For Release Upon Delivery
9:30 a.m., June 22, 2004

TESTIMONY OF

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Before the

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

of the

UNITED STATES SENATE

June 22, 2004

Statement required by 12 U.S.C. 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

INTRODUCTION

Chairman Shelby, Ranking Member Sarbanes, and members of the Committee,

I appreciate this opportunity to appear before you to discuss the challenge of reducing unnecessary regulatory burden on America's banking system. The Office of the Comptroller of the Currency (OCC) welcomes the opportunity to discuss this challenge and to offer suggestions for reforms, including some suggestions particularly affecting the national banking system. We also want to express appreciation to Senator Crapo for his commitment and dedication to this issue.

Imposition of unnecessary regulatory burdens is not simply an issue of bank costs. When unnecessary regulatory burdens drive up the cost of doing business for banks, bank customers feel the impact in the form of higher prices and, in some cases, diminished product choice. Unnecessary regulatory burden also can become an issue of competitive viability, particularly for our nation's community banks, where bankers face competitors that offer comparable products and services but are not subject to comparable regulatory requirements.

This is a challenge that we must confront on several levels. First, at the level of bank <u>regulation</u>, when regulators adopt regulations, and as we review the regulations we already have on the books, we have a responsibility to ensure that regulations are effective to protect safety and soundness, foster the integrity of bank operations, and safeguard the interests of consumers. We also have a responsibility to regulate efficiently, so that we do not impose regulatory burdens that are unnecessary to achieve those goals, and which then act as a drag on banks' efficiency and competitiveness. In the first portion of my testimony, I summarize initiatives the OCC has undertaken in the past decade, and the efforts in which we are currently involved on an interagency basis, to review and revise regulations to reduce unnecessary regulatory burdens stemming from our rules.

Second, there are regulatory burden reduction initiatives that must come from Congress in the form of federal legislation – adding provisions to law to provide new flexibilities, modifying requirements to be less burdensome, and in some cases, eliminating certain requirements currently in the law altogether. This hearing today is a crucial stage in that process, and we and the other witnesses you will hear from have a number of suggestions to offer. My testimony will highlight several of the OCC's priority recommendations, and an Appendix to my testimony contains a more extensive set of suggestions.

Finally, it is important to recognize that many of the areas that are often identified as prospects for regulatory burden reduction involve requirements put in place by Congress for the protection of consumers. Over the years, those requirements have accreted, and in the disclosure area, in particular, consumers receive disclosures so voluminous and so technical that many simply don't read them – or when they do, don't understand them. At some point as we continue our efforts to address regulatory burdens, we are going to run out of discrete fixes to make, and face more fundamental questions about basic approaches. If we were to undertake that task, and do it responsibly, we need much better data on the costs resulting from particular regulatory requirements, and the benefits of those requirements – particularly relative to other approaches that might be used to achieve

Congress' goals – than we have now. I would urge the Committee to consider what sort of information and analysis would need to be assembled as a foundation for such an undertaking.

REGULATORY INITIATIVES TO ADDRESS REGULATORY BURDEN

The OCC constantly reviews its regulations to identify opportunities to streamline regulations or regulatory processes, while still ensuring that the goals of protecting safety and soundness, ensuring the integrity of bank operations, and safeguarding the interests of consumers are met. In the mid-1990's, pursuant to our "Regulation Review" project, we went through every regulation in our rulebook with that goal in mind. We have since conducted several supplemental reviews focused on particular areas where we thought further improvements could be made.

With respect to regulatory processes, the OCC recently adopted a final rule that allows national banks to file licensing applications electronically, utilizing the agency's new electronic filing system, called e-Corp. This ruling materially reduces the paperwork burden on national banks and achieves greater efficiency in the OCC's regulatory processes.

The OCC, together with the banking agencies, the FTC, SEC and CFTC also have undertaken an effort to simplify the privacy notices to consumers required under the Gramm-Leach-Bliley Act (GLBA). The agencies asked for comments on whether to consider amending their privacy regulations to allow, or require, financial institutions to provide alternative types of privacy notices, such as a short-form privacy notice, that would be more consumer friendly and easier for consumers to understand and banks to implement. The agencies also asked commenters to provide sample privacy notices that they believe work well for consumers, and to provide the results of any consumer testing that has been conducted in this area. We also will be conducting a series of focus groups with consumers to find out – from them – what sort of information they find most meaningful, and the most effective way to disclose it to them. This project has the potential to be a win-win for consumers and financial institutions – more effective and meaningful disclosures for consumers, and reduced burden on institutions to produce and distribute privacy notices.

We are also active participants and supporters of the regulatory burden reduction initiative being led by Vice Chairman Reich of the Federal Deposit Insurance Corporation (FDIC). Under Vice Chairman Reich's capable and dedicated leadership, the Federal banking agencies currently are conducting the 10-year regulatory review required under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). Section 2222 requires the Federal Financial Institutions Examination Council and each Federal banking agency to conduct a review of all regulations every 10 years to identify outdated, unnecessary regulatory requirements. The current review period ends in September, 2006.

As part of the EGRPRA process, the banking agencies have broken out their regulations into twelve categories. The agencies have agreed to ask for public comments every six months on the regulations in one or more of these categories throughout the review period. To date, the agencies have issued two joint notices for public comment and are about to put out a third. Each of the comments received is being carefully reviewed and will be considered in formulating the agencies' recommendations for specific regulatory changes that also will be published for public comment.

Moreover, in addition to soliciting written comments, the Federal banking agencies, in conjunction with the Conference of State Bank Supervisors and state regulatory agencies, held five banker outreach meetings last year in different cities so that the regulators could hear first-hand the bankers' concerns and suggestions to reduce burden.[1] These meetings were so well attended and successful that at least three more are being held this year. In addition, we held a consumer and community groups outreach meeting earlier this year in the Washington, D.C. area and we have tentative plans to hold two more meetings in other locations.

The agencies are making every effort to ensure that there is ample opportunity for consumers and the industry to participate in this process. I would like to thank Vice Chairman Reich for his work on this important project and his efforts to make sure that our review is as comprehensive and encompassing of as many different viewpoints as possible.

Moreover, as you know, section 2222 of EGRPRA recognizes that some of the changes

[1] During the EGRPRA outreach sessions held by the interagency working group, some bankers also identified the requirements under the current privacy regulations as a significant burden.

suggested by the public comments may require legislative changes and cannot be appropriately addressed through a regulatory amendment. Thus, the banking agencies have been discussing jointly recommending certain legislative changes to reduce burden that have been raised by commenters as part of the EGRPRA process and we welcome the opportunity to make further suggestions.

