

national bank into a subsidiary of a bank holding company or of a company that will become a bank holding company through the reorganization. In order to clarify the types of entities that would be covered under this section, we have added a sentence at the end of paragraph (b) that states that, for purposes of § 5.32, “bank holding company” means *any* company that owns or controls a national bank, or will own or control one as a result of the reorganization. Thus, the term “bank holding company” is not limited to companies that would be bank holding companies under the definition of the term in the Bank Holding Company Act of 1956 (BHCA).

Pursuant to proposed § 5.32(c), a national bank must submit an application to, and obtain approval from, the OCC prior to participating in a section 1204 reorganization. Paragraph (d) described the procedural requirements for this type of transaction. In accordance with proposed § 5.32(d)(1), the application is deemed approved by the OCC as of the 30th day after the OCC receives it, unless the OCC otherwise notifies the applicant national bank. Approval of applications under § 5.32 is subject to the condition that the bank give the OCC 60 days’ prior notice of any material change in its business plan or any material change from the proposed changes described in the bank’s plan of reorganization. A few commenters recommended that the OCC give national banks notice that an application has been received and is complete to verify that the application is in process and to ensure that all parties know when the 30-day time period starts to run. We have not revised the proposal in response to this suggestion, however, because our standard application procedure includes sending out an acknowledgment letter that will provide the information the commenters requested.

These same commenters also suggested that the OCC provide banks with guidance regarding the type of changes to the business plan that would be material. The OCC has developed a policy addressing the circumstances that constitute a “significant deviation” from a national bank’s existing business plan or operations and circumstances under which we will impose a written condition requiring a bank to provide notice of any significant deviation. This “OCC Significant Deviation Policy” is posted on our website as a sample to the Charters Booklet of the Comptroller’s

Licensing Manual.<sup>6</sup> We expect that this policy will provide the guidance commenters are seeking with respect to the changes we think should prompt the notice required by § 5.32. In order to make the final rule consistent with this Policy, we have changed the references to “material change” in the proposal to “significant deviation.”

Paragraph (d)(2) of proposed § 5.32 implemented the statutory requirements that apply to the content of the reorganization plan. The plan must: (1) Specify how the reorganization is to be carried out; (2) be approved by a majority of the national bank’s board of directors; (3) specify the amount and type of consideration that the bank holding company will provide for the stock of the bank, the date on which the shareholders’ rights to participate in the exchange are to be determined, and the procedure for carrying out the exchange; (4) be submitted to the shareholders of the reorganizing bank at a meeting called in accordance with the procedures outlined in section 3 of the Merger Act;<sup>7</sup> and (5) where applicable, describe any changes to the bank’s business plan resulting from the reorganization. Consistent with section 3 of the Merger Act, the proposal also required that at least two-thirds of the bank’s shareholders approve a reorganization.

Paragraph (d)(3) of proposed § 5.32 provided that the OCC will review the financial and managerial resources and future prospects of the national bank when considering a section 1204 reorganization.

<sup>6</sup> This policy can be found on the OCC’s Web site at <http://www.occ.treas.gov/corpbook/forms/SigDevPolicy8-03.pdf>. The policy defines a significant deviation from a bank’s business plan or operations to include, but not be limited to, a material deviation or material change in the bank’s: (1) Projected growth, such as planning significant growth in a product or service; (2) strategy or philosophy, such as significantly reducing the emphasis of its targeted niche (for example, small business lending) in favor of significant expansion of another area (for example, funding large commercial real estate projects); (3) lines of business, such as initiating a new program for sub-prime lending; (4) funding sources such as shifting from core deposits to brokered deposits; (5) scope of activities, such as establishing transactional Internet banking or entering new, untested markets; (6) stock benefit plans for de novo banks, including the introduction of plans that were not previously reviewed during the chartering process with no objection by the OCC; and (7) relationships with a parent company or affiliate, such as a shift to significant reliance on a parent or affiliate as a funding source or provider of back office support.

<sup>7</sup> Section 3 of the Merger Act, 12 U.S.C. 215a(a)(2), provides generally that a shareholders’ meeting will be called by the bank’s directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation where the bank is located and after sending notice to each shareholder of record by certified or registered mail at least 10 days prior to the meeting.

Proposed § 5.32(e) provided dissenters’ rights protections for section 1204 reorganizations. As provided in the Merger Act, this paragraph would permit any shareholder who has voted against the reorganization at a meeting or given notice in writing at or prior to the meeting to receive the value of his or her shares by providing a written request to the bank within 30 days after the consummation of the reorganization.

Section 5.32(f) of the proposal stated that § 5.32 does not affect the applicability of the BHCA to a transaction covered under § 5.32(b); applicants must indicate in their § 5.32 applications the status of any BHCA application they are required to file with the Board of Governors of the Federal Reserve System.

Proposed paragraph (g) of § 5.32 stated that the OCC’s approval of a § 5.32 application will expire if a national bank has not completed the reorganization within one year of the date of such approval. A commenter suggested that the OCC incorporate flexibility into this provision for complicated transactions that may take longer than one year to complete by permitting banks to apply for a waiver of this restriction. We do not think it is necessary to amend the regulation to establish a formal waiver process, but we will evaluate the need for an extension of the standard time frame on a case-by-case basis in accordance with 5.13(g).<sup>8</sup>

Finally, proposed paragraph (h)(1) stated that applicants shall inform shareholders of all material aspects of a reorganization and comply with applicable requirements in the Federal securities laws and the OCC’s securities regulations in 12 CFR part 11. Proposed paragraph (h)(2) stated that applicants that are not subject to registration requirements under the Securities Exchange Act of 1934 shall submit proxy materials or information statements used in connection with a reorganization to the appropriate OCC district office no later than when such materials are sent to shareholders.

We received no comments regarding proposed § 5.32 other than those we have discussed. Accordingly, we are adopting this provision as proposed with the changes just described.

## 2. Section 1206 Mergers—Revised § 5.33

Section 1206 of the AHEOA provided new authority for a national bank to merge with one or more of its nonbank affiliates, subject to the OCC’s approval.

<sup>8</sup> This section provides that the OCC generally does not grant extensions unless the delay is beyond the control of the applicant.