Office of the
Comptroller of the Currency

COMPTROLLER'S LICENSING MANUAL

Business Combinations

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Introduction

This booklet of the *Comptroller's Licensing Manual* supports the Office of the Comptroller of the Currency's (OCC) supervisory activity with respect to reviewing and deciding applications for business combinations for national banks and federal savings associations (FSA). Throughout this booklet, national banks and FSAs are collectively referred to as "banks," "federally chartered banks," or "institutions," unless it is necessary to distinguish between the two types of charter.

Business combinations, as defined in the "Glossary" section of this booklet, include mergers, consolidations, and certain purchase and assumption transactions. This booklet also covers reorganizations under 12 USC 215a-2 in which a national bank becomes a subsidiary of a bank holding company (BHC). A national bank or FSA must apply to, and obtain approval from, the OCC before consummating any business combination in which the bank or FSA will be the resulting entity. In the case of a national bank, prior approval is required if the surviving entity is a nonbank affiliate of the national bank. A bank engaging in a merger or consolidation must file notice with the OCC when it is not the applicant and the resulting institution.

This booklet

- describes OCC policies and procedures used in the combination process, along with detailed guidance and instructions.
- discusses the factors that the OCC considers in deciding a combination application.
- describes the application process, including the prefiling process, filing and review of the application, the decision, and the post-consummation phase of the combination.
- discusses the procedures and requirements for a bank to enter into a combination (e.g., approval by directors and shareholder vote).

This booklet consists of the following sections:

- "Introduction"
- "Key Policies," which outlines specific factors for combinations
- "Application Process"
- "Procedures"
- "Appendixes," which addresses expedited review and streamlined application eligibility and bank merger competitive review
- "Glossary"
- "References," with statutory and regulatory citations and other useful material; references are also made to other booklets of the *Comptroller's Licensing Manual* and the *Comptroller's Handbook*

Throughout this booklet are hyperlinks to sample documents on the OCC's website, such as the Interagency Bank Merger Act Application, and other information that applicants may find useful.

Key Policies

Decision Criteria

In evaluating a business combination application, the OCC considers a number of statutory and regulatory factors. This section provides an overview of the applicable evaluative factors.

General Policy Factors

The OCC considers the following factors in evaluating an application for a business combination:

- Capital level of the resulting national bank or FSA.
- Conformity of the transaction to applicable law, regulation, and supervisory policies.
- Transaction's purpose.
- Transaction's impact on the safety and soundness of the national bank or FSA.
- Effect of the transaction on the national bank's or FSA's shareholders (or members, in the case of a mutual savings association), depositors, other creditors, and customers.

Bank Merger Act and Related Factors

In addition to the above factors, when the OCC evaluates an application for a business combination under the Bank Merger Act (BMA), the OCC also considers the

- effect of a proposed business combination on competition.
- financial and managerial resources and future prospects of the existing or proposed institutions.
- probable effects of the business combination on the convenience and needs of the community served, including the participating institutions' record of terminating individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.
- effectiveness of any insured depository institution involved in the transaction in combating money laundering activities.
- risk to the stability of the U.S. banking and financial system.
- deposit concentration limit in 12 USC 1828(c)(13) for certain interstate transactions.
- total liabilities concentration limit under 12 USC 1852 for certain combinations involving large financial firms.
- performance of the applicant and the other depository institutions involved in the business combination in helping to meet the credit needs of the relevant communities, including low- and moderate-income neighborhoods, consistent with safe and sound banking practices, in accordance with 12 USC 2903(a)(2).

Safety and Soundness and Compliance

The OCC considers safety and soundness factors, including ratings and examination findings, when assessing the post-merger condition of the acquiring institution.

The OCC expects the resulting institution to remain in a safe and sound condition with acceptable future prospects and to comply with all laws and regulations. Applications from banks in troubled condition or from sound banks seeking to acquire banks in less than satisfactory condition may raise questions regarding the safety and soundness of the resulting institution. The OCC considers the condition of the merging and resulting banks, including capital, management and earnings. Specifically, the OCC considers the following:

- Does the resulting bank have expertise to oversee any areas of concern or new products or lines of business?
- Has management appropriately planned for system integration issues?
- Will the resulting bank have sufficient capital relative to its risk profile?
- Are there any material contingent liabilities to be assumed?

The OCC also considers the compliance records of all merging institutions, including their record of compliance with Bank Secrecy Act (BSA)/Anti-Money Laundering (AML) requirements, the Community Reinvestment Act (CRA), and consumer laws and regulations. The OCC considers the following, for example:

- Do the applicant or target institutions have BSA/AML compliance deficiencies? If so, has any such institution corrected the identified deficiencies? If not fully corrected, what is the status of the bank's progress in remediating these deficiencies?
- Do any of the combining banks present concerns relating to unfair, deceptive, or abusive acts or practices (UDAP/UDAAP), fair lending, or other discriminatory or illegal practices?
- Does either of the combining banks have a "less than satisfactory" CRA rating overall, or in one or more geographic rating areas?

Banks considering business combinations that present safety and soundness or compliance concerns should consult with the appropriate OCC supervisory office to include Compliance and Community Affairs, Compliance Supervision Management, and the Licensing Division before filing any related application.

Legal

The OCC evaluates and decides combination proposals based on requirements under relevant laws and regulations. The OCC regulations governing national bank combination transactions are detailed in 12 CFR 5.33 and incorporate references to the BMA, 12 USC 1828(c), the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal Act, or Riegle-Neal), 12 USC 1831u, and the National Bank Consolidation and Merger Act, 12 USC 215 et seq. The OCC regulations governing an FSA's combination transactions

are detailed in 12 CFR 5.33 and incorporate references to the BMA and sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act (HOLA), 12 USC 1464(d)(3)(A) and 1467a(s).

In determining the legal permissibility of a business combination, the OCC considers:

- the structure of the proposed transaction, including the use of interim banks and the ownership structure of the parties involved.
- the adequacy of notices to the public and disclosure to shareholders.
- the treatment of any minority or dissenting shareholders.
- the permissibility of any subsidiaries or related organizations, assets, and activities.
- any plans to divest or otherwise bring into conformance any impermissible subsidiaries, assets, or activities.
- the resulting bank's authority to retain and operate its main or home office and branches, as well as the main or home office and branches of the target bank.
- whether applicable filings or waivers of related applications have been made with the Board of Governors of the Federal Reserve System (Federal Reserve), Federal Deposit Insurance Corporation (FDIC), or other regulators as appropriate.
- whether proposed changes to capital meet statutory requirements.
- whether other related applications required in connection with the business combination, such as applications for trust powers, operating or financial subsidiaries, or non-controlling investments, are permissible.
- concentration limits under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), sections 622 and 623.
- whether the transaction conforms with any other relevant legal requirements or policy.

Banks considering business combinations that present significant legal issues should consult with the OCC's Licensing Division before filing any related application.

Competition

The U.S. Department of Justice (DOJ) and the responsible federal banking agency review the competitive effect of all BMA applications under federal banking and antitrust laws. When the resulting institution is a national bank or FSA and all of the institutions involved in the combination are insured, the OCC is the responsible federal banking agency. For applications filed pursuant to the BMA, the OCC will not approve a combination whose effect in any section of the country may substantially lessen competition or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless these effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In assessing convenience and needs, the OCC will take into consideration whether institutions involved in a transaction have a record of terminating individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.

Under the BMA, the DOJ and the FDIC (rather than the OCC) evaluate competitive effects of combinations that involve an insured depository institution combining with an uninsured depository institution.

Combinations in which each depository institution involved is uninsured are not subject to the BMA, but are subject to the general federal antitrust statutes such as the prohibitions against monopoly and substantial lessening of competition under the Sherman Antitrust Act and Clayton Antitrust Act, and to notification requirements under the Hart–Scott–Rodino Antitrust Improvement Act, as administered by the DOJ and the Federal Trade Commission.

Affiliated and Nonaffiliated Combinations

Combinations between banks and their affiliates are considered competitively neutral and, therefore, do not result in adverse competitive effects. The OCC generally deems a bank to be affiliated with another depository or non-depository institution if one or more common individuals or companies control both the bank and the other institution. Refer to the "Glossary" section of this booklet for a definition of "control." The OCC also deems an applicant bank and another depository institution involved in a combination to be affiliated when a BHC or savings and loan holding company (SLHC) that owns the applicant bank has filed a related application with the Federal Reserve under the Bank Holding Company Act (BHCA) or HOLA to acquire the other depository institution, the related application has undergone review for competitive effects, and the holding company acquisition consummates before the bank combination. However, the OCC deems a combination between a bank and another nonaffiliated depository institution in which the applicant bank's BHC or SLHC has requested that the Federal Reserve not require a related application as a nonaffiliated combination.

Merger Screens

To speed the competitive review process and reduce regulatory burden on the banking industry, federal banking agencies and the DOJ have developed Merger Screens to identify proposed nonaffiliated combinations that do not have significant adverse effects on competition. The OCC primarily relies on Merger Screen A for measuring competitive effects of a combination.[1] A proposed combination exceeds the threshold of Merger Screen A when it would cause the Herfindahl-Hirschman Index (HHI), a statistical measure of market concentration, to increase by more than 200 points to a level above 1800 based on increased concentration levels of deposits in any geographic banking market.

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

[1] In addition, the OCC has concluded that geographic markets with populations of less than 10,000 are not economically significant for the purpose of this analysis, and therefore, any anticompetitive effects in these markets are considered negligible. Generally, the OCC does not object to a proposed combination in such a market on anticompetitive grounds.

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

Competitive Review Process

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

Financial and Managerial Resources and Future Prospects

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

In evaluating financial and managerial resources, the OCC relies on the views of the supervisory office and information from a variety of sources, such as reports of examination of the depository institutions involved in the combination and the applicant's plans to operate the resulting bank. The OCC closely scrutinizes combinations that raise issues about management's ability to address increased risk to bank earnings and capital that can arise from any of the seven categories of risk that the OCC has defined for supervision purposes: credit, interest rate, liquidity, price, operational, compliance, and strategic.

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

If the integration issues or other issues present significant supervisory concerns, and the issues cannot be resolved through appropriate conditions or otherwise, the OCC may deny the application.

Before entering into merger agreements and data conversion contracts, the bank should take into consideration the possibility that the application may generate substantive public comments and that the review period could therefore be extended.

Convenience and Needs and CRA

When reviewing a business combination application under the BMA, the OCC considers the likely impact of the applicant's plans on the community to be served. The OCC reviews any significant anticipated changes in financial services or products and fees offered to bank customers that would occur after the transaction.

The convenience and needs factor is distinguished from the CRA requirements in that the convenience and needs analysis is prospective, whereas the CRA requires the OCC to consider the applicant's record of performance. The OCC considers any plans of the resulting, combined bank to close branches, particularly in low- to moderate-income areas, reduce services, or provide expanded or less costly services to the community. In addition to the prospective analysis, the convenience and needs analysis will also assess whether the institutions involved have engaged in the termination of individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.

When rendering a decision on combination applications, the OCC also considers

- the CRA records of performance for all participating insured depository institutions.
- the most recent CRA performance evaluations for each of the participating institutions and any public comments received during the public comment period.
- public comment letters that were received before the filing of an application relating to the participating institutions' CRA performance and its ability to meet the convenience and needs of its customers.
- the record of the participating institutions' termination of individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.
- the applicant's responses to any comment letters or additional information requests from the OCC.
- other relevant information.

If the OCC determines that the CRA record of performance of any of the participating institutions is less than satisfactory or, relative to convenience and needs, determines that any institution involved has engaged in the termination of individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis, the OCC may deny or conditionally approve a business combination application based on the facts and circumstances involved in the particular case. If the OCC approves a business combination application despite an adverse conclusion on the

convenience and needs factor, the OCC's decision letter will provide an explanation of its analysis and conclusions.[2].

Refer to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual* for a detailed discussion of how convenience and needs and CRA factors affect the application process, including an application's removal from the expedited review process because of significant CRA issues.

AML Compliance

When transactions are subject to the BMA, the OCC considers the effectiveness of AML compliance programs of each insured depository institution involved, 12 USC 1828(c)(11). The OCC reviews existing supervisory records, comments received during the public notice period, and comments from other regulators and public officials. The OCC anticipates that, in most cases, required information will be available from the supervisory record.

During the processing of a combination application, the OCC reviews any identified BSA/AML program deficiencies. In evaluating this factor, the OCC reviews matters requiring attention and program deficiencies identified by regulatory agencies and the bank's own audit program. The OCC assesses the nature and duration of the issues, the institution's progress in remediating identified program deficiencies, and whether the proposed combination would detract from the remediation, exacerbate existing problems, or create new problems for the resulting institution. If the BSA/AML deficiencies have resulted in an enforcement action for BSA/AML violations, the bank should consult with its supervisory office and the Licensing Division before pursuing any plans for a combination.

Refer to the Federal Financial Institutions Examination Council's *BSA/AML Examination Manual* for an expanded discussion on supervisory expectations.

Financial Stability

The BMA, 12 USC 1828(c)(5), requires the OCC to consider "the risk to the stability of the United States banking or financial system" when reviewing transactions subject to the act. In evaluating a BMA application under this review criterion, the OCC considers the following factors:

- Whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining institutions.
- Whether the proposed transaction would result in a reduction in the availability of substitute providers for the services offered by the combining institutions.
- Whether the combined entity would engage in any business activities or participate in markets in a manner that, in the event of financial distress of the combined entity, would cause significant risks to other institutions.

[2] See PPM 6300-2, "Impact of CRA Ratings on Licensing Applications."

- Whether the proposed transaction would materially increase the extent to which the combining institutions contribute to the complexity of the financial system.
- Whether the proposed transaction would materially increase the extent of cross-border activities of the combining institutions.
- Whether the proposed transaction would increase the relative degree of difficulty of resolving or winding up the combined institution's business in the event of failure or insolvency.
- Any other factors that could indicate that the transaction poses a risk to the U.S. banking or financial system.

Deposit Concentration Limit

Under 12 USC 1828(c)(13), the OCC may not approve an interstate merger transaction if, after the transaction, the acquiring bank and all of its insured depository institution affiliates would control more than 10 percent of insured deposits in the United States. An "interstate merger transaction" is one between insured depository institutions with different home states that are not affiliates. There is an exception for transactions involving an institution in default or in danger of default or with respect to which the FDIC provides assistance under 12 USC 1823.

Liability Concentration Limit

Under 12 USC 1852, a financial company may not combine with another company if, after the transaction, the total consolidated liabilities of the acquiring financial company would exceed 10 percent of aggregate consolidated liabilities of all financial companies in the United States. "Financial company" includes an insured national bank or FSA. There is an exception for transactions involving an institution in default or in danger of default, transactions with respect to which the FDIC provides assistance under 12 USC 1823, or transactions that would result in only a *de minimis* increase in liabilities.

Types of Combinations

A bank may structure a combination based on a variety of factors, such as the charter type of the target institution, the location of the target institution, branching restrictions in the states where the target is located, whether the target is FDIC-insured, whether the target is affiliated with the acquiring bank, and tax considerations. In some cases, a bank may use a multi-step process that involves more than one type of combination.

Combinations Resulting in a National Bank

Same-State Combinations With Banks and Savings Associations

A national bank may combine with other depository institutions located in the same state. These same-state combinations generally involve transactions in which the main offices of both the acquiring national bank and the target are located in the same state. Same-state

combinations, however, also may include ones in which the main office of the target is located in a state in which the acquiring national bank has a branch (or a trust office, in the case of a national bank limited to the activities of a trust company), but not its main office.

As outlined in this section, the sources of authority for the various types of combination transactions, as well as authority to retain branches, may differ depending on the type of institution being acquired. In addition, these transactions may be subject to other statutory requirements, such as the BMA, which are discussed elsewhere in this booklet.