OCC SUPPORT FOR REGULATORY BURDEN RELIEF LEGISLATION

The results that Congress can achieve by removing or reducing regulatory burden imposed by Federal statutes can be broader and more far-reaching than regulatory changes that we can make under the current law. My testimony will highlight some of the important items that the OCC believes will reduce regulatory burden on our banking system and will benefit consumers. We have highlighted other changes that the OCC believes will significantly enhance safety and soundness. These and other suggestions are discussed in more detail in an appendix to my testimony.[2]

NATIONAL BANKS

Repealing State Opt-In Requirements for *De Novo* Branching. As both national and state banks seek to establish branch facilities to enhance service to customers, a change that would reduce burden would be to repeal the state opt-in requirement that applies to banks

[2] Many of the suggested changes that we discuss are included in H.R. 1375, the Financial Services Regulatory Relief Act of 2004, as passed by the House on March 18, 2004. However, we also are recommending some new amendments that were not part of the House-passed bill and have identified these new provisions in the appendix.

that choose to expand interstate by establishing branches *de novo*. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. Under the time frames in the statute, interstate bank mergers are now permissible in all 50 states. *De novo* branching, however, is permissible only in those approximately 17 states that have affirmatively opted-in to allow the establishment of new branches in the state. In many cases in order to serve customers in multi-state metropolitan areas or regional markets, banks must, under current law, structure artificial and unnecessarily expensive transactions in order to establish a new branch across a state border. Enactment of this recommended amendment would relieve these unnecessary and costly burdens on the industry.

Providing Relief for Subchapter S National Banks. Another priority item supported by the OCC is an amendment that would allow directors of national banks that are organized as Subchapter S corporations to purchase subordinated debt instead of capital stock to satisfy the directors' qualifying shares requirements in national banking law. As a result, the directors purchasing such debt would not be counted as shareholders for purposes of the 75-shareholder limit that applies to Subchapter S corporations. This relief would make it possible for more community banks with national bank charters to organize in Subchapter S form while still requiring that such national bank directors retain their personal stake in the financial soundness of these banks.

Simplifying Dividend Calculations for National Banks. Under current law, the formula for calculating the amount that a national bank may pay in dividends is both complex and antiquated and unnecessary for purposes of safety and soundness. The amendment supported by the OCC would make it easier for national banks to perform this calculation, while retaining safeguards in the current law that provide that national banks (and state member banks)[3] need the approval of the Comptroller (or the FRB in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. The amendment would ensure that the OCC (and the FRB for state member banks) would continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Other safeguards, such as Prompt Corrective Action, which prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)) would remain in place.

Resolving Ambiguities About Federal Court Diversity Jurisdiction. Also among our priority items is an amendment that would provide a single-state citizenship rule for national banks and other Federally chartered depository institutions for purposes of determining Federal court diversity jurisdiction. Under this uniform rule, a Federally chartered depository institution, *i.e.,* a national bank or a Federal savings association, would be a citizen only of the state in which it has its main office. Our suggested amendment would apply comparable treatment to national banks and Federal thrifts. Both

[3] See 12 U.S.C. 324 and 12 C.F.R. 208.5 generally applying the national bank dividend approval requirements to state member banks.

national banks and Federal thrifts are Federally chartered and neither is incorporated under the laws of any state. Providing more certainty on this issue would reduce burden and costs on national banks and Federal thrifts.

Modernizing Corporate Governance. The OCC also supports an amendment that would eliminate a requirement in current law that precludes a national bank from prescribing, in its articles of association, the method for election of directors that best suits its business goals and needs. Unlike most other companies and state banks, national banks cannot choose whether or not to permit cumulative voting in the election of their directors. Instead, current law requires a national bank to permit its shareholders to vote their shares cumulatively. Providing a national bank with the authority to decide for itself whether to permit cumulative voting in its articles of association would conform the National Bank Act to modern corporate codes and provide a national bank with the same corporate flexibility available to most corporations and state banks.

Modernizing Corporate Structure Options. Another amendment that is strongly supported by the OCC is an amendment to national banking law clarifying that the OCC may permit a national bank to organize in any business form, in addition to a "body corporate." An example of an alternative form of organization that may be permissible would be a limited liability national association, comparable to a limited liability company. The provision also would clarify that the OCC by regulation may provide the organizational characteristics of a national bank operating in an alternative form, consistent with safety and soundness. Except as provided by these organizational characteristics, all national banks, notwithstanding their form of organization, would have the same rights and privileges and be subject to the same restrictions and enforcement authority.

Such an amendment would allow a national bank to choose the business form that is most consistent with the banks' business plans and would, thus, improve the efficiency of a national bank's operations. For example, if the OCC should permit a national bank to organize as a limited liability national association, this may be a particularly attractive option for community banks. The bank may then be able to take advantage of the pass-through tax treatment for comparable entities organized as limited liability companies (LLCs) under certain tax laws and eliminate double taxation under which the same earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends. Some states currently permit state banks to be organized as unincorporated LLCs and the FDIC adopted a rule allowing certain state bank LLCs to qualify for Federal deposit insurance. This amendment would clarify that the OCC can permit national banks to organize in an alternative business form, such as an LLC, in the same manner.

Paying Interest on Demand Deposits. The OCC supports amendments to the banking laws to repeal the statutory prohibition that prevents banks from paying interest on demand deposits. The prohibition on paying interest on demand deposits was enacted approximately 70 years ago for the purpose of deterring large banks from attracting deposits away from community banks. The rationale for this provision is no longer true today and financial product innovations, such as sweep services, allow banks and their customers to avoid the statutory restrictions. Repealing this prohibition would reduce burden on consumers, including small businesses, and reduce costs associated with establishing such additional accounts to avoid the restrictions.

FEDERAL BRANCHES AND AGENCIES OF FOREIGN BANKS

The OCC also licenses and supervises Federal branches and agencies of foreign banks. Federal branches and agencies generally are subject to the same rights and privileges, as well as the same duties, restrictions, penalties, liabilities, conditions and limitations and laws that apply to national banks. Thus, Federal branches and agencies will benefit equally from legislation that would reduce burden on national banks. Branches and agencies of foreign banks, however, also are subject to other requirements under the International Banking Act of 1978 (IBA) that are unique to their organizational structure and operations in the U.S. as an office of a foreign bank. In this regard, the OCC is recommending amendments to reduce certain unnecessary burdens on Federal branches and agencies while preserving national treatment with national banks.

Implementing Risk-Based Requirements for Federal Branches and Agencies. A priority item for the OCC is an amendment to the International Banking Act of 1978 (IBA) to allow the OCC to set the capital equivalency deposit (CED) for Federal branches and agencies to reflect their risk profile. We support an amendment that would allow the OCC, after consultation with the Federal Financial Institutions Examination Council, to adopt regulations setting the CED on a risk-based institution-by-institution basis. This approach would closely resemble the risk-based capital framework that applies to both national and state banks.

AGENCY OPERATIONS

Improving Ability to Obtain Information from Regulated Entities. Another item that we recommend be adopted is an amendment that would permit all of the Federal banking agencies -- the OCC, FDIC, OTS, and the Federal Reserve Board -- to establish and use advisory committees in the same manner. Under current law, only the Board is exempt from the disclosure requirements under the Federal Advisory Committee Act (FACA). The OCC, FDIC, and OTS, however, also supervise insured depository institutions and these institutions and their regulators have the same need to share information and to be able to conduct open and frank discussions about important supervisory and policy issues without fear of information being withheld because it must be publicly disclosed. Because of the potentially sensitive nature of this type of information, the public meeting and disclosure requirements under FACA could inhibit the supervised institutions from providing the OCC, FDIC, or OTS with their candid views. Our amendment would enhance the free exchange of information between all depository institutions and their Federal bank regulators with resulting safety and soundness benefits.

SAFETY AND SOUNDNESS

The OCC also supports a number of amendments that would promote and maintain the safety and soundness and facilitate the ability of regulators to address and resolve problem situations.

