

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; 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.

(2) When a business combination qualifies for a streamlined application, the applicant should consult the Manual to determine the abbreviated application information required by the OCC. The OCC encourages pre-filing communications between the applicants and the appropriate district office before filing under paragraph (j) of this section.

§ 5.34 Operating subsidiaries.

(a) *Authority.* 12 U.S.C. 24(Seventh) and 93a.

(b) *Licensing requirements.* A national bank generally shall submit an application and obtain prior OCC approval to establish or commence new activities in an operating subsidiary. In certain circumstances, a national bank need only notify the OCC after it has established or commenced specified activities in an operating subsidiary.

(c) *Scope.* This section sets forth authorized activities and application and notice procedures for the establishment and operation of an operating subsidiary by a national bank.

(d) *Standards and requirements—(1) Authorized activities.* A national bank may establish or acquire an operating

subsidiary to conduct, or may conduct in an existing operating subsidiary, activities that are part of or incidental to the business of banking, as determined by the Comptroller of the Currency, pursuant to 12 U.S.C. 24(Seventh), and other activities permissible for national banks or their subsidiaries under other statutory authority.

(2) *Qualifying subsidiaries.* For purposes of this section, an operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary; or the parent bank otherwise controls the subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary. However, the following subsidiaries are not operating subsidiaries subject to this section:

(i) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (*e.g.*, a community development corporation subsidiary under 12 CFR part 24); and

(ii) A subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted.

(3) *Examination and supervision.* Each operating subsidiary is subject to examination and supervision by the OCC. In conducting activities authorized under this section, unless otherwise provided by statute or regulation (including paragraph (f) of this section), applicable provisions of Federal banking law and regulations pertaining to the operations of the parent bank shall apply to the operations of the bank's operating subsidiary. If, upon examination, the OCC determines that the subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety and soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the subsidiary, or discontinue specified activities.

(4) *Consolidation of figures.* Pertinent book figures of the parent bank and its operating subsidiary shall be combined for the purpose of applying statutory limitations when combination is needed to effect the intent of the statute, e.g., for purposes of 12 U.S.C. 56, 60, 84 and 371d. However, in determining compliance with statutory limits based on regulatory capital, the bank shall make any reductions in regulatory capital required by paragraph (f) of this section.

(e) *Procedures—(1) General—(i) Application required.* (A) Except as provided in paragraphs (e)(2) and (e)(4) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing subsidiary, shall submit an application to, and receive approval from, the OCC before acquiring or establishing the subsidiary, or commencing the new activity. The application must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. It also must state whether the bank intends to conduct any activity of the operating subsidiary at a location other than the main office or a previously approved branch of the bank. The OCC may require the applicant to submit a legal analysis if the proposal is novel, unusually complex or raises substantial unresolved legal issues. In such cases, the OCC encourages applicants to have a pre-filing meeting with the OCC.

(B) Notwithstanding any other provision in this section, a national bank shall file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing subsidiary, if the bank controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary. These applications are not subject to paragraph (e)(4) of this section and are not eligible for the notice procedures in paragraph (e)(2) of this section or

the expedited review procedures in paragraph (e)(3) of this section.

(ii) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(iii) *OCC review and approval.* The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible for an operating subsidiary and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the applicant.

(2) *Notice process for certain activities—*

(i) *General.* A national bank that is "adequately capitalized" or "well capitalized" as those terms are defined in 12 CFR part 6, and has not been notified that it is in "troubled condition" as defined in § 5.51, may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate district office written notice within 10 days after acquiring or establishing the subsidiary, or commencing the activity, provided the activity is listed in paragraph (e)(2)(ii) of this section. The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(ii) *Activities eligible for notice.* The following activities qualify for the preapproved notice procedures:

(A) Holding property, such as real estate, personal property, securities, or other assets, acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful

claim, or in the ordinary course of collecting a debt previously contracted;

(B) Business services for the bank or its affiliates. Furnishing services for the internal operations of the bank or its affiliates, including: accounting, auditing, appraising, advertising and public relations, data processing and data transmission services, databases, or facilities;

(C) Financial advice and consulting for the bank or its affiliates;

(D) Selling money orders, savings bonds, or travelers checks;

(E) Management consulting, operational advice, and specialized services for other depository institutions;

(F) Courier services between financial institutions;

(G) Providing check guaranty and verification services;

(H) Data processing and warehousing products, services, and related activities, including associated equipment and technology, for the operating subsidiary, its parent bank, and their affiliates;

(I) Acting as investment or financial adviser, (not involving the exercise of investment discretion), or providing financial counseling, including:

(1) Serving as the advisory company for a mortgage or real estate investment trust;

(2) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(3) Providing financial advice to state or local governments or foreign governments with respect to issuance of securities;

(4) Providing tax planning and preparation; and

(5) Providing consumer financial counseling;

(J) Providing financial and transactional advice to customers and assisting customers in structuring, arranging, and executing various financial transactions (provided that the bank and its affiliates do not participate as a principal), including:

