

communications between the applicants and the appropriate district office before filing under paragraph (j) of this section.

[61 FR 60363, Nov. 27, 1996, as amended at 64 FR 60098, Nov. 4, 1999; 65 FR 12911, Mar. 10, 2000]

§ 5.34 Operating subsidiaries.

(a) *Authority.* 12 U.S.C. 24 (Seventh), 93a, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

(b) *Licensing requirements.* A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

(c) *Scope.* This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. The procedures in this section do not apply to financial subsidiaries authorized under § 5.39.

(d) *Definitions.* For purposes of this § 5.34:

(1) *Authorized product* means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (Public Law 106-102, 113 Stat. 1338, 1407) (GLBA) (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(2) *Well capitalized* means the capital level described in 12 CFR 6.4(b)(1).

(3) *Well managed* means, unless otherwise determined in writing by the OCC:

(i) The national bank has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination; or

(ii) In the case of any national bank that has not been examined, the existence and use of managerial resources

that the OCC determines are satisfactory.

(e) *Standards and requirements—(1) Authorized activities.* A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

(i) Providing authorized products as principal; and

(ii) Providing title insurance as principal if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal. A subsidiary may not provide title insurance as principal if the state had in effect before November 12, 1999, a law which prohibits any person from underwriting title insurance with respect to real property in that state.

(2) *Qualifying subsidiaries.* 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 operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating 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 bank service company under 12 U.S.C. 1861 *et seq.* or a financial subsidiary under section 5136A of the Revised Statutes (12 U.S.C. 24a)); 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.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or 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 operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) *Consolidation of figures.* Pertinent book figures of the parent bank and its operating subsidiary shall be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, *e.g.*, for purposes of 12 U.S.C. 56, 60, 84, and 371d.

(5) *Procedures—(i) Application required.* (A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an application to, and receive approval from, the OCC. 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. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company

holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity 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 these cases, the OCC encourages applicants to have a pre-filing meeting with the OCC.

(B) A national bank must file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing operating 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 the filing exemption in paragraph (e)(5)(vi) of this section and are not eligible for the notice procedures in paragraph (e)(5)(iv) 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 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.

(iv) *Notice process for certain activities.* A national bank that is "well capitalized" and "well managed" 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, if the activity is

listed in paragraph (e)(5)(v) 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. To the extent the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. 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.

(v) *Activities eligible for notice.* The following activities qualify for the notice procedures, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

(A) Holding and managing assets acquired by the parent bank, including investment assets and property 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) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(E) Providing courier services between financial institutions;

(F) Providing management consulting, operational advice, and services for other financial institutions;

(G) Providing check guaranty, verification and payment services;

(H) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(I) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling;

(J) Providing tax planning and preparation services;

(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(L) Underwriting credit related insurance to the extent permitted under section 302 of the GLBA (15 U.S.C. 6712);

(M) Leasing of personal property and acting as an agent or adviser in leases for others;

(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(O) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;

(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA (15 U.S.C. 6713);

(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A "quota share agreement" is an agreement under which the reinsurer is

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liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent;¹

(S) Offering correspondent services to the extent permitted by published OCC precedent;

(T) Acting as agent or broker in the sale of fixed or variable annuities;

(U) Offering debt cancellation or debt suspension agreements;

(V) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;

(W) Acting as a transfer or fiscal agent;

(X) Acting as a digital certification authority to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent; and

(Y) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.

(vi) *No application or notice required.* A national bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, if the bank is adequately capitalized or well capitalized and the:

(A) 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;

(B) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary; and

(C) 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.

(vii) *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.

[65 FR 12911, Mar. 10, 2000]

§ 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

¹See, e.g., the OCC's monthly publication "Interpretations and Actions." Beginning with the May 1996 issue, the OCC's Web site provides access to electronic versions of "Interpretations and Actions" (www.occ.treas.gov).