<u>Enforcing Written Agreements and Commitments</u>. The OCC supports an amendment that would expressly authorize the Federal banking agencies to enforce written agreements and conditions imposed in writing in connection with an application or when the agency imposes conditions as part of its decision not to disapprove a notice, *e.g.,* a Change in Bank Control Act (CBCA) notice.

Such a provision would overturn recent Federal court decisions that conditioned the agencies' authority to enforce such conditions or agreements with respect to a non-bank party to the agreement on a showing that the non-bank party was "unjustly enriched." This change will enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses.

<u>Barring Convicted Felons From Participating in the Affairs of Depository Institutions</u>. The OCC also supports an amendment to the banking laws that would give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an *<u>un</u>*insured national or state bank or *<u>un</u>*insured branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these "bad actors" out of depository institutions applies only to *insured* depository institutions.

<u>Ensuring That Accountants of Insured Depository Institutions Are Held to the Same Standard as Any Other IAP</u>. Under current law, independent contractors for insured depository institutions are treated more leniently under the enforcement provisions in the banking laws than are directors, officers, employees, controlling shareholders, or even agents for the institution or shareholders, consultants, and joint venture partners who participate in the affairs of the institution (institution-affiliated parties (IAP)). To establish that an independent contractor, such as an accountant, has the type of relationship with the insured depository institution that would allow a Federal banking agency to take action against the accountant for a violation of law, breach of fiduciary duty, or an unsafe or unsound banking practice, the banking agency must show that the accountant "knowingly and recklessly" participated in such a violation. This standard is so high that it is extremely difficult for the banking agencies to take enforcement actions against accountants and other contractors who engage in wrongful conduct. The OCC supports removing the "knowing and reckless" requirement to hold independent contractors to a standard that is more like the standard that applies to other IAPs.

Strengthening the Supervision of Stripped-Charter Institutions. The OCC supports an amendment to the CBCA to address issues that have arisen for the banking regulators when a stripped-charter institution (*i.e.,* an insured bank that has no ongoing business operations because, for example, all of the business operations have been transferred to another institution) is the subject of a change-in-control notice. The agencies' primary concern with such CBCA notices is that the CBCA is sometimes used as a way to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance even though the risks presented by the two transactions may be substantively identical. In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the statutory grounds for denial of a notice under the CBCA. There also are significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. To address these concerns, the OCC supports an amendment that (1) would expand the criteria in the CBCA that allow a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider business plan information, and (2) would allow the agency to use that information in determining whether to disapprove the notice.

CONCLUSION

Mr. Chairman, on behalf of the OCC, I thank you for your leadership in holding these hearings. As I have indicated, the OCC supports initiatives that will reduce unnecessary burden on the industry in a responsible manner. We believe that the changes outlined in my testimony today will further these objectives. We would be pleased to work with you and your staff on these issues.

We thank you for this opportunity to provide our views on this important initiative, and I would be happy to answer any questions you may have.

APPENDIX

SUMMARY OF THE REGULATORY BURDEN RELIEF LEGISLATION SUPPORTED BY THE OFFICE OF THE COMPTROLLER OF THE CURRENCY

NATIONAL BANKS

Repealing State Opt-In Requirements for *De Novo* Branching. The OCC supports amending section 5155(g) of the Revised Statutes of the United States (12 U.S.C. § 36(g)), section 18(d)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. § 1828(d)(4)), section 9 of the Federal Reserve Act (FRA) (12 U.S.C. § 321), and section 3(d)(1) of the Bank Holding Company Act (BHCA) (12 U.S.C. § 1842(d)(1)) to ease certain restrictions on banks' interstate banking and branching. Under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act), an out-of-state national or state bank may establish a de novo branch in a state only if that state has adopted legislation affirmatively "opting in" to de novo branching. This amendment would repeal the requirement that a state expressly must adopt an "opt-in" statute to permit the de novo branching form of interstate expansion. The amendment also would repeal the state age requirement for interstate mergers. The Riegle-Neal Act permits a state to prohibit an out-of-state bank or bank holding company from acquiring an in-state bank unless the state bank has been in existence for a minimum period of time (which may be as long as five years).

Under the Riegle-Neal Act, interstate expansion through bank mergers generally is subject to a state "opt-out" that had to be in place by June 1, 1997. While two states "opted out" at the time, interstate bank mergers are now permissible in all 50 states. By contrast, de novo branching by banks requires states to pass legislation to affirmatively "opt-in" to permit out-of-state banks to establish new branches in the state. This requires banks in many cases to structure artificial and unnecessarily expensive transactions in order for a bank to simply establish a new branch across a state border. However, Federal thrifts are not similarly restricted and generally may branch interstate without the state law "opt-in" requirements that are imposed on banks. Also, repeal of the state age requirement would remove a limitation on bank acquisitions by out-of-state banking organizations that is no longer necessary if interstate de novo branching is permitted.

Enactment of this amendment should enhance competition in banking services with resulting benefits for bank customers. Moreover, it will ease burdens on banks that are planning interstate expansion through branches and would give banks greater flexibility in formulating their business plans and in making choices about the form of their interstate operations.

Providing Relief for Subchapter S National Banks. The OCC supports amending section 5146 of the Revised Statutes of the United States (12 U.S.C. § 72) to provide more flexible requirements regarding director qualifying shares for national banks operating, or seeking to operate, as Subchapter S corporations. The National Banking Act currently requires all directors of a national bank to own "shares of the capital stock" of the bank having an aggregate par value of at least $1,000, or an equivalent interest, as determined by the Comptroller, in a bank holding company that controls the bank. This amendment would permit the Comptroller to allow the use of a debt instrument that is subordinated to the interests of depositors, the Federal Deposit Insurance Corporation (FDIC), and other general creditors to satisfy the qualifying shares requirement for directors of national banks seeking to operate in Subchapter S status.

The requirement in current law creates difficulties for some national banks that operate in Subchapter S form. It effectively requires that all directors be shareholders, thus making it difficult or impossible for some banks to comply with the 75-shareholder limit that defines eligibility for the benefit of Subchapter S tax treatment, which avoids double tax on the bank's earnings. Such a subordinated debt instrument would have features resembling an equity interest, since the directors could only be repaid if all other claims of depositors and nondeposit creditors of the bank were first paid in full, including the FDIC's claims, if any. It would thus ensure that directors retain their personal stake in the financial soundness of the bank. However, the holding of such an instrument would not cause a director to be counted as a shareholder for purposes of Subchapter S.

Resolving Ambiguities in Federal Court Jurisdiction. The OCC supports amending chapter three of title LXII of the Revised Statutes of the United States (12 U.S.C. § 81, *et seq.*) to provide that, in determining whether a Federal court has diversity jurisdiction over a case in which a national bank is a party, a national bank is considered to be a citizen only of the state in which the bank has its main office. Other versions of this proposal have provided the single-state rule only for Federal savings associations. The OCC supports expanding these versions to include national banks, as well as Federal thrifts. National banks, like Federal thrifts, are chartered by the Federal Government and not by any state. As a result, national banks also have been subject to differing court rulings on their citizenship status for purposes of diversity jurisdiction. There is no reason to have this unique, special citizenship rule only for Federally chartered thrift institutions. It makes sense to treat all Federally chartered depository institutions the same and end the confusion.

