securities Indus. Ass'n* v. *Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (national bank authority to securitize assets); Interpretive Letter No. 514 (May 5, 1990), *reprinted in* [1990–91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,218 (bonds collateralized by Gov't Nat'l Mortgage Ass'n (GNMA), Fed. Nat'l Mortgage Ass'n (FNMA) and Fed. Home Loan Mortgage Ass'n (FHLMC) pass-through certificates); Interpretive Letter No. 362 (May 22, 1986), *reprinted in* [1985–87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,532 (issuing, underwriting and dealing in evidences of indebtedness collateralized by GNMA, FNMA or FHLMC certificates); Interpretive Letter No. 378 (April 24, 1987), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,602 (issuance and sale of collateralized mortgage obligations—bonds representing interests in pools of mortgages or mortgage-related obligations); Interpretive Letter No. 257 (April 12, 1983), *reprinted in* [1983–84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,421 (underwriting and dealing in mortgage-backed pass-through certificates evidencing undivided interests in Fed. Housing Admin. insured mortgage pools purchased by the bank from GNMA); Investment Securities Letter No. 29 (Aug. 3, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,899 (investment limits for asset-backed securities consisting of General Motors Acceptance Corp. receivables).

[29] *See* 61 FR 67021 (Dec. 19, 1996).

the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

One commenter asserted that § 7.4003 will result in an expenditure by the private sector of $100 million or more because, in this commenter's estimation, that provision will cause consumers to pay higher fees for using RSUs. The OCC notes that the relevant test under the statute is whether a regulation includes a federal mandate that may result in the threshold expenditure. The provision cited by the commenter as support for the conclusion that the rule will cause the private sector to spend $100 million or more is not a mandate. Instead, it simply codifies the conclusion that an RSU is not a branch, and is not subject to state geographic or operational restrictions or licensing laws. Accordingly, no further analysis of that provision under the Unfunded Mandates Act is required.

**List of Subjects**

*12 CFR Part 1*

Banks, banking, National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 5*

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

*12 CFR Part 7*

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

**Authority and Issuance**

For the reasons set out in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as set forth below:

## PART 1—INVESTMENT SECURITIES

1. The authority citation for part 1 continues to read as follows:

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

2. In § 1.3, paragraph (e)(1) is revised to read as follows:

**§ 1.3 Limitations on dealing in, underwriting, and purchase and sale of securities.**

* * * * *

(e) *Type IV securities*—(1) *General.* A national bank may purchase and sell Type IV securities for its own account. Except as described in paragraph (e)(2) of this section, the amount of the Type IV securities that a bank may purchase and sell is not limited to a specified percentage of the bank's capital and surplus.

* * * * *

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

3. The authority citation for part 5 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 93a.

4. In § 5.3, paragraph (c) is revised and paragraph (g)(2) is amended by revising the term ''(CAMEL)'' to read ''(CAMELS)'', to read as follows:

**§ 5.3 Definitions.**

* * * * *

(c) *Appropriate district office means:*

(1) Bank Organization and Structure for all national bank subsidiaries of certain holding companies assigned to the Washington, D.C., licensing unit;

(2) The appropriate OCC district office for all national bank subsidiaries of certain holding companies assigned to a district office licensing unit;

(3) The OCC's district office where the national bank's supervisory office is located for all other banks; or

(4) The OCC's International Banking and Finance Department for federal branches and agencies of foreign banks.

* * * * *

**§ 5.11 [Amended]**

5. In § 5.11, paragraph (i)(1) is amended by revising the phrase ''representative of the OCC'' to read ''presiding officer''.

6. In § 5.33, paragraph (d)(2)(i) is revised to read as follows:

**§ 5.33 Business combinations.**

* * * * *

(d) * * *

(2) * * *

(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 combination; or

* * * * *

**§ 5.35 [Amended]**

7. In § 5.35, paragraph (g)(3) is amended by revising the term ''paragraph (h)'' to read ''paragraph (i)''.

**§ 5.37 [Amended]**

8. In § 5.37, paragraphs (d)(1)(i) and (d)(3) are amended by revising the term ''district'' to read ''supervisory'', and paragraph (d)(3) is amended further by revising the term ''(CAMEL)'' to read ''(CAMELS)''.