The following lists different ways that a national bank may combine with other depository institutions located in the same state:

- Pursuant to 12 USC 215 or 215a, a national bank may acquire a national or state bank with its main office in the same state as the acquiring bank. For purposes of sections 215 and 215a, "state bank" includes a state commercial bank, state trust company, state stock savings bank, or state-chartered savings association. Authority to consolidate or merge under sections 215 or 215a does not depend on the FDIC-insured status of the participating institutions. The resulting bank may retain the branches of the banks involved, including the branches that are not located in the same state as the main offices of the combining banks, if branch retention meets the requirements of the law governing branch retention in section 215 or 215a transactions (12 USC 36(b)(2)).
- In certain circumstances under 12 USC 215 or 215a, a national bank with its main office in one state may acquire a national or state bank, including a state savings association, with its main office in a different state. The most common situation is when the national bank is acquiring another national or state bank in a state in which the acquiring bank already operates a branch, and when the target institution operates branches only in that state or in other states in which the acquiring national bank already operates branches. The resulting national bank may retain the branches of the banks involved, if permitted under the law governing branch retention in section 215 or 215a transactions (12 USC 36(b)(2)).[3]
- Sections 215 and 215a authorize only mergers and consolidations with other national banks, state banks, state stock savings banks, and state savings associations. They do not apply to a merger or consolidation of a national bank with an FSA. Those transactions are authorized pursuant to 12 USC 215c. A resulting national bank may retain the branches of the target FSA if the national bank could establish branches at the sites of the FSA branches under 12 USC 36(c). Generally, this permits the retention of the FSA's branches

[3] While these transactions can be effected under sections 215 or 215a because the banks are located in the same state for purposes of those statutes, if the institutions are both insured banks (not savings associations) and have different home states, the transaction also falls within the scope of the Riegle–Neal Act and could be accomplished under that authority, as discussed in the "Interstate Combinations" section of this booklet. An applicant may select whether to rely on Riegle–Neal Act or sections 215 or 215a for authority to undertake the transaction, especially when the target bank operates only in one state where the acquiring bank already has branches. When the target bank operates branches in states where the acquiring bank does not have its main office or any branches, there may be issues regarding the authority of the acquiring bank in a consolidation or merger under sections 215 or 215a to retain branches in those states under section 36(b)(2). In such cases, the OCC strongly encourages applications under the Riegle–Neal Act.

in states where the national bank already has its main office or branches, or in states where the national bank does not have an existing branch but may, and does, establish a de novo interstate branch under 12 USC 36(g), and where state intrastate branching law, as applied to national banks by 12 USC 36(c), permits establishment of a branch at a site or sites of the various branches of the acquired FSA.

Interstate Combinations Under the Riegle–Neal Act

The Riegle–Neal Act authorizes interstate combinations between insured national and state banks with different home states.[4] The "home state" of a bank under the Riegle–Neal Act is, for national banks, the state where the bank's main office is located or, for state banks, the state that chartered the bank. Thus, under the Riegle–Neal Act, an insured national bank may combine with another insured bank with a different home state. As discussed in footnote 3 and the accompanying text under the "Same-State Combinations" section of this booklet, some combinations that are within the scope of the Riegle–Neal Act are also within the scope of sections 215 or 215a, and the applicant bank may select which authority to use.

Interstate combinations under the Riegle–Neal Act include mergers, consolidations, and purchase and assumption transactions. The Riegle–Neal Act provides its own branch retention authority in 12 USC 36(d) and 1831u(d), and under it the resulting bank may retain, as branches, the main offices and branches of all banks involved in the combination. In addition, the resulting bank may designate its main office from among the main offices and branches of the banks involved in the combination. For purchase and assumption transactions in which a national bank seeks to enter a new state by acquiring an existing branch of an insured bank, but without acquiring the bank, the state where the target branch is located must permit branch acquisitions by an out-of-state bank.[5]

The Riegle–Neal Act has a number of requirements that must be met for a transaction to be approved:

- **Age requirements (refer to 12 USC 1831u(a)(5), (6)):** The bank being acquired must have existed for at least the minimum period of time, if any, specified in the host state's statutes, up to a maximum of five years. A bank that is chartered solely to acquire a bank or branch and that does not open for business before acquiring the existing bank or

[4] The Riegle–Neal Act covers only insured banks (as "bank" is defined in the Federal Deposit Insurance Act), and so it does not apply to combinations between a national bank and a state or federal savings association or to combinations in which one of the banks is uninsured. As discussed in "Interstate Combinations Between National Banks and Insured State and Federal Savings Associations," a national bank may accomplish a Riegle–Neal Act combination with a state or federal savings association that has first converted to a national bank under, as applicable, 12 USC 35 and 12 CFR 5.24 or, if eligible, under 12 USC 1464(i)(5)(A), provided that the combination is consistent with other Riegle–Neal Act requirements. Also, as discussed in the "Interim Bank Combinations" section of this booklet, a national bank may accomplish a Riegle–Neal Act combination with an uninsured bank by first combining the uninsured bank into an interim national bank.

[5] For branch acquisitions under the Riegle–Neal Act, the state where the target branch is located, rather than the selling bank's main office state or chartering state, is considered to be the home state of the selling bank (the state whose law must permit branch acquisitions).

branch is deemed to have existed for the same period of time as the target bank or branch (in the case of the acquisition of a branch without the acquisition of the bank).

- **Filing requirements (refer to 12 USC 1831u(b)(1)A):** An acquiring bank must comply with the filing requirements of any state that will become a host state as a result of the transaction, if the requirements do not discriminate against out-of-state banks and BHCs or their subsidiaries and are similar in effect to those imposed on out-of-state nonbanking corporations. An acquiring bank also must submit a copy of its OCC application to the state bank supervisor of each host state. These filing requirements, however, do not mean that the national bank must obtain approval from the state to undertake the transaction.
- **Deposit concentration limits (refer to 12 USC 1831u(b)(2):** The Riegle–Neal Act imposes nationwide and statewide deposit concentration limits on certain interstate merger transactions. Those limits, however, pertain only to interstate merger transactions involving nonaffiliated banks, and the statewide limitations apply only when both institutions or their affiliates have branches in the same state.[6] In addition, the acquiring bank in an affiliated combination should assess the applicability of separate state-imposed concentration limits.
- **CRA considerations (refer to 12 USC 1831u(b)(3)):** All interstate combinations, including affiliate combinations, are subject to OCC review for compliance with the CRA. The Riegle–Neal Act imposes additional CRA-related criteria on all nonaffiliated Riegle–Neal Act interstate mergers. To approve a nonaffiliated combination that results in a national bank having a branch in a state in which it had neither a branch nor an affiliated bank immediately before the transaction, the OCC considers compliance with the CRA (as it currently must do for any business combination), the most recent written CRA performance evaluation of any bank that would become an affiliate of the resulting bank, comments received during the public comment period, and compliance by applicants with applicable state community reinvestment laws.
- **Capital and management (refer to 12 USC 1831u(b)(4):** Each bank involved in the combination must be at least adequately capitalized as of the date the application is filed. In addition, the OCC must determine that the resulting national bank will be well capitalized and well managed upon consummating the combination.

There is an exception from these requirements for transactions involving one or more banks in default or in danger of default or with respect to which the FDIC provides assistance under 12 USC 1823(c). See 12 USC 1831u(e).

Interstate Combinations Between National Banks and Insured State and Federal Savings Associations

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

The Riegle–Neal Act does not apply to interstate combinations between national banks and federal and state savings associations. An insured national bank, however, may combine with an insured federal or state savings association in an interstate transaction in several ways. The authority for a national bank to consolidate or merge with a state savings association is 12 USC 215 and 215a. As previously noted, these statutes apply to institutions located in the same state. The authority for a national bank to consolidate or merge with an FSA is 12 USC 215c. There is not a same-state location requirement in section 215c. For combinations with state savings associations and FSAs, the authority of the resulting national bank to retain the branches of the savings association is 12 USC 36(c), which, as noted above, authorizes establishment of branches in a state in which the national bank is situated.

If the national bank has a branch in the state where the state savings association is located, then the bank is located in that state and the consolidation or merger can be effected under 12 USC 215 or 215a. Similarly, since the bank has a branch in that state, the bank can establish additional branches in that state under 12 USC 36(c) like other banks in the state. Thus, the bank can retain the savings association's branches. Similarly, in a merger with an FSA under 12 USC 215c, if the national bank has branches in the state where the FSA is located, the bank can retain the FSA's branches.

If the national bank does not already have a branch in the state where the savings association is located, the bank would first establish an interstate de novo branch in that state under the Riegle–Neal Act, 12 USC 36(g). Then it would proceed as stated.

Another way to accomplish an interstate combination with a state savings association or FSA that has a different home state than the national bank is for the savings association first to convert to a national bank. Then, once it is a national bank, the combination is an interstate merger between two insured banks under the Riegle–Neal Act.

Section 341 of Dodd–Frank, codified at 12 USC 5451, provides that notwithstanding any other provision of federal or state law, a savings association that becomes a bank may continue to operate any branch that the savings association operated immediately before it became a bank. Section 341 also provides that after becoming a bank, the bank may establish, acquire, and operate additional branches at any location within any state in which the savings association operated a branch immediately before the conversion if the law of the state where the branch is located, or is to be located, would permit establishing the branch if the bank were a state bank chartered by such state.

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

Purchase and Assumption Transactions

A national bank may effect a business combination through a purchase and assumption transaction under 12 USC 24(Seventh), as well as a merger or consolidation. With OCC approval under the BMA, an insured national bank may acquire the assets of another insured depository institution or assume any deposit liabilities of another insured depository institution.[7] The OCC interprets "acquire the assets" for BMA filing purposes to include the acquisition of assets such that the target is no longer a viable competitor, regardless of whether the target plans to liquidate immediately after consummating the transaction.

If the purchase and assumption transaction includes the acquisition of branches, the bank must have authority to acquire and operate the branches under applicable branching statutes. While 12 USC 24(Seventh) provides authority to acquire assets and assume deposits, it does not by itself authorize branches. If the bank already has its main office or branches in the state(s) where the acquired branches are located, the bank may retain the acquired branches if it could establish or acquire new branches at the sites of the target's branches under 12 USC 36(c). If the bank does not already operate branches in the state in which the acquired branches are located, the bank may acquire and retain the branches, if the transaction can be approved as an interstate branch acquisition under the Riegle–Neal Act (12 USC 1831u(a)(4)). Under section 1831u(a)(4) a bank may acquire branches from a bank in a new state without acquiring the bank if the state where the branch is located permits such acquisitions. If the bank does not already operate branches in the state in which the acquired branches are located, and the state in which the branches are located does not permit interstate branch acquisitions, the national bank may acquire and retain the branches after first establishing a de novo interstate branch under 12 USC 36(g) of the Riegle–Neal Act in the state where the branches are located. Then, the bank may retain the acquired branches if it could establish or acquire new branches at the sites of the target's branches under 12 USC 36(c).

If, after a purchase and assumption transaction, the target institution plans to liquidate or otherwise will no longer be a viable business, the application should include information showing that possible creditors of the target institution, including potential contingent liability claimants, will be protected so that the risk of claims being made against the acquiring national bank is mitigated. This information should be provided regardless of the charter of the target institution. This information need not be provided if the acquiring national bank will assume all liabilities of the target institution, including contingent liabilities.

In addition, if the target institution is a national bank or FSA and plans to liquidate after the purchase and assumption transaction, the target institution must demonstrate that it will be able to liquidate in an orderly manner under 12 CFR 5.48, unless the acquiring bank has

[7] If the institution from which the national bank is assuming deposits or similar liabilities or to which the national bank is transferring deposits is not an FDIC-insured depository institution, review of the transaction under the BMA rests with the FDIC. Combinations with uninsured entities are discussed further in the next section of this booklet.

assumed all liabilities and obligations, including contingent liabilities.[8] If the target national bank or FSA plans to liquidate or otherwise will no longer be a viable business after the purchase and assumption transaction, the OCC expects the owners to begin the process of liquidating the bank under 12 CFR 5.48 promptly after consummating the transaction and to return the institution's charter to the OCC, unless the bank and the OCC have agreed to other arrangements.

Combinations Between National Banks and Uninsured Entities

There are several types of combinations involving uninsured entities: (i) an FDIC-insured national bank acquiring an uninsured depository institution; (ii) an uninsured national bank acquiring an uninsured depository institution; (iii) a national bank merging with its nonbank subsidiary or affiliate; (iv) an insured national bank assuming deposits or similar liabilities from an institution that is not an FDIC-insured depository institution; and (v) an insured national bank transferring deposits to an institution that is not an FDIC-insured depository institution. The latter two types of transactions are discussed in the preceding section of this booklet.

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

Insured National Bank Combining with an Uninsured Depository Institution

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

Uninsured National Bank Combining With an Uninsured Depository Institution

An uninsured national bank may combine with another uninsured depository institution, such as a national trust bank or state trust company, under the OCC's combination regulation. Applications to effect mergers and consolidations between uninsured depository institutions also must comply with relevant national banking laws. For purposes of those statutes, an uninsured national trust bank seeking to combine with another uninsured depository

[8] National banks also are subject to the requirements set forth in 12 USC 181.

institution whose business is limited to providing trust services is considered to be located in states where they have a trust office as defined in 12 CFR 9.2(j) and 9.7(d).

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

National Banks Merging With a Nonbank Subsidiary or Affiliate

A national bank may merge with its nonbank subsidiary or affiliate with OCC approval (12 USC 215a-3). For purposes of this authority, a nonbank affiliate is any company, other than a bank, state trust company, state savings association, or FSA that controls, is controlled by, or is under common control with the national bank. Control generally means having the ability to vote 25 percent or more of any class of voting securities. Refer to the "Glossary" section of this booklet for definitions of "company," "nonbank affiliate," and "control."

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

Applications

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

Applications to the OCC from both insured and uninsured banks for approval under section 215a-3 to merge a nonbank subsidiary or affiliate into the bank should contain information requested in the Interagency Bank Merger Act Application. When an insured national bank is also applying to the FDIC for approval under the BMA, the bank may submit a copy of its Interagency Bank Merger Act Application and request OCC approval under section 215a-3. The letter also should address compliance with other requirements not covered in the Interagency Bank Merger Act Application. Refer to the procedures and requirements in the next section of this booklet.

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

Procedures and Requirements

12 CFR 5.33(g)(4) and (5) set out requirements and procedures for mergers authorized under section 215a-3. The nonbank subsidiary or affiliate must have the authority to enter the merger under the law of the state or other jurisdiction under which the nonbank subsidiary or affiliate is organized. The law need not specifically address national banks. This requirement typically is met when a state's law permits its domestic corporations to merge with entities organized under the law of another jurisdiction.

When the national bank will be the resulting entity, the national bank must follow the procedures and requirements for matters such as notice of shareholder meeting, shareholder and director approval, and content of the merger agreement contained in 12 USC 215a as if the nonbank affiliate were a state bank, except as provided otherwise in 12 CFR 5.33(g)(4). When the nonbank subsidiary or affiliate will be the resulting entity, the national bank must follow the procedures and requirements for matters, such as notice of shareholder meeting, shareholder and director approval, the rights of dissenting shareholders, and appraisal of dissenters' shares contained in 12 USC 214a as if the nonbank affiliate were a state bank except as provided otherwise in 12 CFR 5.33(g)(5).

In both types of transactions, the nonbank subsidiary or affiliate follows the procedures and requirements set out in the law of the state or other jurisdiction under which the nonbank affiliate is organized. The rights of dissenting shareholders and the appraisal of dissenters' shares also are determined in the manner prescribed by the law of the state or other jurisdiction under which the nonbank subsidiary or affiliate is organized.