National banks' diversity jurisdiction is governed by 28 U.S.C. § 1348. This statute provides that generally national banks are "citizens" of the states in which they are "located." The term "located" is not defined in § 1348 and the Federal courts have not defined the term consistently. For example, in 2001, a U.S. Circuit Court concluded that a national bank is "located" in and a citizen of the state of its principal place of business <u>and</u> the state listed in its organization certificate. *See Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7^{th} Cir. 2001) (*Firstar*). This circuit court opinion has created some confusing issues for national banks. The state listed in a national bank's organization certificate may not necessarily be the state in which the national bank currently has its main office. Under Federal law, a national bank can relocate its main office to a state other than that designated in its organization certificate.[4] However, no new organization certificate would need to be

[4] 12 U.S.C. § 30.

issued. After such a relocation, it is possible that the national bank may no longer have any offices in the state listed in its organization certificate. Under *Firstar*, however, the bank would continue to be deemed a citizen of that state for diversity purposes because it is the state listed in its organization certificate.

Courts generally have followed the *Firstar* decision since it was issued. However, more recently other courts have held that a national bank is "located" in the state where it has its principal place of business <u>and</u> in the state specified in its *articles of association*. *See RDC Funding Corp. v. Wachovia Bank, N.A.,* No. 3:03cv1360 (JBA), 2004 U.S. Dist. LEXIS 5524 (D.C. Conn. March 31, 2004); *Evergreen Forest Products of Georgia v. Bank of America,* 262 F. Supp. 2d 1297, 1306-07 (M.D. Ala. 2003). Under these cases, because a national bank's articles of association must be updated to reflect the bank's current main office, the articles of association and <u>not</u> the bank's organization certificate should be used to determine citizenship status in diversity cases. However, even under this interpretation, a national bank also could potentially be a citizen of two states but a different criterion is used to identify one of the two states.

The OCC's suggested amendment would resolve these ambiguities and provide relief to national banks, as well as Federal thrifts. It would provide a clear uniform rule for determining the citizenship of all Federally chartered depository institutions and put into place a simple, single-state rule.

The amendment recommended by the OCC is a new provision and was not included in the House-passed version of H.R. 1375, the Financial Services Regulatory Relief Act of 2004 (FSRRA).

<u>**Modernizing Corporate Governance**</u>. The OCC supports amending section 5144 of the Revised Statutes of the United States (12 U.S.C. § 61). Section 5144 imposes mandatory cumulative voting requirements on all national banks. This law currently requires that, in all elections of national bank directors, each shareholder has the right to (1) vote for as many candidates as there are directors to be elected and to cast the number of votes for each candidate that is equal to the number of shares owned, <u>or</u> (2) cumulate his or her votes by multiplying the number of shares owned by the number of directors to be elected and casting the total number of these votes for only one candidate or allocating them in any manner among a number of candidates. The OCC support an amendment that would permit a national bank to provide in its articles of association the method of electing its directors that best suits its business goals and needs and would provide the OCC with authority to issue regulations to carry out the purposes of this section.

The Model Business Corporation Act and most states' corporate codes provide that cumulative voting is optional. The amendment recommended by the OCC would conform this provision of the National Bank Act to modern corporate codes and would provide national banks with the same corporate flexibility available to most state corporations and state banks.

Modernizing Corporate Structure Options. The OCC supports amending the Revised Statutes of the United States (12 U.S.C. § 21 *et seq.*) to clarify the Comptroller's authority to adopt regulations allowing national banks to be organized in different business forms. Notwithstanding the form of organization, however, generally all national banks would continue to have the same rights and be subject to the same restrictions and requirements except to the extent that different treatment may be appropriate based on the different forms of organization. Many of the requirements in the National Bank Act are based on a national bank having stock and shareholders. It is expected that the Comptroller will apply these requirements in a comparable manner to other authorized organizational forms except as warranted by the differences in form.

The OCC's suggested amendment would reduce burden on national banks and allow them to choose among different business organizational forms, as permitted by the Comptroller, and to select the form that is most consistent with the their business plans and operations so that they may operate in the most efficient manner. Certain alternative business structures may be particularly attractive for community banks. For example, if the Comptroller should permit a national bank to be organized as a limited liability national association and establish the characteristics of such a national bank, the bank then may be able to take advantage of the pass-through tax treatment for comparable limited liability entities under certain tax laws and eliminate double taxation under which the same earnings are taxed both at the corporate level as corporate income and at the shareholder level as dividends.

Some states currently permit state banks to be organized as unincorporated limited liability companies (LLCs) and the FDIC recently adopted a rule that will result in certain state bank LLCs being eligible for Federal deposit insurance. Clarifying that national banks also may be organized in alternative business forms would provide a level playing field.

Paying Interest on Demand Deposits. The OCC supports repealing section 19(i) of the FRA (12 U.S.C. § 371a), section 5(b)(1)(B) of the Home Owners' Loan Act (HOLA) (12 U.S.C. § 1464(b)(1)(B)) and section 18 of the FDIA (12 U.S.C. § 1828) to permit member banks, thrifts, and nonmember banks, respectively, to pay interest on demand deposits. In a joint report submitted to Congress in September 1996, the OCC, along with the other Federal banking agencies, concluded that the statutory prohibition against the payment of interest on demand deposits no longer serves a useful public purpose. See Joint Report: Streamlining of Regulatory Requirements (September 23, 1996). Because banks can pay interest on NOW accounts held by individuals, it is primarily business checking accounts that are subject to prohibition on paying interest on demand deposits. Banks, however, find ways around this prohibition for their business customers through such financial products as sweep accounts that sweep excess demand deposits into money market investments. These programs are costly for the banks to maintain, an inefficient use of the banks' resources, and an unnecessary burden on business customers to establish such accounts.

Simplifying Dividend Calculations for National Banks. The OCC supports amending section 5199 of the Revised Statutes of the United States (12 U.S.C. § 60) to simplify the formula for calculating the amount that a national bank may pay in dividends. The current law requires banks to follow a complex formula that is unduly burdensome and unnecessary for safety and soundness. The proposed amendment would retain certain safeguards in the current law that provide that national banks (and state member banks)[5] need the approval of the Comptroller (or the FRB in the case of state member banks) to pay a dividend that exceeds the current year's net income combined with any retained net income for the preceding two years. For purposes of the approval requirement, these Federal regulators would retain the authority to reduce the amount of a bank's "net income" by any required transfers to funds, such as a sinking fund for retirement of preferred stock.

The amendment would reduce burden on banks in a manner that is consistent with safety and soundness. Among other things, the amendment would ensure that the OCC (and the FRB for state member banks) would continue to have the opportunity to deny any dividend request that may deplete the net income of a bank that may be moving towards troubled condition. Importantly, the amendment would not affect other safeguards in the National Bank Act (12 U.S.C. 56). These provisions generally prohibit national banks from withdrawing any part of their permanent capital or paying dividends in excess of undivided profits except in certain circumstances.

Moreover, other safeguards, such as Prompt Corrective Action, have been enacted in the last ten years that provide additional safety and soundness protections for all insured depository institutions. The proposed amendment would not affect the applicability of these safeguards. These additional safeguards prohibit any insured depository institution from paying any dividend if, after that payment, the institution would be undercapitalized (see 12 U.S.C. § 1831o(d)(1)).