(1) Mergers, acquisitions, divestitures, joint ventures, leveraged buyouts, recapitalizations, capital structurings, and financial transactions (including private and public financings and loan syndications); and

conducting financial feasibility studies; and

(2) Arranging commercial real estate equity financing;

(K) Investment advice, (not involving the exercise of investment discretion), on futures and options on futures;

(L) Making, purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein, for the subsidiary's account, or for the account of others, including consumer loans, credit cards loans, commercial loans, residential mortgage loans, and commercial mortgage loans. The notice procedure is not available under this paragraph, however, if the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with a transaction subject to this section. For purposes of this paragraph (e)(2)(ii)(L), the terms "low-quality asset" and "affiliate" have the same meaning as provided in section 23A of the Federal Reserve Act, 12 U.S.C. 371c;

(M) Leasing of personal property, including:

(1) Leases in which the bank may invest pursuant to 12 U.S.C. 24(Seventh);

(2) Leases in which the bank may invest pursuant to 12 U.S.C. 24(Tenth); and

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

(N) Owning, holding, and managing all or part of the parent bank's investment securities portfolio.

(3) *Expedited review*—(i) *General*. An eligible bank may acquire or establish an operating subsidiary to engage in the activities listed in paragraph (e)(3)(ii) of this section, or may perform such activities in an existing operating subsidiary, by submitting an application to the appropriate district

office and receiving approval thereof. Such an application is deemed approved by the OCC 30 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2). The application must include a complete description of the bank's investment in the subsidiary and of the activity to be conducted and a representation and undertaking that the activity will be conducted in accordance with the OCC policies contained in guidance issued by the OCC regarding the activity. All approvals are subject to the condition that the subsidiary conduct the activity in a manner consistent with OCC policies contained in the published guidance. The OCC also may impose additional conditions in connection with any approval under this section.

(ii) *Activities eligible for expedited review.* The following activities qualify for expedited review:

(A) Providing securities brokerage, related securities credit, and related activities, including investment advice;

(B) Underwriting and dealing in securities permissible for a national bank under 12 U.S.C. 24(Seventh) and 12 CFR part 1;

(C) Acting as futures commission merchant;

(D) Serving as an investment adviser for investment companies under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*;

(E) Providing financial and transactional advice to customers and assisting customers in structuring, arranging, and executing various financial transactions relating to swaps and other derivatives and foreign exchange, coin and bullion, and related transactions;

(F) Data processing and warehousing products, services, and related activities, including associated equipment and technology permissible under 12 U.S.C. 24(Seventh) and 12 CFR 7.1019; or

(G) Real estate appraisal services for the subsidiary, parent bank or other financial institution.

(4) *No application or notice required.* A bank may acquire or establish an operating subsidiary without filing an application or providing notice to the

OCC, provided the bank is adequately capitalized or well capitalized and the:

(i) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(ii) Establishment or acquisition of the prior operating subsidiary was deemed permissible by the OCC;

(iii) Activities in which the new subsidiary will engage continue to be deemed legally permissible by the OCC; and

(iv) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank.

(5) *Fiduciary powers.* If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 and the subsidiary shall be subject to the requirements of 12 CFR part 9, unless:

(i) The subsidiary is registered under the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*; or

(ii) The subsidiary is registered, or has filed a notice, under the applicable provisions of sections 15, 15B or 15C of the Securities Exchange Act of 1934, 15 U.S.C. 78o, 78o-4, or 78o-5, as a broker, dealer, municipal securities dealer, government securities broker or government securities dealer; and the subsidiary's performance of investment advisory services as described in 15 U.S.C. 80b-2(a)(11) is solely incidental to the conduct of its business as broker or dealer and there is no special compensation to the subsidiary for those advisory services.

(f) *Additional requirements for certain permissible activities.* A national bank may acquire or establish an operating subsidiary to engage in an activity authorized under § 5.34(d) for the subsidiary but different from that permissible for the parent national bank, or may perform such activities in an existing operating subsidiary, subject to the following additional requirements:

(1) *Notice and comment.* If the OCC has not previously approved the proposed activity, the OCC will provide public notice and opportunity for comment on the application by publishing notice of the application in the FEDERAL REGISTER. For subsequent applications to conduct the activity, the OCC may also publish notice of the application in the FEDERAL REGISTER and provide an opportunity for public comment.