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

Transactions Involving Bank Holding Companies

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

Reorganizations to Become a Holding Company Subsidiary

National bank shareholders seeking to reorganize to form a holding company or be acquired by a nonaffiliated holding company formerly used an interim national bank merger. Currently, 12 USC 215a-2 and 12 CFR 5.32 provide shareholders with a simplified alternative for effecting such reorganizations. For purposes of section 215a-2, a holding

company is any company that controls a national bank or will control a national bank as a result of the reorganization. A company that is or will become a BHC under the BHCA also must file any application required under the BHCA with the appropriate Federal Reserve Bank.

When reorganizing a national bank to become a subsidiary of a holding company under section 215a-2, the national bank must file a Reorganization of a National Bank to a Subsidiary of a Bank Holding Company Application. Generally, public notice under 12 CFR 5.8 does not apply to an application under this section unless the OCC determines that the application presents significant or novel policy, supervisory, or legal issues. (Updated July 31, 2018)

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

Acquiring a Bank Subsidiary of a Bank Holding Company

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

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

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

Combinations Resulting in an FSA

Same-State and Interstate Combinations

FSAs may enter into a business combinations in accordance with 12 CFR 5.33(g)(3), 5.33(n), and 5.33(o), the BMA, and sections 5(d)(3)(A) and 10(s) of the HOLA.

A stock FSA may consolidate or merge with another insured depository institution, a state trust company, or a credit union or may engage in another business combination listed in 12 CFR 5.33(d)(2)(iv) or (v) or 12 CFR 5.33(d)(10) if the

- combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations.
- resulting FSA meets the requirements for insurance of accounts.

A mutual FSA may engage in any of the transactions described in the preceding paragraph if the mutual FSA is the surviving institution, subject to the requirements described in that paragraph. If the mutual FSA is not the surviving institution, however, the transaction is permissible only if: (i) the acquiring institution is an FDIC-insured state-chartered mutual savings association or mutual savings bank; (ii) the transaction is approved under 12 CFR 192; or (iii) the transaction involves a mutual holding company reorganization under 12 USC 1467a(o) or a similar transaction under state law.

A resulting FSA must comply with 12 USC 1464(r)(1), which generally permits an FSA to establish, retain, or operate out-of-state branches only if: (1) the FSA meets the Qualified Thrift Lender (QTL) test set forth at 12 USC 1467a(m) or qualifies as a domestic building and loan association under 26 USC 7701(a)(19); and (2) for out-of-state branches, the total assets of the FSA attributed to all branches of the FSA in that state would qualify the branches as a whole as a QTL or a domestic building and loan association. There are several exceptions to this requirement, which are set forth at 12 USC 1464(r)(2).

Purchase and Assumption Transactions

An FSA may effect a business combination through a purchase and assumption transaction, as well as a merger or consolidation. With OCC approval under the BMA, an FSA may acquire the assets of another insured depository institution or assume any deposit liabilities of another insured depository institution. With FDIC approval under the BMA and OCC approval under 12 CFR 5.33, an FSA may assume deposits or similar liabilities from, or

transfer deposits to, an uninsured bank or institution, including a credit union.[9] The OCC interprets "acquire the assets" for BMA filing purposes to include the acquisition of assets such that the target is no longer a viable competitor, regardless of whether the target plans to liquidate immediately after consummating the transaction. If, after a purchase and assumption transaction, the target institution plans to liquidate or otherwise will no longer be a viable business, the application should include information showing that possible creditors of the target institution, including potential contingent liability claimants, will be protected. This information should be provided regardless of the charter of the target institution. This information need not be provided if the acquiring FSA will assume all liabilities of the target institution, including contingent liabilities.

In addition, if the target institution is a national bank or FSA and plans to liquidate after the purchase and assumption transaction, the target bank must demonstrate that it will be able to liquidate in an orderly manner under 12 CFR 5.48 unless the acquiring bank has assumed all liabilities and obligations, including contingent liabilities.[10] If the target national bank or FSA plans to liquidate or otherwise will no longer be a viable business after the purchase and assumption transaction, the OCC expects the owners to begin the process of liquidating the bank under 12 CFR 5.48 promptly after consummating the transaction and to return the institution's charter to the OCC, unless the bank and the OCC have agreed to other arrangements.

If the purchase and assumption transaction includes the acquisition of branches, the FSA must have authority to acquire and operate the branches. Generally, an FSA may branch in any state unless the branching would violate section 5(r) or 10(e)(3) of the HOLA, or section 13(k)(4) of the Federal Deposit Insurance Act of 1950 (FDIA).[11]

Combinations Resulting in a Mutual FSA

Same-State and Interstate Combinations

When a mutual FSA combines with a mutual federal or state-chartered savings association, 12 CFR 5.33(o) requires that, for each federal mutual savings association involved in the transaction, the board of directors shall approve the plan of combination by a two-thirds vote. Mutual FSAs do not have shareholders and although the members of a mutual FSA possess voting rights, they are not required by regulation to vote on a merger. Pursuant to 12 CFR 5.33(o)(4), however, the OCC may require that a plan of combination be submitted to the mutual members at a duly called meeting and that the plan, to be effective, be approved by such voting members.

[9] If the institution from which the FSA is assuming deposits or similar liabilities or to which the FSA is transferring deposits is not an FDIC-insured depository institution, review of the transaction under the BMA rests with the FDIC. Combinations with uninsured entities are discussed further below. Transfers of deposits from mutual FSAs to stock institutions or uninsured institutions may raise significant issues.

[10] National banks also are subject to the requirements set forth in 12 USC 181.

[11] Refer to 12 CFR 145.92.

Mutual FSAs seeking to merge do not need to seek a waiver of 12 CFR 5.33(o)(4) from the OCC. Rather, upon a review of the plan of combination and, specifically, a review and comparison of the membership rights of the existing institution and the resultant institution, the OCC makes a determination as to whether the membership rights are changed to the extent that the merger transaction should receive the vote and approval of the members of the acquired institution.

Purchase and Assumption Transactions

A mutual FSA must provide notice to affected accountholders and the option of retaining the account with the transferring FSA, if it proposes to transfer any account liabilities to: (i) an entity the accounts of which are not insured by the FDIC Deposit Insurance Fund or the National Credit Union Share Insurance Fund; or (ii) a stock form depository institution.[12] Based on the relevant facts and circumstances, the OCC may require a mutual FSA to obtain approval of a transfer of deposits under 12 CFR 5.53. A mutual FSA may not begin liquidation unless the OCC has notified it that the OCC does not object to the liquidation plan.

Combinations Between FSAs and Uninsured Entities

There are several types of combinations involving an FSA and an uninsured entity: (i) an FSA acquiring an uninsured depository institution; (ii) an uninsured depository institution acquiring a stock FSA; (iii) an FSA assuming deposits or similar liabilities from an institution that is not an FDIC-insured depository institution; and (iv) an FSA transferring deposits to an institution that is not an FDIC-insured depository institution. The second type of transaction is discussed in the "Termination of Federal Charter" booklet of the *Comptroller's Licensing Manual*, and the third and fourth types of transactions are discussed in the section of this booklet addressing purchase and assumption transactions by FSAs.

An FSA seeking to acquire an uninsured depository institution in a merger or consolidation must file an application and obtain OCC approval under the OCC's combination regulation (12 CFR 5.33), and obtain FDIC approval under the BMA,[13] before consummating the combination. Applicants also must provide the OCC with assurances that the combination complies with legal requirements covering the proxy or information statement, and shareholders' approval of the proposed combination. Refer to the "Shareholder Considerations" section of this booklet under "Application Issues" for additional discussion.

[12] Refer to 12 CFR 5.33(n)(4).

[13] Applications filed with the OCC should include a letter and a copy of the application filed with the FDIC.

Other Combinations

Interim Bank Combinations

A national bank or BHC may, with OCC approval, charter and organize an interim national bank to facilitate a combination. Similarly, an FSA or SLHC may, with OCC approval, charter and organize an interim FSA to facilitate a combination. An interim national bank or FSA does not operate independently, but exists, usually for a short time period, solely as a vehicle to effect a combination, such as acquiring a nonaffiliated bank or savings association, cashing out minority shareholders, or forming a holding company. Using an interim national bank or FSA to effect a merger may raise issues regarding dissenters' rights unless the interim bank is the acquiring bank, and the existing bank is the target bank. A national bank or BHC that would own the interim national bank for a brief period during the combination should contact the Federal Reserve to confirm whether it would be considered a BHC for that period and, if so, file any applications required or request waiver of applications under the BHCA and its implementing regulation. Similarly, an FSA or SLHC that would own an interim FSA for a brief period during a combination should contact the Federal Reserve to confirm whether it would be considered a SLHC for that period.

Common Uses of an Interim Bank

- **Acquiring a nonaffiliated bank:**[14] An interim bank may be used as a means of acquiring a nonaffiliated bank. In such a transaction, the acquirer would be assured of 100 percent ownership of the resulting bank, since all shareholders of the target bank must surrender their shares in exchange for consideration in the merger or consolidation between the interim bank and the target bank.
- **Eliminating minority shareholders:** A shareholder or shareholders, including a BHC, that control a majority of the voting shares of a national bank or FSA, may use an interim bank to eliminate or "freeze out" minority shareholders of the bank. The majority shareholders form an interim bank that acquires the existing bank through a merger or consolidation.[15] Minority shareholders of the existing bank normally receive either cash or, if the majority owner of the bank is a holding company, shares of the holding company in exchange for their shares of the existing bank.
- **Forming a holding company:** Shareholders may use an interim bank to form a holding company to own a bank. Directors of the existing bank form a new company that applies to the Federal Reserve to become a BHC under the BHCA, or an SLHC under the HOLA. The new company organizes the interim bank, which combines with the existing bank.

[14] In this paragraph, a nonaffiliated bank and target bank refer to national banks, FSAs, state banks, and state savings associations.

[15] Interim bank transactions are eligible for expedited review only in a corporate reorganization resulting in the formation of a new BHC (refer to 12 CFR 5.33(d)(3)(ii) and 5.33(i)). A statutory merger involving an interim bank to eliminate minority shareholders ("freeze out" transaction) does not qualify for expedited review. If the transaction is structured as a consolidation, however, and the resulting bank's charter number is that of the existing bank, the transaction can qualify for expedited review if it satisfies the streamlined application criteria under 12 CFR 5.33(j)(1).

Shareholders of the existing bank normally receive shares of the new holding company in exchange for their shares. As previously stated, 12 USC 215a-2 provides a simplified process for a national bank to reorganize to be controlled by a BHC. Unlike applications for interim bank mergers to form a BHC, applications filed with the OCC under section 215a-2 are not subject to the BMA factors or requirements.

- **Change in bank control:** The use of an interim bank by an individual or group of individuals to acquire control of a bank may raise serious policy concerns. The evaluative factors for setting up an interim bank and merging it with the target bank are fundamentally different from the factors set out in the Change in Bank Control Act (CBCA), 12 USC 1817(j). Refer to the "Change in Bank Control" booklet of the *Comptroller's Licensing Manual*. The use of an interim bank may result in, or may be perceived as resulting in, a circumvention of the CBCA. As such, any individual or group of individuals who seeks to use an interim bank to effect a change in control should meet with the Deputy Comptroller for Licensing before filing an application.

Reverse Triangular Mergers

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

With certain exceptions, the OCC will not approve a reverse triangular merger of a national bank under 12 USC 215a because the target bank's shareholders are not granted dissenters' rights under that statute. Based on Internal Revenue Service interpretations, often the combining institutions can achieve the same tax benefits offered by a reverse triangular merger if the applicant structures the transaction as a consolidation under 12 USC 215, which provides dissenters' rights to shareholders of all parties to the combination. The OCC has made exceptions to allow reverse triangular mergers using 12 USC 215a if the

- transaction cannot be accommodated through a forward merger or a consolidation,
- target bank is wholly owned by a BHC,
- target bank's shareholders have unanimously approved the combination, or
- target bank is a state bank and state law protects the dissenting shareholders.

Chartering and Organization Requirements

Applicants for interim bank combinations must apply for and receive approval to organize an interim national bank or interim FSA. The OCC has developed streamlined organization documents to establish the interim charter. The Interim Bank Charter Application and the combination application are processed simultaneously. Although an interim bank does not operate independently as a bank, the interim bank must comply with various chartering and organizational requirements.

Capitalization and Directors

The OCC has broad discretion to set capital requirements for interim banks, including the ability to set capital requirements on a case-by-case basis. An interim national bank generally meets its capital requirements by having at least the amount of capital raised by the sale of directors' qualifying shares. Interim national bank directors' residency, citizenship, and stock ownership requirements are the same as those for operating banks under 12 USC 72. Refer to the "National Bank Director Waivers" booklet of the *Comptroller's Licensing Manual*.

The OCC grants preliminary approval to form an interim bank when it acknowledges receipt of the application to engage in a combination that involves the creation of the interim bank. The interim bank becomes a legal entity at that time and may enter into legally valid agreements or contracts after it files, and the OCC accepts, for national banks, its executed articles of association, organization certificate, and oaths of directors, and for FSAs, its executed charter. Before consummating the combination, an interim national bank must complete the organization process by completing the Stock Payment Certificate and Oaths of Directors and Officers form.

Structure Issues

For an interim national bank combination structured as a merger under 12 USC 215a, the acquiring bank must be the interim national bank and the target must be the existing bank to preserve dissenters' rights for the shareholders of the existing bank, unless the shareholders of the existing bank unanimously approve the transaction. The OCC generally does not approve purchase and assumption transactions that transfer all, or substantially all, of a target's assets and liabilities to an interim national bank because the purchase and assumption structure does not provide dissenters' rights for the target's shareholders. Moreover, if an interim bank would continue as an operating bank in its own right after a purchase and assumption transaction, it may be required to apply for deposit insurance. Refer to 12 CFR 303.62(b)(2).

Timing Issues

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

Emergency Combinations

Under the BMA, applicants generally are required to provide public notice and opportunity for public comment for 30 days, and the OCC requests comments from the DOJ on competitive factors. In addition, for combinations between unaffiliated banks, the parties must wait 30 days after OCC approval, or 15 days in some cases, before consummating the transaction. The OCC may shorten or eliminate the notice and comment periods, and the post-approval waiting period under the BMA, if certain conditions are met. Where the effect

of the proposed combination may be to substantially lessen competition or tend to create a monopoly, or otherwise would be in restraint of trade, the OCC also may weigh the convenience and needs of the communities served by troubled institutions against possible anticompetitive effects of an emergency combination under the BMA. In this regard, the OCC will conclude adversely on the convenience and needs factor where the facts of record show that the participating institutions' engaged in terminating individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.

In addition, when an interstate combination is filed under the Riegle–Neal Act, the filing is exempt under 12 USC 1831u(e) from many of the requirements of the Riegle–Neal Act if the combination involves an insured bank in default or in danger of default, or with respect to which the FDIC provides assistance. These requirements include the age, branch acquisition, and concentration limits, and the filing, CRA, and adequacy of capital and management requirements. Similarly, there is also an exception from the deposit concentration limit for certain interstate transactions in 12 USC 1828(c)(13) for transactions involving an institution in default or in danger of default or with respect to which the FDIC provides assistance under 12 USC 1823.

Expedited (10-Day, 5-Day) Combinations

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

Filing a 10-Day, 5-Day Combination Application

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

The applicant generally submits the streamlined bank merger application with the request for 10-day, 5-day processing. The OCC reviews the application for accuracy and completeness while it considers the request for 10-day, 5-day processing. The OCC provides copies of the combination application for 10-day, 5-day processing to the DOJ for its views on the

competitive effects of the proposal. By statute, the DOJ has 10 days to review and comment on the application.