Repealing Obsolete Limitations on the OCC's Removal Authority. The OCC supports amending section 8(e)(4) of the FDIA (12 U.S.C. § 1818(e)(4)) relating to the procedures for the removal of an institution-affiliated party (IAP) from office or participation in the affairs of an insured depository institution. With respect to national banks, current law requires the OCC to certify the findings and conclusions of an Administrative Law Judge to the FRB for the FRB's determination as to whether any removal order will be issued. This amendment would repeal this certification and FRB approval process and allow the OCC directly to issue the removal order with respect to national banks.

The present system stems from historical decisions made by Congress on circumstances that are no longer applicable. Originally, the role of the OCC in removal cases was to certify the facts of the case to the FRB. The FRB then made the decision to pursue the case and made the final agency decision. At that time, the Comptroller was a member of the FRB and, therefore, participated in the FRB's final removal decision. However, Congress later removed the Comptroller from the FRB and gave the OCC the authority directly to issue suspensions and notices of intention to remove.

All of the Federal banking agencies, except the OCC, may remove a person who engages in certain improper conduct from the banking business. This amendment would give the

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[5] See 12 U.S.C. 324 and 12 C.F.R. 208.5 generally applying the national bank dividend approval requirements to state member banks.

Comptroller the same removal authority as the other banking agencies to issue orders to remove persons who have been determined under the statute to have, for example, violated the law or engaged in unsafe or unsound practices in connection with an insured depository institution. Like the other banking agencies, the Comptroller should make these decisions about persons who engage in improper conduct in connection with the institutions for which the Comptroller is the primary supervisor. This is a technical change to streamline and expedite these actions and has no effect on a person's right to seek judicial review of any removal order. The FRB also supports this amendment.

Repealing Obsolete Intrastate Branch Capital Requirements. The OCC supports amending section 5155(c) of the Revised Statutes of the United States (12 U.S.C. § 36(c)) to repeal the requirement that a national bank, in order to establish an intrastate branch office in a state, must meet the capital requirements imposed by the state on state banks seeking to establish intrastate branches.

This technical amendment would repeal the obsolete capital requirement for the establishment of intrastate branches by national banks. This requirement is not necessary for safety and soundness. Branching restrictions are already imposed under other provisions of law to limit the operations of a bank if it is in troubled condition. See 12 U.S.C. § 1831o(e) (prompt corrective action).

Clarifying the Waiver of Publication Requirements for Bank Merger Notices. The OCC supports amending sections 2(a) and 3(a)(2) of the National Bank Consolidation and Merger Act (12 U.S.C. § 215(a) and 215a(a)(2), respectively) concerning the newspaper publication requirement of a shareholder meeting to vote on a consolidation or merger of a national bank with another bank located within the same state. This change would clarify that the publication requirement may be waived by the Comptroller in the case of an emergency situation or by unanimous vote of the shareholders of the national or state banks involved in the transaction.

This amendment does not affect other requirements in the law. The current law also requires that the consolidation or merger must be approved by at least a 2/3 vote of the shareholders of each bank involved in the transaction. In addition, the shareholders of the banks generally must receive notice of the meeting by certified or registered mail at least ten days prior to the meeting. These provisions are not changed.

Repealing Obsolete References to the Main Place of Business of a National Bank. The OCC supports amending two sections of the Revised Statutes of the United States (12 U.S.C. §§ 22 and 81) to replace obsolete language that is used in these two sections with the modern term "main office."

The change to 12 U.S.C. § 22 would clarify that the information required to be included in a national bank's organization certificate is the location of its *main office*. The change of 12 U.S.C. § 81 would clarify that the general business of a national bank shall be transacted in its *main office* and in its branch or branches. Both statutes currently use obsolete terms to describe a main office of a national bank.

Deleting Obsolete Language in the National Bank Act. The OCC supports amending section 5143 of the Revised Statues of the United States (12 U.S.C. § 59) to delete obsolete language. Generally, 12 U.S.C. § 59 permits a national bank to reduce its capital and distribute cash or other assets to its shareholders that become available as a result of the reduction if approved by a vote of two-thirds of its shareholders and by the OCC. The current statute, however, also references two obsolete provisions. The first provision limits the amount of the capital reduction to a "sum not below the amount required by this chapter to authorize the formation of associations." This limitation refers to the obsolete minimum capital requirement for a de novo institution that was provided under 12 U.S.C. § 51; however, 12 U.S.C. § 51 was repealed in 2000 by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. No. 106-569, Title XII, § 1233(c). The second obsolete provision limits the amount of a bank's capital that can be reduced to the "amount required for its outstanding circulation." The reference to "outstanding circulation" relates to the obsolete practice by national banks of issuing circulating notes to serve as currency.

This amendment would delete the obsolete language in the statute but would maintain the current relevant requirement that a national bank cannot reduce its capital and distribute assets to its shareholders unless approved by two-thirds of its shareholders and by the OCC.

This amendment is a new provision and was not included in the House-passed version of the FSSRA.

SAFETY AND SOUNDNESS

Enforcing Written Agreements and Commitments. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq*.) to add a new section that provides that the Federal banking agencies may enforce the terms of (1) conditions imposed in writing in connection with an application, notice, or other request, and (2) written agreements.

This amendment would enhance the safety and soundness of depository institutions and protect the deposit insurance funds from unnecessary losses. This amendment is intended to reverse some court decisions that question the authority of the agencies to enforce such conditions or agreements against institution-affiliated parties (IAP) without first establishing that the IAP was unjustly enriched. In addition, the amendment would clarify that a condition imposed by a banking agency in connection with the nondisapproval of a notice, *e.g.,* a notice under the Change in Bank Act (CBCA), can be enforced under the FDIA.

Barring Convicted Felons From Participating in the Affairs of Depository Institutions. The OCC supports amending section 19 of the FDIA (12 U.S.C. § 1829) to give the Federal banking agencies the authority to prohibit a person convicted of a crime involving dishonesty, breach of trust, or money laundering from participating in the affairs of an *un*insured national or state bank or *un*insured branch or agency of a foreign bank without the consent of the agency. Under current law, the ability to keep these bad actors out of depository institutions applies only to *insured* depository institutions. The OCC believes that this amendment would help to enhance the safe and sound operations of uninsured, as well as insured, institutions.

Ensuring That Accountants of Insured Depository Institutions Are Held to the Same Standard as Other IAPs. The OCC supports amending section 3(u)(4) of the FDIA (12 U.S.C. § 1813(u)(4)) to remove the "knowing and reckless" requirement. This change would hold independent contractors to a standard that is more like the standard that applies to other IAPs. Under current law, independent contractor IAPs are treated more leniently under the enforcement provisions in the banking laws than are directors, officers, employees, controlling shareholders, or even agents for the institution or shareholders, consultants, and joint venture partners who participate in the affairs of the institution. To establish that an independent contractor, such as an accountant, has the type of relationship with the insured depository institution that would allow a Federal banking agency to take action against the accountant as an IAP for a violation of law, breach of fiduciary duty, or an unsafe or unsound banking practice, the banking agency must show that the accountant "knowingly and recklessly" participated in such a violation. This amendment would strike the "knowing and reckless" requirement.