**§ 5.51 [Amended]**

9. In § 5.51, paragraph (c)(6)(i) is amended by revising the term ''(CAMEL)'' to read ''(CAMELS)''.

**§ 5.64 [Amended]**

10. In § 5.64, paragraph (b) is amended by revising the term ''district'' to read ''supervisory''.

## PART 7—BANK ACTIVITIES AND OPERATIONS

11. The authority citation for part 7 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.* and 93a.

12. The title of part 7 is revised to read as set forth above.

13. In § 7.1012, paragraphs (c)(2)(i) and (c)(2)(ii) are revised and paragraphs (c)(2)(iii), (c)(2)(iv), (c)(2)(v), and (c)(2)(vi) are added to read as follows:

**§ 7.1012 Messenger service.**

* * * * *

(c) * * *

(2) * * *

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

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

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

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

(iv) The messenger service does not operate under the name of the bank, and the bank and the messenger service do not advertise, or otherwise represent, that the bank itself is providing the service, although the bank may advertise that its customers may use one or more third party messenger services to transact business with the bank;

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

(vi) The messenger service acts as the agent for the customer when the items are in transit. The bank deems items intended for deposit to be deposited when credited to the customer's account at the bank's main office, one of its branches, or another permissible

facility, such as a back office facility that is not a branch. The bank deems items representing withdrawals to be paid when the items are given to the messenger service.

* * * * *

14. In § 7.1016, paragraphs (a) including the footnote, (b)(1)(iii)(C), (b)(1)(iv), and (b)(2)(ii) are revised to read as follows:

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

(a) *General authority.* A national bank may issue and commit to issue letters of credit and other independent undertakings within the scope of the applicable laws or rules of practice recognized by law.[30] Under such letters of credit and other independent undertakings, the bank's obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the applicant and the beneficiary. A national bank may also confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person's independent undertaking within the scope of such laws or rules.

(b) * * *

(1) * * *

(iii) * * *

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

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

(2) * * *

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

* * * * *

15. In § 7.1017, the introductory text is revised to read as follows:

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

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

* * * * *

16. In § 7.2005, paragraph (b)(4) is revised to read as follows:

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

* * * * *

(b) * * *

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

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

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

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

* * * * *

17. In § 7.2008, the last sentence of paragraph (b) is revised and a new paragraph (c) is added to read as follows:

**§ 7.2008 Oath of directors.**

* * * * *

(b) *Execution of the oath.* * * * Appropriate sample oaths are located in the ''Comptroller's Corporate Manual.''

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

18. Section 7.2020 is revised to read as follows:

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

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

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

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

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

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

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

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

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

19. A new § 7.2023 is added to subpart B to read as follows:

**§ 7.2023 Reverse stock splits.**

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

[30] Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co., 1/800/328–4880); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 500) (available from ICC Publishing, Inc., 212/206–1150; http://www.iccwbo.org); the International Standby Practices (ISP98) (ICC Publication No. 590) (available from the Institute of International Banking Law & Practice, 301/869–9840; http://www.iiblp.org); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law, 212/963–5353); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 525) (available from ICC Publishing, Inc., 212/206–1150; http://www.iccwbo.org); as any of the foregoing may be amended from time to time.

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

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

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

20. In § 7.4000, the section heading and paragraphs (a) and (b) are revised to read as follows:

**§ 7.4000 Visitorial powers.**

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

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

(i) Examination of a bank;

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

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

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

(b) *Exceptions to the general rule.* Federal law expressly provides special authority for state or other federal officials to:

(1) Inspect the list of shareholders, provided the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(2) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(3) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(4) Ascertain the correctness of federal tax returns (26 U.S.C. 7602); and

(5) Enforce the Fair Labor Standards Act (29 U.S.C. 211).

* * * * *

21. A new § 7.4003 is added to read as follows:

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

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

22. A new § 7.4004 is added to read as follows:

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

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

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

23. A new § 7.4005 is added to read as follows:

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

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

Dated: October 25, 1999.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

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