Processing Time Frames for 10-Day, 5-Day Combinations

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

If the OCC approves a combination under 10-day, 5-day processing, the acquiring bank may consummate the transaction after a 5-day post-decision waiting period during which the DOJ may comment on whether the combination is anticompetitive or take action to challenge the transaction. The OCC issues a letter certifying consummation, if the bank has met all pre-merger requirements and conditions specified in its approval letter.

The BMA allows the OCC to approve a merger if anticompetitive effects of the transaction are clearly outweighed in the public interest by the probable effect of the transaction on meeting the convenience and needs of the community to be served. This situation may arise when a bank is the only party to express interest in acquiring an insured depository institution that is in imminent or immediate danger of failing. In this regard, the OCC will conclude adversely on the convenience and needs factor where the facts of record show that the participating institutions engaged in terminating individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a financial service without assessing the risks posed by individual customers on a case-by-case basis.

Laws enjoining anticompetitive mergers, such as the Sherman Act, are incorporated in the BMA, and are reviewed by the DOJ for all bank mergers. When large post-acquisition market shares are anticipated, applicants are encouraged to speak with the DOJ as early in the acquisition process as possible to determine if anticompetitive effects of a proposed acquisition would cause it to enjoin a bank merger.

Immediate Combinations

The BMA allows the OCC to eliminate the public notice and comment requirements and permit consummation immediately upon approval if the OCC finds that it must act immediately to prevent the probable failure of an FDIC-insured depository institution involved in the transaction. Refer to 12 USC 1828(c)(3).

Application Process

The OCC encourages banks to review its website for more detailed information about the application process, including policies and procedures, and merger-related documentation. The website contains previous OCC decisions on business combinations and provides information on the policy matters that the OCC considers before making a decision on an application. The website also contains opinions and legal interpretations addressing a variety of permissible activities.

Exploratory Calls or Meetings

The applicant's contact person may contact the OCC licensing staff at the appropriate OCC licensing office to ask for further information or assistance. As the applicant commences acquisition negotiations and before execution of a definitive agreement, the contact person may request an exploratory conference call or meeting with the OCC to ask questions or clarify concerns. The licensing staff coordinates an initial conference call or meeting between appropriate OCC staff and the contact person and other key people associated with the proposal, to discuss the potential risks surrounding the proposal and gauge the prospects for a favorable OCC decision. The OCC expects applicants considering transactions that raise novel, precedential, complex, or significant legal or supervisory issues to contact the licensing staff before entering into a definitive agreement. Circumstances warranting prior licensing contact include the following:

- The application presents novel, precedential, or highly complex issues.
- The applicant or target bank is in less than satisfactory condition.
- The applicant or target bank presents BSA/AML, compliance, or CRA issues.
- The applicant or target bank is, or is soon to be, subject to an enforcement action.
- The size of the target bank represents 50 percent or more of the total assets of the acquiring bank.
- The acquisition is being financed by debt, either at the bank level or the holding company level.
- The applicant is new to the application process.

Prefiling Meetings or Discussions

The OCC normally requires a prefiling conference call or meeting with the acquiring bank before filing of an application regarding any combination that would result in a significant increase in assets or that involves any of the issues discussed in the "Exploratory Calls or Meeting" section of this booklet. The prefiling conference call or meeting normally is held in the OCC district office where the application is filed but may be held at another location at the request of the applicant.

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

Public Notice and Comment Periods

The public comment period for a filing subject to the BMA is generally 30 days after the newspaper publication. The end of the public comment period is listed in the Weekly Bulletin.[16] The newspaper notice should direct the public to the Weekly Bulletin for additional information about the filing, including the closing date of the comment period. (Updated July 31, 2018)

Notice of a combination application subject to the BMA generally must be published three times in a newspaper of general circulation in the community or communities where the main or home offices of the banks involved in the transaction are located. (Updated July 31, 2018) The first notice should be published in the newspaper on the date of filing or as soon as practicable before or after the date of filing. The second notice should be published one week after the first publication or, if the newspaper does not publish on that day, on the newspaper's publication date that is closest to that day. The last notice should be published on the 25th day after the first publication or, if the newspaper does not publish on the 25th day, on the newspaper's publication date that most closely precedes the 25th day.

The OCC may require additional public notice or may provide public notice itself if the OCC believes it necessary to ensure adequate notice and opportunity to comment. Material differences between initial and subsequent notices may result in extended comment periods and delays in processing applications.

The public notice of the transaction described in this section is separate from the notice of the shareholders' meeting that must be published for the conduct of any shareholder meeting, which is discussed under the "Shareholder Considerations" section of this booklet under "Application Process."

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

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

[16] The OCC publishes a Weekly Bulletin containing certain national bank and FSA applications and notices. It is a record of receipt and actions taken by the OCC on applications and notices filed by national banks and FSAs for new banks, new branches, mergers, conversions, fiduciary powers, subsidiaries, relocation of main offices and branches, changes in corporate title, branch closings, changes in bank control, terminations, and federal branches and agencies. The Weekly Bulletin is available by date and incorporates a comment period end date for national bank and FSA mergers, consolidations, and purchase and assumption transactions.

The notice must state whether the application involves an interim bank charter application and whether the application is a merger, consolidation, or purchase and assumption. It also must state whether any branches of the combining institutions would cease to operate as a result of the transaction. Where applicable, the bank must follow the procedures applicable to branch closings under 12 USC 1831r-1. Refer to the "Branch Closings" booklet of the *Comptroller's Licensing Manual*. If the applicant knows that branches would close or consolidate because of the combination, but the identity and number of branches to be closed have not yet been finalized when the application is filed with the OCC, the notice should disclose that an as-yet-undetermined number of offices would cease to operate.

Finally, if during the public notice period an applicant identifies branches that it plans to close, it should amend subsequent publications to disclose this new information.

FOIA Reading Room

To allow community groups and the general public to have access to public portions of combination applications and information regarding comment periods, the OCC posts merger applications to the FOIA Reading Room.[17]

The applicant must clearly designate any sections of the application for which it is seeking confidential treatment. Improperly designating public information as confidential, or including certain confidential information in the public section, may delay posting of the public portion of the application to the FOIA Reading Room.

To ensure the application is posted promptly to the FOIA Reading Room, applicants should submit separate PDF files of the public portion, the confidential portion, and the personally identifiable information (PII). Refer to the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual*.

Comments From the Public

When evaluating public comments,[18] the OCC considers the information provided by the commenter and information provided by the applicant's response(s), as well as information available through the course of the OCC's supervision. With the exception of confidential information, the applicant's response is shared with the commenter.

Significant adverse comments may result in delays in processing an application. Applicants need to consider the possibility of such delay when planning a target date for consummating a transaction or systems conversions. (Updated July 31, 2018)

[17] The FOIA Reading Room serves as the vehicle to obtain federal agency records, unless the records (or any portion thereof) are protected from disclosure by one of FOIA's nine exemptions or one of its three special law enforcement record exclusions.

[18] The OCC posts comments on www.regulations.gov, where they can be viewed by the public.

Meetings and Hearings

In general, the OCC relies on written information submitted during the comment period to reach a decision on an application. The OCC considers obtaining information through other means, such as meetings or hearings, however, if it would be useful in reaching a decision. Refer to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual* for additional discussion about OCC policies and procedures concerning meetings and public hearings.[19]

Filing the Application

An authorized bank officer must sign and date the OCC certification in either the streamlined or the interagency BMA application. Applications that qualify as business reorganizations or that involve a streamlined business combination (as those terms are defined in the "Glossary" section of this booklet) generally are granted expedited review. The OCC and the other banking agencies have adopted an "Interagency Bank Merger Act Application" that bank applicants should use to apply to the OCC for any combination that does not qualify for expedited review. An applicant involved in a transaction that qualifies for expedited review may file the "Streamlined Business Combination Application." (See the "Expedited Review" section of this booklet.) Applicants should attach the appropriate checklist when using either form. Applicants also should refer to the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual* for guidance on how to file the application.

When acknowledging receipt of an application, the licensing staff indicates whether it qualifies for expedited review and provides a target time frame for processing the filing. OCC staff notifies the applicant promptly if the situation changes (for example, the OCC removes the application from expedited review), or if the OCC needs additional information to complete its review. Although the OCC strives to request additional information at the earliest possible date, it may request information or opinions from an applicant at any time during the processing of a corporate filing.

The contact person should advise the OCC promptly whenever any significant changes occur from the applicant's original plans after the application is filed.

Initial Process

The OCC begins its review by determining whether the application is accurate and complete. During the review process, the OCC may ask the applicant to provide additional detailed information about any aspect of the proposal to reach an informed decision.

A number of factors affect the processing time frame for a combination application. These factors include whether the filing is complete and qualifies for expedited review, or whether there are any reasons for removing the filing from expedited review. Other factors that may affect processing time frames include adverse public comments, safety and soundness or

[19] Refer to 12 CFR 5.11 for additional information on hearings.

compliance issues, the DOJ competitive factor review period, a proposed significant increase in the acquiring bank's assets, and any meetings or hearings under 12 CFR 5.11.

Expedited Review

Applications processed under expedited review are deemed approved as of the 15th day after the close of the public comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review or that the expedited review process is extended, or the application is removed from expedited review, pursuant to 12 CFR 5.13(a)(2). The OCC may act on the application before the end of the expedited review period, but in no event before the conclusion of the public comment period.

Under 12 CFR 5.13(a)(2), the OCC removes a business combination from expedited review if the OCC concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA, or compliance concern, or raises a significant legal or policy issue. The OCC notifies applicants promptly if such concerns or issues cause it to remove an application from expedited review. Refer to the "Public Notice and Comments" and the "General Policies and Procedures" booklets of the *Comptroller's Licensing Manual* for additional discussion.

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

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

Standard Processing

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

Streamlined Application

Under 12 CFR 5.33(i) and (j), business reorganizations and streamlined business combinations, as defined in 12 CFR 5.33, generally are eligible for expedited review and may use the "Streamlined Business Combination Application." Information requirements concerning CRA performance, branch closings, convenience and needs (including the record of the participating institutions' termination of individual customer accounts or categories of customer accounts or otherwise electing not to provide a person or category of persons with a

financial service without assessing the risks posed by individual customers on a case-by-case basis.), and related matters are not reduced on this application compared with the standard application.

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

Application Issues

Legal Issues

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

Applications for a combination must include accurate and fully developed facts, and a determination that the transaction complies with all applicable statutes and regulations.

Affiliate Transaction Restrictions

Banks are subject to quantitative and qualitative restrictions on certain covered transactions with affiliates under sections 23A and 23B of the FRA, codified as 12 USC 371c, 371c-1, and their implementing regulation, Regulation W (12 CFR 223). 12 USC 1468 applies sections 23A and 23B to FSAs "in the same manner and to the same extent as if the savings association were a member bank," and also imposes additional restrictions on affiliate transactions involving FSAs and affiliates. The affiliate transaction restrictions are designed to safeguard the interests of the bank when it engages in transactions with affiliates. Covered transactions, restricted by sections 23A and 23B, include a bank's purchase of assets from, investment in securities issued by, or loan or extension of credit to, an affiliate. The acceptance of securities issued by an affiliate as collateral security for a loan and the issuance of a guarantee, acceptance, or letter of credit on behalf of an affiliate are also covered transactions. Certain other types of transactions listed in 12 CFR 223.52 are subject to the restrictions of sections 23B, as well.[20]

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

For purposes of business combinations, the restrictions typically arise in mergers of a nonbank company with an affiliated national bank or combinations involving one or more affiliated, uninsured depository institutions.[21] Most other affiliated business combinations, such as combinations involving only affiliated insured depository institutions that are reviewed under the BMA, are exempt from most of the restrictions in sections 23A and 23B and Regulation W.[22]

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

"Control" under sections 23A and 23B generally occurs when

- the company or shareholders have the power to vote 25 percent or more of any class of voting securities,
- the company or shareholders are able to control in any manner the election of a majority of the directors or trustees of the company, or
- the Federal Reserve determines after notice and opportunity for hearing that the company or shareholders directly or indirectly exercise a controlling influence over the management and policies of a company.

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

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

[21] For purposes of Regulation W, "depository institution" means any FDIC-insured bank or savings association, as defined in the FDIA, 12 USC 1813, but does not include any branch of a foreign bank.

[22] Refer to 12 CFR 223.42(j) for the BMA exemption.

Sections 23A and 23B—Provisions

The three provisions in sections 23A and 23B that are most likely to present issues in connection with corporate reorganizations are: (1) the quantitative limits; (2) the prohibition on purchasing low-quality assets (see the "Glossary" section of this booklet for definitions); and (3) the requirement that transactions with affiliates be conducted on arm's-length terms. Sections 23A and 23B also require that covered transactions be consistent with principles of safety and soundness and that credit transactions with affiliates generally be collateralized.[23] Depending on the structure of the reorganization, a full or partial exemption from these restrictions may be available.

- **Quantitative limits:** In the absence of any available exemption, a bank may not engage in covered transactions with an affiliate in an amount that exceeds 10 percent of the bank's capital and surplus, or 20 percent of capital and surplus for all affiliates as a group. Regulation W prescribes certain valuation rules for section 23A covered transactions that must be applied to determine whether such a transaction complies with these quantitative limits. For example, the value of a purchase of assets is calculated by combining the value of liabilities assumed plus any consideration paid for the assets. A bank must observe the quantitative limits when engaging in a covered transaction with an affiliate unless an exemption is available. Thus, a bank's purchase of assets from its holding company, or any subsidiary of that holding company that is not an insured depository institution, usually may not exceed 10 percent of the acquiring bank's capital and surplus. Transactions with financial subsidiaries, however, are treated differently from transactions with other affiliates with respect to these quantitative limits. A bank's transactions with its own financial subsidiary are not subject to a 10 percent limit, although they are included in the 20 percent limit.

- **Transfers of low-quality assets:** A bank's purchase of low-quality assets from an affiliate is generally prohibited unless the purchase is made in connection with a transaction eligible for the BMA exemption. When a corporate reorganization contemplates a bank's acquisition of low-quality assets from an affiliate, and the BMA exemption is not available, a banking organization has at least the following four options that are acceptable to both the OCC's and the Federal Reserve's staff:
  - The affiliate holding the low-quality assets may retain them and transfer the rest of the assets to the bank.
  - The affiliate may transfer the low-quality assets to the bank's shareholders as a dividend or in some other legally permissible way. The shareholders may in turn either keep the assets or donate, but not sell, them to the bank. A donation of the low-quality assets may be made concurrently with the bank's purchase of permissible assets from the same transferor, provided it is done in a separate transaction.
  - In addition, the OCC may exempt a transaction by a bank from the requirements of section 23A if the OCC and the Federal Reserve jointly find the exemption to be in the public interest and consistent with the purposes of section 23A. The OCC and

[23] The term "credit transaction" includes not only loans or extensions of credit, but also a bank's issuance of a guarantee or letter of credit on behalf of an affiliate or a confirmation of a letter of credit issued by an affiliate. It also includes a cross-netting arrangement, as that term is defined in Regulation W.

Federal Reserve must notify the FDIC of such finding, and the FDIC, before the end of the 60-day period commencing on the date it receives notice of the finding, must not object in writing based on a determination that the exemption presents an unreasonable risk to the Deposit Insurance Fund.

– The affiliate holding the assets may sell any servicing rights associated with the assets to the bank, while retaining title to the assets. If the assets later recover and are no longer "low-quality assets" as defined in Regulation W, they may be sold outright to the bank.

Other options may be available. In every case, however, the OCC reviews any low-quality assets in a portfolio and determines whether their acquisition by a bank conforms to safe and sound banking practices. Banks are advised to contact the OCC if a contemplated transfer of low-quality assets may present a barrier to accomplishing a transaction.