The knowing and reckless standard in the current law is so high that it is extremely difficult for the banking agencies to take enforcement actions against accountants and other contractors who engage in wrongful conduct. The amendment will strengthen the agencies' enforcement tools with respect to accountants and other independent contractors.

This amendment is a new provision and is not included in the House-passed version of the FSSRA.

Strengthening the Supervision of Stripped-Charter Institutions. The OCC supports amending the CBCA in section 7(j) of the FDIA (12 U.S.C. § 1817(j)) to expand the criteria to allow a Federal banking agency to extend the time period to consider a CBCA notice. Under the CBCA, a Federal banking agency must disapprove a CBCA notice within certain time frames or the transaction may be consummated. Initially, the agency has up to 90 days to issue a notice of disapproval. The agency may extend that period for up to an additional 90 more days if certain criteria are satisfied and this amendment provides for new criteria that would allow an agency to extend the time period under this additional up to 90-day period. The new criteria that an agency could use to extend the time period can provide the agency more time to analyze the future prospects of the institution or the safety and soundness of the acquiring party's plans to sell the institution or make changes in its business operations, corporate structure, or management. Moreover, the amendment would permit the agencies to use that information as a basis to issue a notice of disapproval.

The OCC believes that this amendment will address issues that have arisen for the banking regulators when a stripped-charter institution (*i.e.,* an insured bank that has no ongoing business operations because, for example, all of the business operations have been merged into another institution) is the subject of a CBCA notice. The agencies' primary concern with such CBCA notices is that the CBCA is sometimes used as a way to acquire a bank with deposit insurance without submitting an application for a *de novo* charter and an application for deposit insurance.

In general, the scope of review of a *de novo* charter application or deposit insurance application is more comprehensive than the statutory grounds for the denial of a notice under the CBCA. There are also significant differences between the application and notice procedures. In the case of an application, the banking agency must affirmatively approve the request before a transaction can be consummated. Under the CBCA, if the Federal banking agency does not act to disapprove a notice within certain time frames, the acquiring person may consummate the transaction. In the case of a CBCA notice to acquire a stripped-charter institution, acquirers are effectively buying a bank charter without the requirement for prior approval and without the scope of review that the law imposes when applicants seek a new charter, even though the risks presented by the two sets of circumstances may be substantively identical. The recommended amendment would expand the criteria in the CBCA that allows a Federal banking agency to extend the time period to consider a CBCA notice so that the agency may consider the acquiring party's business plans and the future prospects of the institution and use that information in determining whether to disapprove the notice.

Providing a Statute of Limitations for Judicial Review of Appointment of a Receiver for a National Bank. The OCC supports amending section 2 of the National Bank Receivership Act (12 U.S.C. § 191) to provide for a 30-day period to judicially challenge a determination by the OCC to appoint a receiver for a national bank. Current law generally provides that challenges to a decision by the OTS to appoint a receiver or conservator for an insured savings association or the FDIC to appoint itself as receiver or conservator for an insured state depository institution must be raised within 30 days of the appointment. 12 U.S.C. §§ 1464(d)(2)(B), 1821(c)(7). There is, however, no statutory limit on a national bank's ability to challenge a decision by the OCC to appoint a receiver of an insured or uninsured national bank.[6] As a result, the general six-year statute of limitations for actions against the U.S. applies to the OCC's receiver appointments. See James Madison, Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996).

The six-year protracted time period under current law severely limits the OCC's authority to manage insolvent national banks that are placed in receivership by the agency and the ability of the FDIC to wind up the affairs of an insured national bank in a timely manner with legal certainty. (In the case of an insured national bank that is placed in receivership by the OCC, the FDIC must be appointed the receiver.) The recommended amendment would make the statute of limitations governing the appointment of receivers of national banks consistent with the time period that generally applies to other depository institutions. The amendment would not affect a national bank's ability to challenge a decision by the OCC to appoint a receiver, but simply require that these challenges must be brought in a

[6] Under current law, there is a 20-day statute of limitations for challenges to the OCC's decision to appoint a conservator of a national bank. 12 U.S.C. § 203(b)(1).

timely manner and during the same time frame that generally applies to other depository institutions.

<u>Allocating Examiner Resources More Efficiently</u>. The OCC supports amending section 10(d) of the FDIA (12 U.S.C. § 1820(d)) to provide that an appropriate Federal banking agency may make adjustments in the examination cycle for an insured depository institution if necessary for safety and soundness and the effective examination and supervision of insured depository institutions. Under current law, insured depository institutions must be examined by their appropriate Federal banking agencies at least once during a 12-month period in a full-scope, on-site examination unless an institution qualifies for the 18-month rule. Small insured depository institutions with total assets of less than $250 million and that satisfy certain other requirements may be examined on an 18-month basis rather than a 12-month cycle. The amendment would permit the banking agencies to make adjustments in the scheduled examination cycle as necessary for safety and soundness.

Such an amendment would give the appropriate Federal banking agencies the discretion to adjust the examination cycle of insured depository institutions to ensure that examiner resources are allocated in a manner that provides for the safety and soundness of insured depository institutions. For example, as deemed appropriate by a Federal banking agency, a well-capitalized and well-managed bank's examination requirement for an annual or 18-month examination could be extended if the agency's examiners were needed to immediately examine troubled or higher risk institutions. This amendment would permit the agencies to use their resources in the more efficient manner.

<u>Enhancing the Ability of Banking Agencies to Suspend or Remove Bad Actors From Depository Institutions</u>. The OCC supports amending section 8(g) of the FDIA (12 U.S.C. § 1818(g)) to clarify that the appropriate Federal banking agency may suspend or prohibit IAPs charged or convicted with certain crimes (including those involving dishonesty, breach of trust, or money laundering) from participating in the affairs of <u>any</u> depository institution and not only the institution with which the party is or was last affiliated. The amendment also would clarify that the section 8(g) authority applies even if the IAP is no longer associated with the depository institution at which the offense allegedly occurred or if the depository institution with which the IAP was associated is no longer is existence. Moreover, the amendment would allow the banking agency to suspend or remove an individual who attempts to become involved in the affairs of an insured depository institution <u>after</u> being charged with a covered crime. It makes little sense to allow the agencies to suspend or remove a person who is charged with such a crime while serving at an insured depository institution, but deny the agencies the ability to remove a person that becomes affiliated with an insured depository institution while under indictment for the same type of crime.

Under current law, if an IAP is charged with such a crime, the suspension or prohibition will remain in effect until the charge is finally disposed of or until terminated by the agency. If the individual is convicted of such a crime, the party may be served with a notice removing the party from office and prohibiting the party for further participating in the affairs of a depository institution without the consent of the appropriate Federal banking agency.[7] Before an appropriate Federal banking agency may take any of these actions under section 8(g), the agency must find that service by the party may pose a threat to interests of depositors or impair public confidence in a depository institution. The statute further provides that an IAP that is suspended or removed under section 8(g) may request a hearing before the agency to rebut the agency's findings. Unless otherwise terminated by the agency, the suspension or order of removal remains in effect until the hearing or appeal is completed. Current law, however, applies only to the depository institution with which the IAP is then associated. This amendment will help to ensure that, if a Federal banking agency makes the required findings, the agency has adequate authority to suspend or prohibit an IAP charged with such crimes from participating in the affairs of any depository institution if any of the various circumstances described above should occur.