(2) *Corporate requirements.* The following corporate requirements apply:

(i) The subsidiary shall be physically separate and distinct in its operations from the parent bank, including ensuring that the employees of the subsidiary are compensated by the subsidiary. However, this requirement shall not be construed to prohibit the parent bank and the subsidiary from sharing the same facility, provided that any area in which the subsidiary conducts business with the public is distinguishable, to the extent practicable, from the area in which customers of the bank conduct business with the bank;

(ii) The subsidiary shall be held out as a separate and distinct entity from the bank in its written material and direct contact with outside parties. All written marketing material shall clearly state that the subsidiary is a separate entity from the bank and the obligations of the subsidiary are not obligations of the bank;

(iii) The subsidiary's name shall not be the same name as its parent bank, and a subsidiary that has a name similar to its parent bank shall take appropriate steps to minimize the risk of customer confusion, including with respect to the separate character of the two entities and the extent to which their respective obligations are insured or not insured by the Federal Deposit Insurance Corporation;

(iv) The subsidiary shall be adequately capitalized according to relevant industry measures and shall maintain capital adequate to support its activities and to cover reasonably expected expenses and losses;

(v) The subsidiary shall maintain separate accounting and corporate records;

(vi) The subsidiary shall conduct its operations pursuant to independent policies and procedures that are also

intended to inform customers that the subsidiary is an organization separate from the bank;

(vii) Contracts between the subsidiary and the bank for any services shall be on terms and conditions substantially comparable to those available to or from independent entities;

(viii) The subsidiary shall observe appropriate separate corporate formalities, such as separate board of directors' meetings;

(ix) The subsidiary shall maintain a board of directors at least one-third of whom shall not be directors of the bank and shall have relevant expertise capable of overseeing the subsidiary's activities; and

(x) The subsidiary and the parent bank shall have internal controls appropriate to manage the financial and operational risks associated with the subsidiary.

(3) *Supervisory requirements.* When the subsidiary will conduct an activity described in this paragraph (f) as principal, the following additional requirements apply:

(i) The bank's capital and total assets shall each be reduced by an amount equal to the bank's equity investment in the subsidiary (for purposes of risk-based capital this deduction shall be made equally from Tier 1 and Tier 2 capital), and the subsidiary's assets and liabilities shall not be consolidated with those of the bank. The OCC may, however, require the bank to calculate its capital on a consolidated basis for purposes of determining whether the bank is adequately capitalized under 12 CFR part 6;

(ii) The standards of sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1) shall apply to, and shall be enforced and applied by the OCC with respect to, transactions between the bank and the subsidiary; and

(iii) The bank must qualify as an eligible bank under the criteria set forth at § 5.3(g), both prior to commencement of the activity, and thereafter, taking into account the capital deduction required by paragraph (f)(3)(i) of this section. If the bank ceases to be well capitalized for two consecutive quarters, it

shall submit to the OCC, within the period specified by the OCC, an acceptable plan to become well capitalized.

§ 5.35 Bank service companies.

(a) *Authority.* 12 U.S.C. 93a and 1861-1867.

(b) *Licensing requirements.* Except where otherwise provided, a national bank shall submit a notice and obtain prior OCC approval to invest in the equity of a bank service company or to perform new activities in an existing bank service company.

(c) *Scope.* This section describes the procedures and requirements regarding OCC review and approval of a notice to invest in a bank service company.

(d) *Definitions—(1) Bank service company* means a corporation or limited liability company organized to provide services authorized by the Bank Service Company Act, 12 U.S.C. 1861 *et seq.*, all of whose capital stock is owned by one or more insured banks in the case of a corporation, or all of the members of which are one or more insured banks in the case of a limited liability company.

(2) *Limited liability company* means any non-corporate company, partnership, trust, or similar business entity organized under the law of a State (as defined in section 3 of the Federal Deposit Insurance Act) which provides that a member or manager of such company is not personally liable for a debt, obligation, or liability of the company solely by reason of being, or acting as, a member or manager of such company.

(3) *Depository institution*, for purposes of this section, means an insured bank, a financial institution subject to examination by the Office of Thrift Supervision, or the National Credit Union Administration Board, or a financial institution whose accounts or deposits are insured or guaranteed under state law and eligible to be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

(4) *Invest* includes making any advance of funds to a bank service company, whether by the purchase of stock, the making of a loan, or otherwise, except a payment for rent earned,

goods sold and delivered, or services rendered before the payment was made.

(5) *Principal investor* means the insured bank that has the largest amount invested in the equity of a bank service company. In any case where two or more insured banks have equal amounts invested, the bank service company shall designate one of the banks as its principal investor.

(e) *Standards and requirements.* A national bank may invest in the equity of a bank service company that conducts, or through an existing bank service company may conduct, activities described in paragraphs (f)(4) and (f)(5) of this section, and activities (other than taking deposits) permissible for the national bank and other state and national bank shareholders or members in the bank service company.

(f) *Procedures—(1) OCC notice and approval required.* Except as provided in paragraphs (f)(2) and (f)(5) of this section, a national bank that intends to make an investment in the equity of a bank service company, or to perform new activities in an existing bank service company, shall submit a notice to and receive prior approval from the OCC. The OCC approves or denies a proposed investment within 60 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory or compliance concern, or raises a significant legal or policy issue. The notice must include the information required by paragraph (g) of this section.

(2) *Notice process only for certain activities.* A national bank that is "adequately capitalized" or "well capitalized," as defined in 12 CFR part 6, and has not been notified that it is in "troubled condition," as defined in § 5.51, may invest in the equity of a bank service company, or perform a new activity in an existing bank service company, by providing the appropriate district office written notice within ten days after the investment, provided that the bank service company engages only in the activities listed in § 5.34(e)(2)(ii). No prior OCC approval is required. The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a