- **Section 23B and the arm's-length requirement:** As previously noted, section 23B of the FRA requires that transactions between a bank and its affiliates be conducted on an arm's-length basis. Section 23B provides that banks may engage in certain transactions with an affiliate on terms and under circumstances, including credit standards, that are substantially the same, or at least as favorable to the bank, as those prevailing at the time for comparable transactions with or involving nonaffiliated companies. If no such comparable transactions exist, then the bank must transact on terms and under circumstances, including credit standards, which in good faith would be offered to, or would apply to, nonaffiliated companies. As is the case with section 23A, mergers or purchase and assumption transactions between affiliated insured depository institutions that are reviewed and approved under the BMA are exempt from section 23B and Regulation W. If one of the transacting institutions is uninsured, the acquiring bank should contact the OCC even when the combination will be reviewed and approved under the BMA.

Sections 23A and 23B—Exemptions

A near-complete exemption to all affiliate-transactions restrictions, including the prohibition against a bank's purchase of low-quality assets from an affiliate, is available when a reorganization involves a combination of a bank with an affiliated, insured depository institution subject to the BMA. Only the safety and soundness requirement of section 23A applies to such combinations.

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

Uninsured sister depository institutions are treated as affiliates. A bank's transactions with uninsured sister depository institutions are subject to section 23B unless an exemption from section 23B is available.

Regulation W includes two exemptions that may be useful for banks contemplating combinations. First, Regulation W exempts certain internal corporate reorganizations from the collateral requirements and quantitative limits of section 23A, but not from the low-quality asset prohibition, the safety and soundness requirement, or from section 23B. The following conditions must be satisfied for the exemption to be available:

- The transactions must be part of an internal corporate reorganization of a holding company involving the transfer of all or substantially all of the assets of an affiliate or of a division of an affiliate.
- The bank must provide advance notice to the OCC and the Federal Reserve, including a description of the primary business of the affiliate and an indication of the proposed date of the transfer.
- The bank's top-tier holding company must commit to the OCC and the Federal Reserve (and carry through on its commitment) to make the bank whole with respect to any assets that become low-quality during the first two years after the transfer, either by making cash contributions to the bank or by purchasing the low-quality assets.
- A majority of the bank's board of directors must review and approve the transactions in advance.
- The value of the covered transaction, when aggregated with any other transactions undertaken pursuant to this internal corporate reorganization exemption during the previous 12 months, must represent less than an amount set by the OCC that is between 10 and 25 percent of the bank's capital and surplus.
- The holding company and all of its subsidiary depository institutions must be well capitalized and well managed both before and after consummating the transfer.

Second, Regulation W exempts asset purchases by de novo banks from the collateral requirements, quantitative limits, and low-quality asset prohibitions of section 23A, as well as from section 23B, provided that the OCC has approved the asset purchase in writing in connection with its review of the formation of the new bank. Refer to 12 CFR 223.42(i).

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

Undercapitalized Banks

An undercapitalized national bank or FSA, as defined in 12 CFR 6.4, is prohibited from, among other things, acquiring any interest in any company or any other insured depository institution unless: (1) the OCC has accepted the bank's capital restoration plan, the bank is implementing the plan, and the proposed combination is consistent with and would further achievement of the plan; or (2) the FDIC determines that the proposed action would further the purpose of the prompt corrective action statute.[24]

Liquidation Account

When the target in a combination is a savings association that converted from a mutual to a stock institution, the resulting bank must establish and maintain the liquidation account previously established by the target. This account represents the eligible depositors' interest in the net worth of the mutual institution at the time it converted to a stock institution. In the event of a solvent liquidation of the resulting bank, eligible depositors are entitled to a priority distribution from the institution's net worth before any distributions are made to stockholders. Pursuant to 12 CFR 5.33(g)(3)(ii), the consolidation or merger agreement must address the effect on, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution. Refer to 12 CFR 5.33(g)(3)(ii).

Golden Parachutes Restrictions

National banks and FSAs that are in troubled condition as defined by 12 CFR 5.51(c)(7) must receive prior OCC approval for any golden parachute payments or employment agreements pursuant to 12 USC 1828(k) and 12 CFR 359. FDIC concurrence is generally, but not always, required.

Bank and Trade Names

The OCC considers the name of a bank to be primarily a business decision subject to any applicable state law. The National Bank Act requires that every national bank's formal name include the word "national." A national bank or FSA may change its corporate title provided that the new name complies with applicable laws, including 18 USC 709. The institution's name should be consistent with OCC Bulletin 1998-22, "Branch Names: Interagency Statement" regarding false advertising and the misuse of names.

When different trade names are used, customers may believe they are dealing with two different depository institutions, and as a result may inadvertently exceed FDIC insurance limits (generally, $250,000 per institution) by depositing excess amounts in different branches of the same institution. The OCC believes it is important that customers understand the scope of FDIC insurance in those circumstances. Accordingly, a bank that intends to use a different name for a branch or other facility should ensure that customers do not become

[24] Refer to 12 USC 1831o(e)(4).

confused and believe that the bank's facilities are separate institutions or that deposits in the different offices are separately insured. Such measures may include the following:

- Disclosing, clearly and conspicuously, in signs, advertising, and similar materials that the facility is a branch, division, or other unit of the bank. The bank should exercise care that the signs and advertising do not create a deceptive or misleading impression.
- Using the legal name of the bank for legal documents, certificates of deposit, signature cards, loan agreements, account statements, checks, drafts, and other similar documents.
- Educating bank staff about the possibility of customer confusion over deposit insurance. The bank should instruct staff at the branch and any other facilities operating under trade names to ask customers before opening new accounts whether the customers have deposits at the bank's other facilities or branches. In addition, soon after the bank combines with, acquires, or is acquired by another depository institution, staff should call customers' attention to disclosures that identify a particular branch or facility as part of an institution.
- Obtaining from depositors opening new accounts at the branch a signed statement acknowledging that they are aware that the branch and other facilities belong to the same bank and that deposits held at each facility are not insured separately.

In addition, the practice of banks using different trade names for different delivery channels raises similar concerns. Accordingly, institutions intending to use different trade names in different delivery channels should take reasonable steps to ensure that customers will not be confused about either the bank's identity or the extent of FDIC insurance coverage.

Refer to the "Changes of Corporate Title and Address" booklet of the *Comptroller's Licensing Manual* for additional information.

National Bank Directors' Residency and Citizenship Requirements

Pursuant to 12 USC 72, every national bank director must be a citizen of the United States throughout his or her term of service. The OCC, however, may waive this requirement for a minority of the total number of directors of any national bank.

Also pursuant to 12 USC 72, a majority of a national bank's directors must reside in the state where the bank is located (that is, the state(s) in which the bank has its main office or branches) or within 100 miles of its main office for at least one year immediately preceding their election and during their continuance in office. The OCC may waive the residency requirement.

Refer to the "National Bank Director Waivers" booklet of the *Comptroller's Licensing Manual* for additional information.

Dividends and Capital Reduction

With prior OCC approval, a national bank may make a cash or noncash distribution to its shareholders in connection with a business combination. A national bank may include with a

combination application requests to declare dividends under 12 USC 60(b) and 12 CFR 5.64 or to reduce capital under 12 USC 59 and 12 CFR 5.46.[25] Refer to the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual* for additional information.

FSAs may be subject to an application or notice requirement when submitting an application that involves a declaration of dividends or a reduction of capital. Refer to 12 CFR 5.55. In certain circumstances, there is an informational notice requirement that must be submitted to the OCC for subsidiaries of SLHCs that are subject to a dividend or capital distribution filing with the Federal Reserve.[26]

FSAs may include with a combination application requests to declare dividends or to reduce capital under 12 CFR 5.55.

Fiduciary Powers

OCC-supervised institutions that do not have fiduciary powers under 12 USC 92a or 1464(n), and that plan to acquire a state bank or state savings association that engages in activities for which a bank would need fiduciary powers, must seek and obtain OCC approval before exercising fiduciary powers. The request for fiduciary powers may be included in the combination application. No additional approval is necessary if two or more national banks combine through merger or consolidation and any of the national banks has, before the combination, received OCC approval to exercise fiduciary powers, and the resulting bank exercises fiduciary powers in the same manner and to the same extent as the bank to which approval was originally granted. Similarly, no additional approval is necessary if two or more FSAs combine through merger or consolidation and any of the FSAs has, before the combination, received OCC or Office of Thrift Supervision approval to exercise fiduciary powers, and the resulting FSA exercises fiduciary powers in the same manner and to the same extent as the FSA to which approval was originally granted. OCC approval under the fiduciary powers regulations is required, however, if a national bank without trust powers acquires an FSA with trust powers or if an FSA without trust powers acquires a national bank with trust powers, and the resulting entity intends to exercise the fiduciary powers previously exercised by the acquired institution. No approval is required for a national bank or FSA with OCC or OTS approval to exercise fiduciary powers to continue exercising those powers if it is the resulting bank in a merger or consolidation with a state bank. Refer to 12 CFR 5.26 and the "Fiduciary Powers" booklet of the *Comptroller's Licensing Manual* for additional discussion.

Investment in Bank Premises

A bank that proposes to increase its investment in bank premises in connection with a combination may need to seek and receive OCC approval under 12 CFR 5.37 before consummating the combination, or may need to provide notice to the OCC within 30 days

[25] Distributions under 12 USC 59 and 12 CFR 5.46 will have no effect on the national bank's future dividend paying capacity.

[26] 12 CFR 5.55(e)(4).

after consummating the combination. For details, refer to the "Bank Premises and Equipment" booklet of the *Comptroller's Handbook*.

Main or Home Office Designation

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

A national bank resulting from a Riegle–Neal Act combination under 12 USC 215a-1 and 1831u may, with OCC approval, retain and operate, as its main office, a main office or branch that any bank involved in the transaction operated immediately before the combination.

An FSA resulting from a merger can change the name or location of the home office by amending its charter accordingly.

Resulting Bank Charter Number

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

Shareholder Considerations

Shareholder Approval

National Banks

Before consummating a merger or consolidation that will result in a national bank, shareholders that own or control at least two-thirds of the capital stock of each depository institution involved must approve the terms and conditions that govern the transaction at a shareholders' meeting.[27] If one or more of the institutions is a state institution, and the laws of that state require more than a two-thirds affirmative vote for ratification of the agreement, that higher affirmative vote must be obtained before consummating the transaction. The shareholder approval requirement cannot be waived, even in an emergency situation involving imminent or immediate failure of an FDIC-insured depository institution. The OCC will not certify consummation of a combination until it receives the required secretary's certificate for shareholders' approval or certified declaration(s) of unanimous shareholder consent from the holding company.

[27] Refer to 12 USC 215(a) and 12 USC 215a(a)(2).

In the case of the merger of a national bank with a nonbank affiliate under 12 USC 215a-3 resulting in a national bank, or the merger of an uninsured national bank with a nonbank affiliate under 12 USC 215a-3 resulting in a nonbank affiliate, shareholders that own or control at least two-thirds of the capital stock of the national bank must approve the terms and conditions that govern the transaction at a shareholders' meeting. In each of these cases, the nonbank affiliate must follow the procedures for merger set out in the laws of the state or other jurisdiction under which the nonbank affiliate is organized.[28]

Federal Savings Associations

Generally an affirmative vote of two-thirds of the outstanding voting stock of any constituent stock FSA is required for approval of a merger or consolidation involving the stock FSA. If any class of shares is entitled to vote as a class under the FSA's charter, an affirmative vote of the majority of the shares of each voting class and two-thirds of the total voting shares is required. The shareholders of a constituent institution other than an FSA must approve the transaction under the standard set forth in the laws of the applicable jurisdiction.

Shareholders of the resulting FSA are not required to authorize a consolidation or merger if

- the consolidation or merger does not involve an interim FSA or interim state savings association,
- the association's charter is not changed,
- each share of stock outstanding immediately prior to the effective date of the consolidation or merger is to be an identical outstanding share or a treasury share of the resulting FSA after such effective date, and
- either
  - no voting stock of the resulting FSA and no securities convertible to voting stock of the resulting bank are to be delivered or issued under the plan of combination, or
  - the authorized unissued shares or treasury shares of voting stock of the resulting FSA to be issued or delivered under the plan of combination, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 15 percent of the total shares of voting stock of the FSA outstanding immediately before the effective date of the consolidation or merger.

The OCC may require mutual FSA members to vote on a consolidation, merger, or other business combination at a duly called meeting and may require that the transaction, to be effective, must be approved by such voting members.

Purchase and Assumption Transactions

In purchase and assumption transactions, usually no shareholder vote is required for the acquiring or purchasing bank. The target bank's shareholders may be required to vote, however, when the target is a national bank or FSA that will go into liquidation after or concurrent with the purchase and assumption. Similarly, shareholder approval may be

[28] Refer to 12 CFR 5.33(g)(4) and 5.33(g)(5).

required if state law requires it for a target state-chartered bank, or if the target bank's articles or charter require a vote.

Proxy Disclosures

National banks or FSAs seeking to merge or consolidate with other depository institutions, and national banks seeking to merge with one or more of their nonbank subsidiaries or affiliates, must adequately inform all shareholders eligible to vote on all material aspects of the transaction and notify shareholders of the meeting to vote on the combination. Refer to "Notice of Shareholders' Meeting to Vote on Combination." Only banks with securities registered under the Securities Exchange Act of 1934, subject to 12 CFR 11, must submit preliminary proxy materials or information statements to the OCC's Securities and Corporate Practices Division before distribution to shareholders.[29] All other banks must submit a copy of final proxy materials or information statements used for the combination to the appropriate district office no later than the time they are sent to shareholders.

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

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

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

Timing of OCC Approval and Proxy Release

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

[29] A bank must register its securities with the OCC under the Securities Exchange Act of 1934 if it has shares that are traded on a national securities exchange or it has total assets exceeding $10 million and a class of equity security (other than an exempted security) held of record by 2,000 or more persons. Refer to 15 USC 781(b), (g), and (i).

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

Shareholders' Notice and Meeting

A national bank generally must publish notice of the shareholders' meetings to ratify merger or consolidation agreements on the same day each week for four consecutive weeks in a newspaper of general circulation in the communities where each institution's main office is located.[30] Publication of shareholder notice to the shareholders may be waived in cases where the OCC determines that an emergency exists justifying such waiver, by unanimous action of the shareholders. In addition, a BHC that is the sole shareholder of a bank may approve a merger or consolidation agreement without holding a shareholders' meeting. Refer to "Shareholders' Waiver of Notice of Shareholders' Meeting and Written Consent of Business Combination."

In addition to the newspaper notice, at least 10 days before the meeting, a national bank soliciting shareholder votes must send to each shareholder, by certified or registered mail, a notice accompanied by a proxy or information statement.[31] If one or more of the entities involved in a combination is not a national bank, then the applicants should consider the relevant laws and regulations governing notice and publication requirements for the non-national bank entities.

The notice for the conduct of any shareholder meeting is separate from the public notice that must be published. Refer to the "Public Notice and Comment" section of this booklet under "Application Process" section of this booklet for additional public notice details.

Exercise of Dissenters' Rights; Appraisal Process

A shareholder dissenting from a consolidation or merger involving a national bank or FSA may be entitled to receive the value of his or her shares from the resulting entity. The specific details of the steps a shareholder must follow to perfect his or her dissenters' rights generally are detailed in the appropriate statute and regulation under which the transaction is

[30] Refer to 12 USC 215(a), 12 USC 215a(a)(2). There is no similar requirement for FSAs.

[31] The additional notice to each shareholder may be waived for those shareholders who specifically waive such notice. Refer to 12 USC 215(a) and 12 USC 215a(a)(2).

authorized. Refer to 12 USC 214a, 215, 215a, 215a-2, 215a-3, or 215c and 12 CFR 5.33.[32] The requirements in each of these sections vary slightly and should be read carefully and followed precisely so that dissenters' rights are not erroneously forfeited. In addition, any proxy material distributed to the shareholders should describe the appropriate steps for dissenting shareholders.