The amendment that the OCC supports is more comprehensive and covers more circumstances under which an IAP who is charged with such a crime may be suspended or removed than the amendment to section 8(g) that is included in the House-passed version of the FSSRA.

***FEDERAL BRANCHES AND AGENCIES OF FOREIGN BANKS*.**

Implementing Risk-Based Requirements for Federal Branches and Agencies. The OCC supports an amending section 4(g) of the International Banking Act of 1978 (IBA) (12 U.S.C. § 3102(g)) concerning the Comptroller's authority to set the amount of the capital equivalency deposit (CED) for a Federal branch or agency. The CED is intended to ensure that assets will be available in the U.S. for creditors in the event of liquidation of a U.S. branch or agency. The current CED statute that applies to foreign banks operating in the U.S. through a Federal license may impose undue regulatory burdens without commensurate safety and soundness benefits. These burdens include obsolete requirements about where the deposit must be held and the amount of assets that must be held on deposit. As a practical matter, the IBA sets the CED at 5% of total liabilities of the Federal branch or agency and provides that the CED must be maintained in such amount as determined by the Comptroller. As a result, Federal branches and agencies often must establish a CED that is larger than the capital that would be required for a bank of corresponding size or for a similar size State-chartered foreign branch or agency in major key States.

The OCC recommends that section 4(g) be amended to allow the OCC, after consultation with the Federal Financial Institutions Examination Council (FFIEC), to adopt regulations allowing the CED to be set on a risk-based institution-by-institution basis. Such an approach would more closely parallel the risk-based capital framework

[7] Under another provision of the FDIA, any person convicted of any crime involving dishonesty, breach of trust, or money laundering may not, among other things, become or continue as an IAP with respect to any insured depository institution without the prior consent of the FDIC. 12 U.S.C. § 1829. As discussed above, the OCC also supports amending § 1829 to apply to *un*insured, as well as insured, depository institutions and to give the OCC the authority to keep these convicted felons out of uninsured national banks or Federal branches or agencies.

that applies to national and state banks. The Federal Reserve Board has no objections to the OCC's amendment.

This amendment is a new provision and was not included in the House-passed version of the FSSRA.

Allowing the Option for a Federal Representative Office License. The OCC supports amending section 4 of the IBA (12 U.S.C. § 3102) to permit the OCC to license Federal representative offices. Representative offices of foreign banks generally engage in representational functions. They do not engage in core banking activities, such as accepting deposits or lending money. Although the IBA sought to provide foreign banks with a Federal option for their U.S. offices by giving the OCC the authority to license Federal branches and agencies, it did not provide the OCC with the authority to establish Federal representative offices. In this respect, the IBA does not fully implement the dual banking option, nor does it advance the goal of national treatment for foreign banks seeking to establish a representative office in the United States.

The absence of a Federal representative office option has in some cases resulted in additional regulatory burden for those foreign banks that would want to have their entire U.S. operations under a Federal license. If foreign banks with an existing Federal branch or agency want to have a representative office, they are required to establish them under state law provisions, and thus gain another U.S. regulator (the state).

The amendment supported by the OCC would provide foreign banks with the option of establishing Federal representative offices with OCC approval and under the OCC's supervision. Specifically, it would authorize the OCC to approve the establishment of a representative office, provided that state law does not prohibit this establishment. In acting on an application to establish a Federal representative office, the OCC generally would apply the same criteria that it applies when it acts on Federal branch or agency applications.

The amendment also would provide that the OCC would have the authority to regulate, supervise, and examine representative offices that it licenses. Finally, to ensure that the OCC has adequate authority to enforce this provision, the proposal would amend section 3(q) of the FDI Act to include a Federal representative office as an entity for which the Comptroller serves as the appropriate Federal banking agency and, would further amend the FDI Act to clarify that representative offices are subject to the enforcement authority of the Federal Reserve and OCC under 12 U.S.C. § 1818.

This amendment would not affect or in any way diminish the Federal Reserve's authority under current law to approve (in addition to the primary, or licensing, authority) the establishment of foreign banks' U.S. offices (Federal- or state-licensed branches, agencies, or representative offices) and to examine any of these entities under the IBA. Moreover, the Federal Reserve would have the same ability to recommend to the OCC that the license of a Federal representative office be terminated that it has under current law to recommend that the license of a Federal branch or agency be terminated.

This amendment is a new provision and was not included in the House-passed version of the FSSRA.

Providing Equal Treatment for Federal Agencies of Foreign Banks. The OCC supports amending section 4(d) of the IBA (12 U.S.C. § 3102(d)) to provide that the prohibition on uninsured deposit-taking by Federal agencies of foreign banks applies only to deposits from U.S. citizens or residents. As a result, a Federal agency would be able to accept uninsured foreign source deposits from non-U.S. citizens. State agencies of foreign banks may accept uninsured deposits from parties who are neither residents nor citizens of the United States, if so authorized under state law. However, due to slight language differences in the IBA, the D.C. Circuit Court of Appeals has held that Federal agencies cannot accept any deposits, including those from noncitizens who reside outside of the United States. Conference of State Bank Supervisors v. Conover, 715 F.2d 604, 623 (D.C. Cir. 1983).

The amendment supported by the OCC would allow Federal agencies to accept the limited *uninsured* foreign source deposits that state agencies may accept under the IBA. As a result, the amendment would repeal an unnecessary regulatory burden that has competitively disadvantaged Federal agencies and prevented them from offering the same services to foreign customers that may be offered by state agencies. Because these deposits are not insured, this amendment does not pose any risks to the deposit insurance fund.

Maintaining a Federal Branch and a Federal Agency in the Same State. The OCC supports an amendment to section 4(e) of the IBA (12 U.S.C. § 3102(e)) to provide that a foreign bank is prohibited from maintaining both a Federal agency and a Federal branch in the same state only *if* state law prohibits maintaining both an agency and a branch in the state. Current law prohibits a foreign bank from operating both a Federal branch and a Federal agency in the same state notwithstanding that state law may allow a foreign bank to operate both types of offices.

According to the legislative history of the current provision, this prohibition was included in the IBA to maintain parity with state operations. However, today some states permit foreign banks to maintain both a branch and agency in the same state. Florida law permits a foreign bank to operate more than one agency, branch, or representative office in Florida (*see* Fla. Stat. Ann. § 663.06). Other states, such as Connecticut, also may permit a foreign bank to have both a state branch and a state agency (*see* Conn. Gen. Stat. Ann. § 36a-428). This amendment would repeal an outdated regulatory burden in current law and permit a foreign bank to maintain both a Federal branch and a Federal agency in those states that do not prohibit a foreign bank from maintaining both of these offices. This change would enhance national treatment and give foreign banks more flexibility in structuring their U.S. operations.

INFORMATION SHARING

Improving Information Sharing With Foreign Supervisors. The OCC supports amending section 15 of the IBA (12 U.S.C. § 3109) to add a provision that ensures that the FRB, OCC, and FDIC cannot be compelled to disclose information obtained from a foreign supervisor if public disclosure of this information would be a violation of foreign law and the U.S. banking agency obtained the information pursuant to an information sharing arrangement with the foreign supervisor or other procedure established to administer and enforce the banking laws. The banking agency, however, cannot use this provision as a basis to withhold information from Congress or to refuse to comply with a valid court order in an action brought by the U.S. or the agency.