Generally, a shareholder must dissent either by voting against the transaction at the shareholders' meeting or by notifying the bank in writing at or before such meeting that he or she dissents from the plan to consolidate, or merge. Within 30 days after the date of consummation of the transaction, the dissenting shareholder also must confirm in writing his or her dissent to the transaction and surrender his or her stock certificates to the resulting bank. Next, a committee of three is selected to appraise the stock of the dissenting shareholders. The committee includes one representative that the majority of dissenting shareholders appoints, one representative that the resulting entity appoints, and one representative that those two representatives appoint. If two members of the three-member committee agree on the value of the shares, that value governs. If that value is acceptable to one or more dissenting shareholders, the process is complete for those shareholders who find the value acceptable, and the appraised value of the shares is paid by the resulting entity. If that value is not acceptable to one or more dissenting shareholders, those shareholders may, within five days of being notified of the appraised value, appeal to the OCC, which then conducts a reappraisal that will be final and binding upon the appellants.

In addition, if within 90 days of the date of consummation of the transaction, for any reason one or more of the appraisers are not selected, or the appraisers fail to determine a value, any interested party may request in writing an appraisal from the OCC. In transactions involving mergers and consolidations between national banks and state banks (as defined in 12 USC 214(a) and 215b(1)), the statutes provide that the OCC's appraisal or reappraisal is final and binding on all parties, and the resulting entity pays the cost of an OCC appraisal or reappraisal. Refer to 12 USC 214a(b), 215(d), and 215a(d).

There are several exceptions to the dissenters' rights and appraisal process described above. First, in transactions in which an FSA is merging or consolidating into a national bank or in which a national bank or another FSA is merging or consolidating into an FSA, the OCC may apportion the costs and expenses among the parties. Refer to 12 CFR 5.33(g)(2)(ii)(C), and 5.33(g)(3)(i)(B)(*2*) and (C)(*2*). Second, in transactions in which a state bank, state savings association, or other state entity is merging or consolidating into an FSA, or in transactions in which a nonbank affiliate is merging into a national bank, the rights of dissenting shareholders of the state entity are determined by the law of the state or other jurisdiction under which the state entity is organized. Refer to 12 CFR 5.33(g)(3)(i)(D)(*2*)

[32] For mergers of an insured or uninsured national bank with a nonbank affiliate under 12 USC 215a-3 resulting in a national bank, the rights of dissenting shareholders of the nonbank affiliate are determined in the manner prescribed by the laws of the state or other jurisdiction under which the nonbank affiliate is organized. For mergers of an uninsured national bank with a nonbank affiliate resulting in a nonbank affiliate, national bank shareholders who dissent may receive the value of their shares if they comply with 12 USC 214a, as if the nonbank affiliate were a state bank. The rights of dissenting shareholders of the nonbank affiliate are determined in the manner prescribed by the laws of the state or other jurisdiction under which the nonbank affiliate is organized.

and 5.33(g)(4)(iv). Third, in transactions in which a national bank is merging into a nonbank affiliate and transactions in which an FSA is merging or consolidating into a state bank, state savings association, or other state entity, the regulations provide that the OCC will conduct an appraisal or reappraisal only if the parties agree the OCC's appraisal will be final and binding and agree on how the total expenses of the OCC will be divided among the parties and paid to the OCC. Refer to 12 CFR 5.33(g)(5)(iv)(A) and 5.33(g)(7)(iii)(A). Also, see the Licensing Fee Schedule for the OCC's current fee for performing a stock appraisal.

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

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

OCC Valuation Methodology

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

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

For banks that are considered going concerns, the OCC typically uses one of three methods or a combination of those methods to determine a reasonable estimate of the shares' value. Each of those methods is described in this section of the booklet: market value, investment value, and adjusted book value. If more than one method is used, varying weights are applied in reaching an overall valuation. The weight given to the value by a particular valuation method is based on how accurately the given method is believed to represent a fair price. For example, the OCC may give more weight to a value representing infrequent trading by

shareholders than to the value derived from the investment value method when the subject bank's earnings trend is so irregular that it is considered to be a poor predictor of future earnings.

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

Market Value Method

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

Investment Value Method

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

The peer banks are selected based on location, size, and earnings patterns. To select a reasonable peer group when there are too few comparable independent banks in a location that are comparable to that of the subject bank, the pool of banks from which a peer group is selected may be broadened. For example, the peer group may be broadened to include one-bank holding company banks in a comparable location, or by selecting banks in less comparable locations that are similar in asset size and earnings patterns to the subject bank. Once the peer banks are selected, the selected price to earnings ratio of the peer banks is then applied to the earnings per share estimated for the subject bank to reach a fair estimate of value.

Adjusted Book Value Method

The third method the OCC uses for reaching a fair estimate of value is the adjusted book value method. An adjusted book value is derived by multiplying the book value of the target

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

Agreements and Board of Directors' Approval

A majority of the board of directors of each of the participating depository institutions involved in a merger or consolidation involving a national bank must approve an agreement to combine.[33] If a target depository institution in a merger or consolidation with a national bank is a state bank, and the law of the state where the target is located is more stringent with respect to board and shareholder approval than the national bank merger and consolidation statutes, then the target bank must abide by the state law requirements. In a combination transaction involving a stock FSA that does not involve a national bank, a majority of the board of each constituent must approve the combination, but where a state-chartered bank or state-chartered savings association is a constituent, the vote of the directors of the state-chartered institution is governed by state law. A combination involving a mutual FSA must be approved by two-thirds of the mutual FSA's board. For national banks, refer to the "Sample Agreement—Merger"; "Sample Agreement-Consolidation"; "Secretary's Certificate of Board of Directors' Approval of Combination." Alternatively, a bank's board of directors may waive its notice of a board meeting and approve a combination agreement by consent.

In the case of purchase and assumption transactions, management, as directed by the board of directors' resolution, usually executes a purchase of assets and assumption of liabilities agreement.

In combinations involving interim banks, the OCC accepts agreements executed between the primary parties (for example, an operating depository institution and a BHC or SLHC). To help ensure that the combination is completed in accordance with 12 USC 215 or 215a, the agreement should provide for the interim bank to become a party to the agreement upon its organization. This is done through an addendum to the initial agreement. Combination agreements structured in this manner are permissible if: (1) the agreement satisfies all the requirements of 12 USC 215 or 215a in the case of transactions with a national bank; (2) the initial agreement clearly states the intent to include the interim bank in the combination; and (3) the interim bank becomes a party to the agreement before consummating the combination.

[33] Refer to 12 USC 215(a), 215a(a)(1).

Branch Authorization and Closing

Branch Authorization

The resulting national bank in a combination may retain, as branches, the branches of the acquiring bank and the main offices and branches of the target institutions as permitted under 12 USC 36 and 12 CFR 5.30. A resulting FSA in a combination may retain, as branches, the branches of the acquiring FSA and main offices and branches of the target institutions as permitted under 12 USC 1464(r) and 12 CFR 145.92. The application should address the legal authority of the resulting bank to retain branches of all institutions participating in the combination.

The combination application must include a list of all locations for which the resulting bank requests OCC authorization. The application also must list all branches of each institution involved in the combination, including those of a national bank or FSA that the resulting bank will not retain after consummation. (See the "Branch Closings" section of this booklet.)

The OCC issues an authorization letter after consummating the transaction for any office that will be a branch of the resulting bank that was not approved as a branch of a national bank or FSA before the combination. Refer to the "Branches Requiring Authorization" form. The OCC letter certifying the combination authorizes the resulting bank's retention, as branches, of the main offices of the combining institutions (except the resulting bank's main office) and all existing branch offices (brick-and-mortar branches and other types of facilities that meet the definition of a branch under federal banking laws) of the acquired institutions that are not national banks or FSAs.

If permitted under 12 USC 36 or 12 USC 1464(r) and 12 CFR 5.30 or 12 CFR 5.31, as applicable, banks may retain approved but unopened branches of a target institution if the target institution received all required approvals for those branches before the transaction. The application must include a list of all approved but unopened branches for which authorization is requested. Banks should be aware of the 18-month expiration period affecting approved but unopened branches.

Branch Closings

The applicant must identify branches that will cease to operate as a result of the transaction. If the applicant is unable to determine at the time of filing the exact number and location of the branch closings, the application should state that a yet-to-be-determined number of offices will close and provide as much specificity as possible. When the exact locations are determined, the applicant must follow the branch closing procedures set forth in 12 USC 1831r-1. Refer to the "Branch Closings" booklet of the *Comptroller's Licensing Manual*. The OCC may require additional public notice once the determination of exact branch closings is made.

The responsibility for filing the notice lies with the acquiring or resulting national bank or FSA, but either party to a combination may give notice. Thus, for example, the acquirer may

give the notice before consummating the transaction when the acquirer intends to close a branch after consummation, or the target or seller may give the notice because it intends to close a branch at or before consummation.

Nonconforming Assets and Activities

An applicant must identify any nonconforming assets or activities, including nonconforming subsidiaries, of any institutions involved in the combination that will not be disposed of, or discontinued, before consummating the transaction. Refer to 12 CFR 5.33(e)(5). A nonconforming asset or activity is one that is impermissible for a national bank or FSA or, if permissible in general, is being conducted in a manner that exceeds limits applicable to national banks or FSAs. Nonconforming assets include investments in subsidiaries or other entities that are not permissible for a national bank or FSA, as applicable. If the applicant has questions about the legal authority of the resulting bank to retain certain assets or continue certain activities, the application should contain an analysis of the legality of the assets or activities, including a legal opinion, if appropriate.

The OCC generally permits the resulting bank a reasonable period of time, usually not more than two years after consummating the combination, to divest or conform nonconforming assets or discontinue or conform nonconforming activities of the target without undue hardship. An applicant seeking to retain nonconforming assets or activities must provide information describing its plan to conform, divest, or discontinue nonconforming assets or activities, and an explanation of the reasonableness of the time periods involved. If an asset or activity is conforming only if it is held or conducted in a financial subsidiary of a national bank, then the resulting national bank must hold the asset or conduct the activity in a financial subsidiary, or if not, then the national bank must conform or divest the asset or activity within the time period specified by the OCC, which will generally be two years. Any resulting FSA shall conform to the requirements of sections 5(c) and 10(m) of HOLA, 12 USC 1464(c) and 1467a(m), within the time period prescribed by the OCC.

Subsidiary and Investment Authorization

An applicant must identify any subsidiary, other company, or investment to be acquired in a business combination and state the activities of each subsidiary or other company in which the applicant would be acquiring an investment. The OCC does not require a separate application or notice under 12 CFR 5.34, 5.35, 5.36, 5.38, 5.39, 5.58, or 5.59.

A national bank proposing to acquire, through a business combination, a subsidiary, financial subsidiary investment, bank service company investment, service corporation investment or other equity investment of any entity other than a national bank, must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the applicant were establishing the subsidiary, or making such investment, pursuant to 12 CFR 5.34, 5.35, 5.36, or 5.39.

An FSA proposing to acquire, through a business combination, a subsidiary, bank service company investment, service corporation investment or other equity investment of any entity

other than an FSA must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the applicant were establishing the subsidiary, or making such investment, pursuant to 12 CFR 5.35, 5.38, 5.58, or 5.59.

A national bank that proposes to acquire a community development project or corporation that the OCC previously has not approved must seek and receive OCC approval from Community Affairs under 12 CFR 24 before consummating the combination.[34]

Exit Notice to OCC

A national bank or FSA engaging in a consolidation or merger in which it is not the resulting institution must file a notice with the appropriate OCC licensing office advising of its intention to terminate its status as a federal charter. Refer to 12 CFR 5.33(k). The bank shall submit the notice at the time the application to merge or consolidate is filed with the responsible agency, or if there is no such filing, then 30 days before the effective date of the merger or consolidation.

The notice should contain a short description of the transaction, a copy of the filing with another regulatory agency, and the planned consummation date.

Post-Decision Process

Appeals

An applicant may appeal an OCC decision under policy and procedures discussed in OCC Bulletin 2013-15, "Bank Appeals Process: Guidance for Bankers." For more information, see the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual*.

Extension of Time

When the OCC approves or conditionally approves a business combination, the applicant has up to six months to consummate the transaction. Refer to 12 CFR 5.33(e)(7). The approval will lapse if a combination is not consummated within six months from the date of OCC approval, unless the OCC grants an extension of time.

The OCC normally does not grant extensions of time to consummate. An extension of the approval time, however, may be requested from the appropriate OCC licensing office and granted if the applicant can provide sufficient information to prove that the reason for the delay is beyond its control or otherwise satisfy the OCC that sufficient grounds exist to extend the approval.

[34] Questions about national bank public welfare investments in community development corporation subsidiaries and other community and economic development entities under 12 USC 24(Eleventh) and its implementing regulation, 12 CFR 24, can be referred to the Community Affairs Division: communityaffairs@OCC.treas.gov.

Consummation

Applicants should advise the OCC at least 10 days before the desired consummation date for the combination, allowing the OCC adequate time to determine if the bank has met any applicable pre-combination requirements specified in the approval letter. Refer to the "Notice of Consummation." Generally, the OCC issues its certification letter on the effective date.

Certification of Resulting Bank's Capital

Resulting banks may be required to file a notice or application for any increases in permanent capital as a result of a combination. Pursuant to 12 CFR 5.46, national banks are required to file a notice, or in some cases an application, after an increase in permanent capital and obtain OCC certification. The OCC will acknowledge receipt of the filing and certify any increase in permanent capital for resulting national banks. In cases specified in 12 CFR 5.45, FSAs are required to file an application after an increase in permanent capital. Certification by the OCC is not required for FSAs.

Lending Limit Calculation

When a combination transaction results in a change in capital category under 12 USC 1831o and 12 CFR 6 (prompt corrective action), the bank should calculate its lending limit based on the resulting capital and the effective date of such capital category change. The effective date of the change in capital category is the date the bank is notified of, or is deemed to have notice of, its capital category pursuant to 12 CFR 6.3(b).

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

Oath of New Directors

A resulting national bank must furnish the OCC with an executed "Oath of Bank Director" for all new directors added as a result of a merger. In a consolidation, the resulting national bank must furnish the OCC with an executed "Oath of Bank Director" for all directors.

OCC Semiannual Assessment

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

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

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

Procedures: Prefiling

Exploratory Inquiry, Conference Call, or Meeting

1. Potential applicants may request an exploratory conference call or meeting with the OCC to clarify any questions or concerns. The potential applicant should provide any available written documents that describe the proposal to the appropriate OCC licensing office for review before the call or meeting. The potential applicant should allow adequate time for OCC staff to review the material.

2. Potential applicants may request information about the business combination process from the licensing staff in the appropriate OCC office if this information has not been requested previously.

Prefiling Meeting

3. The OCC strongly encourages potential applicants to schedule a prefiling meeting. A prefiling meeting is optional but would be beneficial if the transaction presents possible issues or if the applicant has questions on the structure of the transaction or the filing process. Either the applicant or the OCC may request a prefiling meeting.

4. In advance of any prefiling meeting, the potential applicant usually provides the OCC staff with an overview of the proposal, including a discussion of the business plan and the market, with particular emphasis on any unique aspects or novel policy or legal issues.

Procedures: Application Process

Filing the Application and Publication

1. The applicant completes and forwards the application[35] (original and copies) to the appropriate OCC licensing office. The applicant should e-mail a PDF copy of the public and confidential portions of the application to the OCC.

2. For combinations that require approval under the BMA, the applicant arranges for newspaper publication of public notice on the filing date, or as soon as practicable before or after the date of filing, and two times thereafter. (Refer to the "Public Notice and Comment Periods" section of this booklet and the sample notice.) Promptly after publication, the applicant submits a statement containing the name and address of the newspaper in which the notice was published and dates of publication to the appropriate OCC licensing office. Refer to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual*.

3. The applicant applies for and obtains any other required regulatory approvals.

Organizing an Interim Bank

4. If the transaction includes the formation of an interim national bank or FSA to facilitate the transaction, the applicant files the "Interim Bank Charter Application" with the other application materials. The application to form an interim national bank should include the interim's signed articles of association, organizational certificate, and oaths of directors. The application to charter an interim FSA should include the interim's charter and bylaws. Refer to 12 CFR 5.33(e)(4).

5. The applicant proceeds with any remaining steps required to organize the interim bank, including filing the "Stock Payment Certificate and Oaths of Directors and Officers" for an interim national bank.

Public Comments and Hearings

6. If the public or interested persons request copies of the application, OCC licensing staff follows the information request procedures in the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual*.

7. If public comments are filed or a hearing or meeting is requested, OCC licensing staff refers parties to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual* for guidance and procedures.

[35] Refer to occ.gov, for the "Interagency Bank Merger Act Application" and application forms for a streamlined merger, a national bank reorganization to form a BHC, or a merger of a national bank with a nonbank affiliate (in which the affiliate survives or the national bank survives).

8. The applicant reviews and may respond to the OCC on any public comments, and provides a copy to the commenter. If the applicant does not provide a copy to the commenter, the OCC forwards any nonconfidential portions of the response from the applicant to the commenter.

Initial Review

Shareholder Approval

1. If the bank has, or will have, registered securities under section 12(b) or (g) of the Securities Exchange Act of 1934, 12 USC 78l(b) or (g), it must file preliminary shareholder proxy materials or information statements with the OCC's Securities and Corporate Practices Division in the OCC's Washington, D.C., headquarters.

2. For national banks, if the transaction requires shareholder approval, the bank publishes notice of the shareholders' meeting on the same day of the week for four consecutive weeks (see the "Shareholder Considerations" section of this booklet under "Application Process").

3. The bank mails notice of the shareholders' meeting, with accompanying proxy materials or information statements, to all shareholders by certified or registered mail at least 10 days before the meeting, or earlier, if required. The bank also sends definitive copies of the shareholders' materials to the appropriate OCC licensing office.

4. The bank mails proxy materials or information statements to the appropriate OCC licensing office.

   Note: Any shareholders wishing to dissent must file to dissent at or before the shareholder vote.

5. The bank obtains any applicable shareholders' approval of the combination.

6. Shareholders of depository institutions who are provided with dissenters' rights by law or regulation may perfect their rights by objecting to the combination before the applicable shareholder meeting, or by voting against the combination at the shareholder meeting. Refer to the "Dissenters' Rights" section of this booklet for more information as specific requirements apply.

Procedures: Consummation

Banks should use the following procedures:

Consummation and Filing of Documents

1. Notify the Director for district licensing by e-mail or letter at least 10 days in advance (five days in advance for a combination processed under 10-day, 5-day procedures) of the date that the bank plans to consummate the combination. The consummation date must follow any applicable DOJ waiting period for transactions filed under the BMA.

2. As applicable, forward to the OCC copies of any pertinent required regulatory approvals, evidence of satisfaction of any pre-consummation requirements imposed by the OCC, or other similar documentation required by the OCC.

3. If not previously done, submit to the OCC the: secretary's certificates of the board of directors' approval; the executed combination agreement; amended articles of association for combinations in which the articles of association change for a resulting national bank, or amended charter for an FSA; and, if applicable, the secretary's certificates certifying shareholders' ratification.

Post-Consummation

4. File an "Oath of Bank Director" for each new director who has not previously taken the oath (applicable for national banks only).

5. Surrender any national bank or FSA charter certificates that are no longer valid.

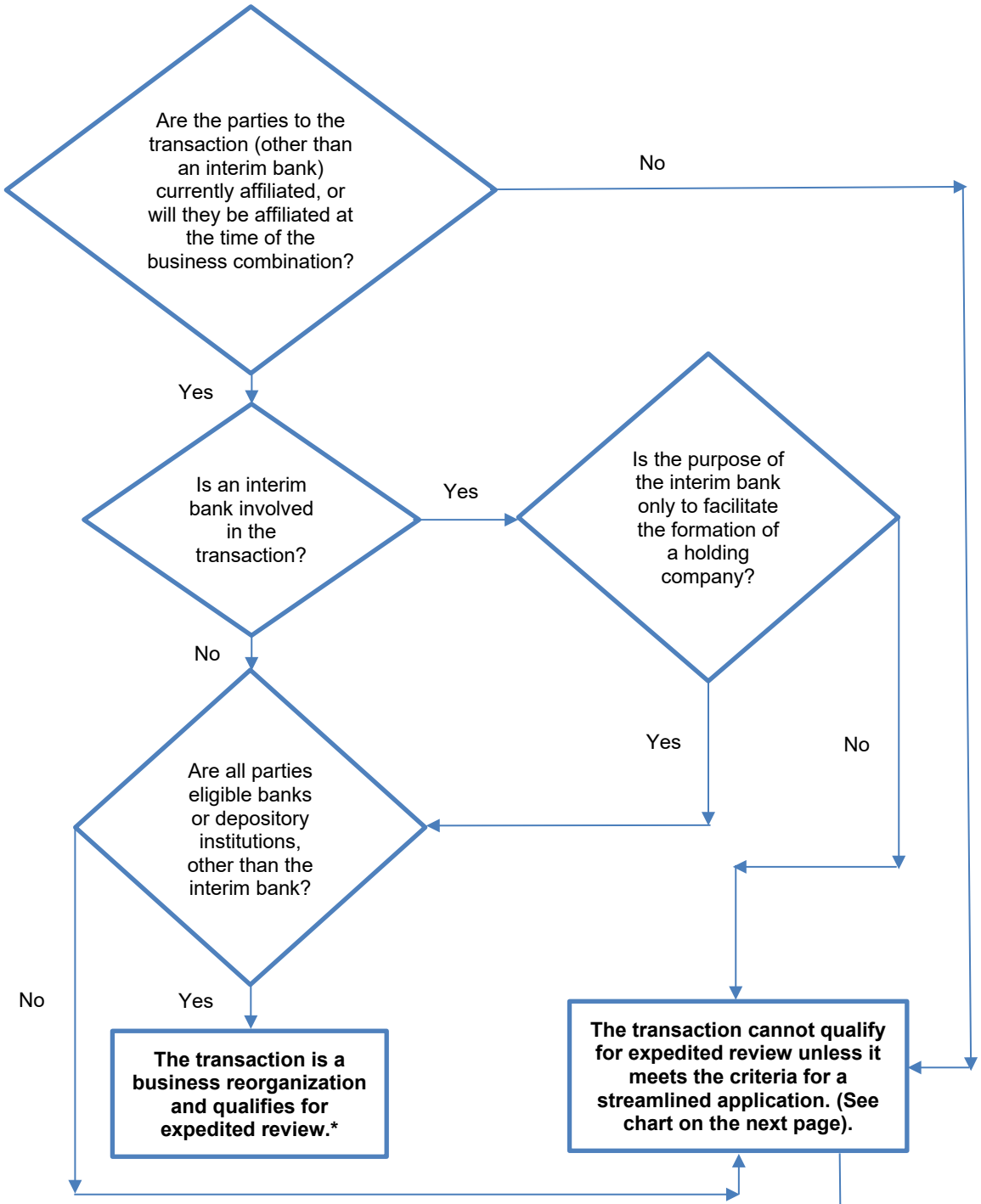
6. Surrender any branch certificates or authorizations for branches to be closed as a result of the transaction.

Dissenters' Rights

7. If there are any dissenting shareholders appealing the valuation of shares, submit a request for a stock appraisal directly to the Licensing Division at OCC Headquarters in accordance with 12 USC 214, 215, 215a, 215a-2, 215a-3, 215c, or 12 CFR 5.33.

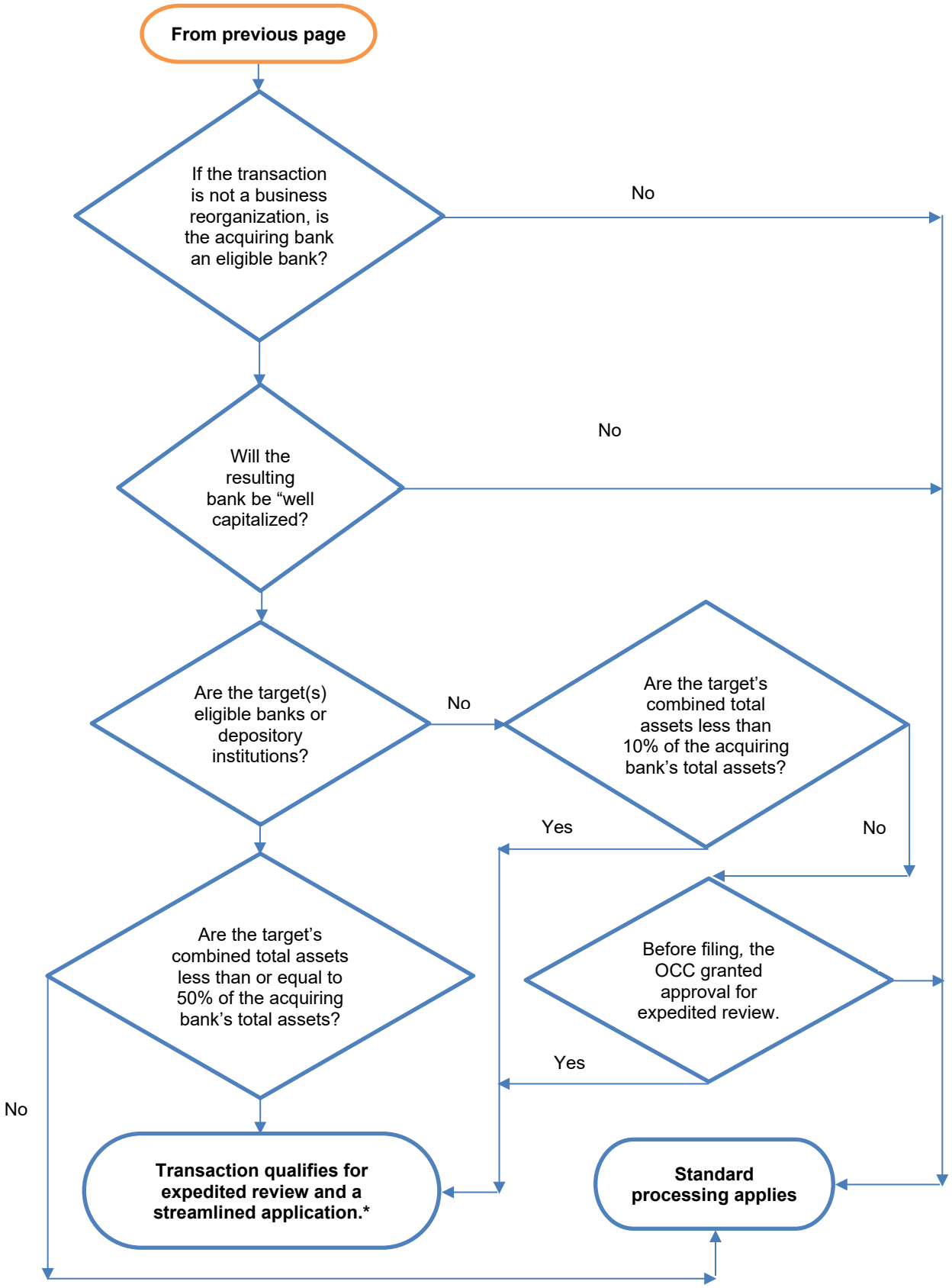
Appendixes

Appendix A: Expedited Review Eligibility Criteria for Business Combinations Involving Banks or Depository Institutions*



*Mergers involving non-bank subsidiaries or affiliates with a national bank are not eligible for expedited review. Combinations involving a mutual FSA do not qualify for expedited review.

**A transaction that qualifies for expedited review and streamlined application can be removed from expedited review by the OCC as provided in 12 CFR 5.13(a)(2)(i).



*A transaction that qualifies for expedited review and streamlined application may be removed from expedited review.
12 CFR 5.13(a)(2)(i)

Appendix B: Bank Merger Act Competitive Review

Introduction and Overview

The banking agencies and the DOJ review the competitive impact of mergers involving FDIC-insured depository institutions, as well as mergers involving BHCs or SLHCs, under the banking and antitrust laws to proscribe mergers that may substantially lessen competition.[36] To speed this competitive review and reduce regulatory burden on the banking industry, the banking agencies and the DOJ have developed screens (Screens A and B) to identify proposed mergers that clearly do not have significant adverse effects on competition. In addition to the screens, the banking agencies and the DOJ have identified information, described in section 2 of this appendix, which has proven to be useful in analyzing the competitive effects of proposed mergers highlighted by Screen A or Screen B.

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

Section 1—Screening

Banking Agencies

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

Department Of Justice

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

[36] The information in this appendix is taken from the DOJ's policy statement on bank mergers, "Bank Merger Competitive Review—Introduction and Overview (1995)."

In some cases, the DOJ may further review transactions that do not exceed the 1800/200 threshold in Screen A. This is most likely when Screen A does not reflect fully the competitive effects of the transaction in all relevant markets, in particular lending to small and midsize businesses. For example, the DOJ is more likely to review a transaction involving two commercial banks if the post-merger HHI approaches 1800 and the HHI increase approaches 200, and Screen A includes savings associations that are not actively engaged in commercial lending. In addition, the DOJ is more likely to review a transaction if the predefined market in which the applicants compete is significantly larger than the area in which small business lending competition may exist (for example, the predefined market includes multiple counties, or is significantly larger than Ranally Metropolitan Area (RMA) in which the applicants are located). In such a case, applicants should consider submitting the calculations set forth in Screen B. Often, the DOJ reviews the information in Screen B and finds no need for further review of the proposed merger.

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

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

- the screens' market area does not fit the transaction. Sometimes the geographic market used in the screens may not be an appropriate choice for analyzing the particular merger involved. For example, the screens' market area is a county, and one merging institution is at the east end of one county and the other merging institution is at the west end of the adjacent county. The institutions may in reality be each other's most important competitors, but the screens would not reflect that fact. Or the screens' market area may be quite large, but the merger involves two institutions at the center of the market. Institutions at the periphery of the market area may be improbable substitutes for the competition that would be lost in the transaction, and thus the transaction should be scrutinized in a narrower area to ensure that the relevant geographic market is considered.
- specialized products are involved. Sometimes the merging institutions are competitors for a specialized product and few of the institutions included in the screens compete in offering that product. For example, the screens likely would not identify a concentrated market for working capital loans to midsize commercial customers if the market area has many institutions but the merging institutions are two of only a few able to compete for such business.

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

Section 2—Additional Analysis

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

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

- evidence that the merging parties do not significantly compete with one another.
- evidence that rapid economic change has resulted in an outdated geographic market definition, and that an alternative market is more appropriate.
- evidence that market shares are not an adequate indicator of the extent of competition in the market, such as evidence that
  - institutions in the market would be likely to expand current levels of commercial lending. Such evidence might include current loan-to-deposit ratios, recent hiring of new commercial loan officers, pending branch applications or significant out-of-market resources that would be shifted into the market in response to new loan opportunities.
  - a particular institution's market share overstates or understates its competitive significance (such as evidence that an institution is rapidly gaining or losing market share or that the institution is not competitively viable or is operating under regulatory restrictions on its activities).
- evidence concerning entry conditions, including evidence of entry by institutions within the last two years and the growth of those institutions that have entered; evidence of likely entry within the next two years, such as pending branch applications; and expectations about potential entry by institutions not now in the market area and the reasons for such expectations, including legal requirements for entry.