This amendment would provide assurances to foreign supervisors that the banking agencies cannot be compelled to disclose publicly confidential supervisory information that the agency has committed to keep confidential, except under the limited circumstances described in the amendment. This authority is similar to the authority provided to the Securities and Exchange Commission under the securities laws (15 U.S.C. § 78q(h)(5)). Some foreign supervisors have been reluctant to enter into information sharing agreements with U.S. banking agencies because of concerns that the U.S. agency may not be able to keep the information confidential and public disclosure of the confidential information provided could subject the supervisor to a violation of its home country law. This amendment will be helpful to ease those concerns and will facilitate information sharing agreements that enable U.S. and foreign supervisors to obtain necessary information to supervise institutions operating internationally.

Improving Ability to Obtain Information from Regulated Entities. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq.*) to permit the OCC, FDIC, Fed, and OTS to establish and use advisory committees in the same manner. All of these agencies have the same need to be able to conduct open and frank discussions with the banking industry and other members of the public about a variety of supervisory, policy, and consumer issues. Moreover, frequently, the banking agencies are discussing the same issues with industry and public officials.

In particular, given the significant changes occurring in the structure of the banking system and the way banks deliver products and services, the agencies need the ability to efficiently -- and quickly -- keep abreast of these changes and how they will impact the continuing ability of banks to be responsive to customer and community needs. Because of the potentially sensitive nature of information about these issues, any public meeting requirements could inhibit the banking agencies from obtaining frank, open, and candid advice from industry and community representatives and the customers the banks serve.

The Federal Advisory Committee Act (5 U.S.C. App.) (FACA) generally requires that the meetings of advisory committees must be open to the public, and that advance notice of a committee meeting must be published in the Federal Register. The minutes of the meeting and all working papers and other documents prepared for or by the advisory committee also must be publicly available. Under current law, the Federal Reserve System is exempt from

FACA. However, all of the other Federal banking agencies must follow FACA's procedures and requirements when establishing or using committees to provide advice or recommendations to the agency relating to their supervisory responsibilities.

This amendment, which is recommended by the OCC and FDIC, would ensure that all of the other Federal banking agencies can benefit from the same free exchange of information with the banks and others that currently only is available to the Federal Reserve System. The amendment would permit the OCC, FDIC, and OTS also to establish and use committees to provide advice and recommendations with respect to safety and soundness, product and service developments and delivery, and consumer issues affecting supervised institutions without concerns that confidential information will be publicly disclosed. Moreover, by enhancing the free exchange of information between banks and all Federal bank regulators, the amendment further strengthens the safety and soundness of insured depository institutions.

This amendment is a new provision and was not included in the House-passed version of the FSSRA.

Improving Information Sharing. The OCC supports amending the FDIA (12 U.S.C. § 1811, *et seq.*) to provide that a Federal banking agency has the discretion to furnish any confidential supervisory information, including a report of examination, about a depository institution or other entity examined by the agency to another Federal or state supervisory agency and to any other person deemed appropriate.

Such an amendment would give the other Federal banking agencies parallel authority to share confidential information that was given to the FRB in Sec. 727 of the Gramm-Leach-Bliley Act (GLBA). This provision is discretionary and nothing in this provision would compel a banking agency to disclose confidential supervisory information that it has agreed to keep confidential pursuant to an information sharing or other agreement with another supervisor.

OTHER RECOMMENDATIONS

Reducing Reporting Burdens Relating to Insider Lending Reporting. The OCC supports amending section 22(g) of the Federal Reserve Act (12 U.S.C. § 375a) and section 106(b)(2) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972(2)) to eliminate certain reporting requirements concerning loans made to insiders. Specifically, the reports that would be eliminated are (1) the report that must be filed with a bank's board of directors when an executive officer of the bank obtains certain types of loans from another bank that exceeds the amount the officer could have obtained from his or her own bank, (2) the supplemental report a bank must file with its quarterly call report identifying any loans made to executive officers during the previous quarter, and (3) an annual report filed with a bank's board of directors by its executive officers and principal shareholders regarding outstanding loans from correspondent banks.

Nothing in these amendments affects the insider lending restrictions that apply to national banks or the OCC's enforcement of those restrictions. Moreover, the OCC believes that it will continue to have access to sufficient information during the examination process to review a national bank's compliance with the insider lending laws. Under the OCC's regulations, national banks are required to follow the FRB's regulations regarding insider lending restrictions and reporting requirements (see 12 C.F.R. § 31.2). The FRB's regulations require member banks to maintain detailed records of all insider lending. In addition, the OCC has the authority under 12 U.S.C. § 1817(k) to require any reports that it deems necessary regarding extensions of credit by a national bank to any of its executive officers or principal shareholders, or the related interests of such persons.

Providing an Inflation Adjustment for the Small Depository Institution Exception under the Depository Institution Management Interlocks Act (DIMIA). The OCC supports amending section 203(1) of DIMIA (12 U.S.C. § 3202(1)). Under current law, generally a management official may not serve as a management official of any other nonaffiliated depository institution or depository institution holding company if (1) their offices are located or they have an affiliate located in the same MSA, or (2) the institutions are located in the same city, town, or village, or a city, town, or village that is contiguous or adjacent thereto. For institutions of less than $20 million in assets, the SMSA restriction does not apply. The amendment would increase the current $20 million exemption to $100 million. The OCC supports this amendment. This $20 million cap has not been amended since the current law was originally enacted in 1978. However, the asset size of FDIC-insured commercial banks between 1976 and 2000 has increased over five fold. Depository institutions of all sizes will continue to be subject to the city, town, or village test.

Streamlining Depository Institution Merger Application Requirements. The OCC supports amending the Bank Merger Act (BMA) (12 U.S.C. § 1828(c)) to provide that the responsible agency in a merger transaction, which is generally the Federal banking agency that has the primary regulatory responsibility for the resulting bank, must request a competitive factors report only from the Attorney General, with a copy to the FDIC. Under current law, this report must be requested from all of the other Federal banking agencies but the other agencies are not required to file a report. This amendment would appropriately streamline the agencies' procedures in processing BMA transactions.

Shortening of the Post-Approval Antitrust Review Period. The OCC supports amending section 11(b)(1) of the BHCA (12 U.S.C. § 1849(b)(1)) and section 18(c)(6) of the BMA (12 U.S.C. § 1828(c)(6)) to permit the shortening of the post-approval waiting period for certain bank acquisitions and mergers. Under current law, the post-approval waiting period generally is 30 days from the date of approval by the appropriate Federal banking agency. The waiting period gives the Attorney General time to take action if the Attorney General determines that the transaction will have a significant adverse effect on competition. The waiting period under both the BHCA and BMA, however, may be shortened to 15 days if the appropriate banking agency and the Attorney General agree that no such effect on competition will occur. The proposed amendment would shorten the mandatory 15-day waiting period to 5 days.

The amendment would give the banking agency and the Attorney General more flexibility to shorten the post-approval waiting period as appropriate for those transactions that do not raise competitive concerns. If such concerns exist, the 30-day waiting period will continue to apply. This change will not affect the waiting periods for transactions that involve bank failures or emergencies. In those cases, the statute already provides for other time frames.

This amendment is a new provision and was not included in the House-passed version of the FSSRA.