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

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

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

- evidence that a credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market.
- evidence of actual competition by out-of-market institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.
- evidence of actual competition by nonbank institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.

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

Glossary

Affiliate: Generally, any company, including a bank or other depository institution that controls or is under common control with a bank. Certain other entities also are affiliates for purposes of sections 23A and 23B of the FRA (12 USC 371c and 371c-1) and Regulation W (12 CFR 223). Also refer to 12 USC 1468.

Applicant: Either the acquiring or target depository institution.

Appropriate licensing office: The OCC office responsible for processing applications or notices to engage in various corporate activities or transactions as described at Licensing Office Contacts.

Appropriate district office: The OCC office responsible for the supervision of a national bank or FSA, as described in subpart A of 12 CFR 4.

Business combination:

(i) Any merger or consolidation between a national bank or FSA and one or more depository institutions or state trust companies, in which the resulting institution is a national bank or FSA;
(ii) in the case of an FSA, any merger or consolidation with a credit union in which the resulting institution is an FSA;
(iii) in the case of a national bank, any merger between a national bank and one or more of its nonbank affiliates;
(iv) the acquisition by a national bank or FSA of all, or substantially all, of the assets of another depository institution; or
(v) the assumption by a national bank or FSA of any deposit liabilities of another insured depository institution or deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or FSA.

Business reorganization:

(i) A business combination between eligible national banks and eligible FSAs, or between an eligible national bank or an eligible savings association and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company before the combination; or
(ii) a business combination between an eligible national bank or an eligible savings association and an interim national bank or interim FSA chartered in a transaction in which a person or group of persons exchanges its shares of the eligible national bank or eligible savings association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible national bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the national bank or savings association.

Company: A corporation, limited liability company, partnership, business trust, association, or similar organization.

Consolidation:

- In the case of a national bank under 12 USC 215 and 1828(c), any combination of existing depository institutions into a new entity under a national bank charter, or under the charter of an existing national bank, when at least one institution is a national bank. Shareholders of the consolidating institutions surrender their equity in return for either equity in the consolidated bank or another form of consideration. Shareholders of the consolidating depository institutions must approve the transaction under 12 USC 215, which provides dissenters' rights to shareholders of all consolidating institutions.
- In the case of an FSA, any combination of existing FSAs into a new entity under an FSA charter, or under the charter of an existing FSA, when at least one institution is an FSA. FSA shareholders who dissent from a plan to consolidate may receive the value of their FSA shares in cash if they comply with the requirements of 12 USC 214a as if the other FSA were a state bank.

Control: As defined in the transactions with affiliates provisions of the FRA, when a company or shareholder

(i) directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other company;
(ii) controls in any manner the election of a majority of the directors or trustees of the other company; or
(iii) the Federal Reserve determines, after notice and opportunity for hearing, that a company or shareholder, directly or indirectly, exercises a controlling influence over the management of policies of a company.

The statute provides that no company shall be deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity. Regulation W provides a rebuttable presumption that a shareholder that owns or controls 25 percent or more of a company's equity capital controls that company.

Depository institution: Any bank, state bank, or savings association.

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

Eligible bank or **eligible FSA:** A national bank or FSA that

(i) is well capitalized as defined in 12 CFR 6.4.

(ii) has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMELS);
(iii) has a CRA (12 USC 2901 et seq.) rating of "outstanding" or "satisfactory," if applicable;
(iv) has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System; and
(v) is not subject to a cease and desist order, consent order, formal written agreement, or prompt corrective action directive (refer to 12 CFR 6, subpart B) or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the national bank or FSA may be treated as an "eligible bank or eligible savings association" for purposes of this part.

Eligible depository institution:

(i) With respect to a national bank, a state bank or a federal or state savings association that meets the criteria for an "eligible bank or eligible savings association" under 12 CFR 5.3(g) and is FDIC-insured; and
(ii) with respect to an FSA, a state or national bank or a state savings association that meets the criteria for an "eligible bank or eligible savings association" under 12 CFR 5.3(g) and is FDIC-insured.

Federal savings association: A depository institution (mutual or stock) chartered under section 5 of the HOLA, 12 USC 1464.

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

Herfindahl-Hirschman Index: A statistical measure of market concentration. It is used as the principal measure of market concentration in the Merger Screen. The HHI for a given market is calculated by squaring each individual competitor's share of total deposits within the market and summing the squared market share products. The more concentrated a specific market becomes, the higher the HHI. For example, for a market with four competitors with equal market shares, the HHI would be: $25^2+25^2+25^2+25^2=2{,}500$; however, for a market with two banks having 40 percent of the deposits and two banks having 10 percent of the deposits, the HHI would be: $40^2+40^2+10^2+10^2=3{,}400$. For a more concentrated market, with one bank having 60 percent of the deposits and two banks having 20 percent of the deposits, the HHI would be: $60^2+20^2+20^2=4{,}400$.

Home Owners' Loan Act: The statute that provides for the chartering, regulation, and supervision of FSAs, including the extent to which an FSA may invest in, sell, or otherwise deal in loans and investments.

Home state: (1) With respect to national banks and state banks under the Riegle–Neal Act, the state where the bank's main office is located (for national banks) or the state by which the bank is chartered (for state banks), or (2) with respect to FSAs, the state where the FSA's home office is located.

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

Interim bank: A national bank or FSA that does not operate independently, but exists solely as a vehicle to accomplish a business combination.

Lending limit: The legal limit under 12 CFR 32 on the aggregate amount of credit that a bank can extend to a single borrower. In certain circumstances, loans to separate borrowers are combined for purposes of applying the limit. The limit is calculated as a percentage of the bank's capital and surplus.

Low-quality assets: As defined under Regulation W, these include

- an asset (including a security) classified as "substandard," "doubtful," or "loss," or treated as "special mention" or "other transfer risk problems," either in the most recent report of examination or in any internal classification system used by the member bank or the affiliate (including an asset that receives a rating that is substantially equivalent to "classified" or "special mention" in the internal system of the member bank or affiliate).
- an asset in nonaccrual status.
- an asset on which principal or interest payments are more than 30 days past due.
- an asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.
- assets acquired debts previously contracted that have not yet been reviewed in an examination or inspection.

Merger: Under 12 USC 215a, 215c, 1828(c), 1464(d)(3)(A), 1467a(s) and 12 CFR 5.33, the acquisition of one or more depository institutions by an existing national bank, FSA or interim national bank or interim FSA. The shareholders of the target institution surrender their equity in return for either equity in the acquiring bank or another form of consideration.

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

National bank: Any national banking association operating under the OCC's supervision.

Nonbank affiliate: With respect to a national bank, for purposes of 12 USC 215a-3, any company, other than a bank or FSA that controls, is controlled by, or is under common control with the national bank.

Other combination:[37]

(i) Any merger or consolidation between a national bank or FSA and one or more depository institutions or state trust companies in which the national bank or FSA is not a resulting bank;
(ii) in the case of a federal stock savings association, any merger or consolidation with a credit union in which the resulting institution is a credit union;
(iii) the transfer by a national bank or FSA of any deposits to another insured depository institution, credit union, or any other institution; and
(iv) the acquisition by a national bank or FSA of all, or substantially all, of the assets or substantially all of the liabilities of any company other than a depository institution.

State savings association: An institution as defined in section 3(b)(1) of the FDIA, 12 USC 1813(b)(1).

State trust company: A trust company organized under state laws that is not engaged in the business of receiving deposits, other than trust funds.

Streamlined business combination: A transaction that satisfies one of the following standards:

(i) At least one party to the transaction is an eligible bank or eligible FSA, and all other parties to the transaction are eligible banks, eligible FSAs, or eligible depository institutions; the resulting national bank or FSA will be well capitalized immediately after consummating the transaction; and the total assets of the target institution are no more than 50 percent of the total assets of the acquiring bank or FSA, as reported in each institution's call report filed for the quarter immediately preceding the filing of the application;
(ii) The acquiring bank or FSA is an eligible bank or eligible FSA; the target bank or savings association is not an eligible bank, eligible FSA, or eligible depository institution; the resulting national bank or resulting FSA will be well capitalized immediately after consummating the transaction; and the applicants in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;
(iii) The acquiring bank or FSA is an eligible bank or eligible FSA; the target bank or savings association is not an eligible bank, eligible FSA, or eligible depository institution; the resulting bank or FSA will be well capitalized immediately after consummating the transaction; and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank or FSA, as reported in each institution's call report filed for the quarter immediately preceding the filing of the application; or
(iv) In the case of a transaction under 12 CFR 5.33(g)(4), the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately after consummating the transaction, the applicants in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined

[37] Other combination transactions do not require an application to the OCC under 12 CFR 5.33. Some, however, may require an application under 12 CFR 5.53 or otherwise; others may require notice to the OCC.

application; and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's call report filed for the quarter immediately preceding the filing of the application.

Significant deviation or change: A material variance from the bank's business plan or operations that occurs after the proposed transaction has consummated.

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

References

In this section, "NB" denotes that the referenced law, regulation, or issuance applies only to national banks, and "FSA" denotes that the reference applies only to federal savings associations.

Asset Composition

Regulation	12 CFR 5.53

Authorization to Commence Banking Business

Law	12 USC 26 and 27 (NB)

Bank Holding Company Act

Law	12 USC 1841
Regulation	12 CFR 225

Bank Merger Act

Law	12 USC 1828(c)
Regulation	12 CFR 5.33

Bank and Thrift Combinations

Law	12 USC 214a, 215, 215a, 215a-1, 215a-3, 215c (NB) 12 USC 1464(d)(3), 1467a(s) (FSA) 12 USC 1828(c) 12 USC 1831u (NB) 12 USC 1842(d) (NB)
Regulation	12 CFR 5.33

Bank Secrecy Act

Law	31 USC 5311-5328
Regulation	12 CFR 21.21

Branch and Subsidiary Authorization

Law	12 USC 24(7), 36, 1831u(d) (NB)
Regulation	12 CFR 5.30 (NB) 12 CFR 5.31 (FSA) 12 CFR 5.33

Branch Closings

Law	12 USC 1831r-1

Issuance

Joint Policy Statement on Branch Closing, Notices and Policies, June 3, 1999

Business Combinations

Law	12 USC 24(7), 214a, 215, 215a, 215a-1, 215a-2, 215a-3, 215c, 1831u (NB) 12 USC 1464(d)(3), 1467a(s) (FSA) 12 USC 1828(c)
Regulation	12 CFR 5.33

Capital Requirements

Law	12 USC 92a, 36(c), 3907 (NB)
Regulation	12 CFR 5.20, 5.33

Capital Stock

Law	12 USC 51c, 52, 53, 55 (NB)

Capital Structure Change

Law	12 USC 57, 59 (NB)
Regulation	12 CFR 5.46, 5.47, 7.2020, 7.2023 (NB) 12 CFR 5.45, 5.55, 5.56 (FSA)

Certificate Authorizing Transaction of Banking Business

Law	12 USC 27, 1814 (NB)

Community Reinvestment Act of 1977

Law	12 USC 2901 to 2908
Regulation	12 CFR 25 (NB), 12 CFR 195 (FSA)

Competitive Analysis

Law	12 USC 1828(c)(4)
Regulation	12 CFR 5.33(e)(1)(i)

Consolidation

Law	12 USC 215 (NB) 12 USC 1828(c)
Regulation	12 CFR 5.33

Depository Institution Management Interlocks Act

Law	12 USC 3201
Regulation	12 CFR 26

De Minimis Market Test

Issuance

OCC Decision, April 8, 1983, Application to Merge The National Bank and Trust Company of Norwich, Norwich, NY, With National Bank of Oxford, Oxford, NY

Directors

Law	12 USC 71–76 (NB)

Number of	
Law	12 USC 71a (NB)
Oath of	
Law	12 USC 73 (NB)
President as	
Law	12 USC 76 (NB)
Purchases from and Sales to	
Law	12 USC 375 (NB)
Qualification of	
Law	12 USC 72 (NB)
Regulation	12 CFR 7.2005 (NB)
Composition	12 CFR 163.33 (FSA)

Fair Access Final Rule

Law	12 USC 1
Regulation	12 CFR 55

Filing Fees

Regulation	12 CFR 5.5

Fiduciary Powers

Law	12 USC 92a (NB), 12 USC 1464(n) (FSA)
Regulation	12 CFR 5.26 12 CFR 9 (NB), 12 CFR 150 (FSA)

Issuance
Interpretive Letter 695, December 8, 1995 (NB)

Interstate Combinations

Law	12 USC 24(Seventh), 30, 36, 215, 215a, 215a-1, 215c, 1815(d)(3), 1823(c) (NB) 12 USC 1828(c) 12 USC 1831u, 1835a, 1842(d) (NB)
Regulation	12 CFR 5.33

Intrastate Combinations

Law	12 USC 24(Seventh), 215, 215a, 215c (NB) 12 USC 24(Seventh) 1828(c)
Regulation	12 CFR 5.33

Investment in Bank Premises

Law	12 USC 371d (NB)
Regulation	12 CFR 5.37, 7.1000

Lending Limit Calculation

Law	12 USC 84 12 USC 1464(u) (FSA)

Regulation	12 CFR 3, 6, 32

Liquidation

Law	12 USC 181, 182 (NB)
Regulation	12 CFR 5.48

Merger

Law	12 USC 214a, 215, 215a, 215c, 215a-1, 215a-3 (NB) 12 USC 1828(c)
Regulation	12 CFR 5.33

Meetings and Hearings

Regulation	12 CFR 5.11

Operating Subsidiary Annual Report

Regulation	12 CFR 5.34(e)(6) (NB)

Issuance

OCC Bulletin 2004-55, "Annual Report on Operating Subsidiaries: Final Rule," December 1, 2004 (NB)

Place of Business

Law	12 USC 22, 81 (NB)

Proxy or Information Statement

Law	15 USC 78l
Regulation	12 CFR 5.33, 11 12 CFR 169 (FSA)

Public Comments

Regulation	12 CFR 5.10

Issuance

Comptroller's Licensing Manual, "Public Notice and Comments" booklet

Public Welfare Investments (Community Development Corporation, Community Development Projects, and Other Public Welfare Investments)

Law	12 USC 24(Eleventh) (NB)12 USC 1464(c)(3)(A) (FSA)
Regulation	12 CFR 24 (NB) 12 CFR 160.36 (FSA) 12 CFR 5.59(f)(8) (FSA)

Publication of Application (Public Notice)

Law	12 USC 1828(c)
Regulation	12 CFR 5.33, 5.8

Publication of Significant Corporate Decisions

Issuance

PPM 1000-15, "Publication of Significant OCC Interpretive Opinions and Corporate Decisions in *Interpretations and Actions*," September 5, 2001

Purchase and Assumption

Law	12 USC 24(7) (NB) 12 USC 1828(c)
Regulation	12 CFR 5.33

Regulation W

Regulation	12 CFR 223

Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994

Law	12 USC 36(d), (e), (f); 215a-1; 1823(c), 1828(d); 1831u; 1835a; 2906(b)(1)(B), (d), (e) (NB)
Regulation	12 CFR 5.33 (NB)

Issuance

Comptroller's Handbook, "Other Consumer Protection Laws and Regulations"

Shareholders' List

Law	12 USC 62 (NB)

Shareholders' Meeting

Law	12 USC 214a(a), 215a(a)(2) (NB)

Transactions with Affiliates, Restrictions

Law	12 USC 371c (section 23A), 371c-1 (section 23B) 12 USC 1468 (FSA)
Regulation	12 CFR 223 (Regulation W)

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Reason	**Affected pages**
Policy change	2, 4, 7, 8, 25, 26, 31
Addition to “References” section	71