

suggestions made by the commenters and clarify points about which there may have been misunderstandings. The following discussion highlights those modifications.

## II. Discussion

### A. Changes to 12 CFR Part 5

#### 1. Definitions (Revised § 5.3)

The proposal revised § 5.3 to update references to the OCC units that should receive certain applications. The OCC received no comments on this technical amendment and adopts it as proposed.

#### 2. Permissible Non-Controlling Equity Investments (Revised § 5.36)

The proposal stated that a well-capitalized, well-managed Federal branch may make non-controlling investments and use the after-the-fact notice procedure set forth in 12 CFR 5.36 in the same manner as a national bank.

Three commenters addressed this amendment. One commenter supported the proposed change, stating that it is consistent with national treatment principles. The second was also supportive, indicating that it would have no objection to the proposed regulatory change as long as any investment made by the branch is a permissible investment under the Bank Holding Company Act and the foreign bank obtains any necessary authorizations from the Board of Governors of the Federal Reserve System (FRB). The commenter requested that OCC clarify that these conditions apply to these investments. As discussed below, to address this point, we are adding language to the final regulation in 12 CFR 28.10(c) clarifying that nothing in the OCC's rules relieves a foreign bank from complying with requirements imposed by the FRB in accordance with applicable law.

A third commenter opposed allowing Federal branches to make non-controlling equity investments, stating that there is "no statutory authorization [in the International Banking Act of 1978] for the investments referred to [in] the new proposed section, which relies solely on the principle of national treatment." This commenter disagreed with the OCC's interpretation of national treatment under the International Banking Act of 1978 (IBA), asserting that the IBA's national treatment scheme does not treat Federal branches as national banks but rather treats Federal branches as *branches* of national banks.

The OCC disagrees. The commenter's interpretation is not supported by the

plain language of the statute or its legislative history, court cases that have interpreted the statute, or the Congressional intent of the IBA.

The plain language of section 4(b) of the IBA<sup>1</sup> states:

Except as otherwise specifically provided in this Act or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a *national bank* at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a *national bank* doing business at the same location. \* \* \*

(emphasis added).

After carefully examining legislative history and Congressional intent, a U.S. Court of Appeals interpreted the national treatment language in the IBA and concluded that the IBA is intended to "treat federally-chartered foreign and *domestic banks* as similarly as possible under the [IBA] (emphasis added)." <sup>2</sup> The court expressly addressed the issue of whether establishing a Federally chartered office of a foreign bank parallels the opening of a national bank's principal office or the opening of a branch of a national bank. The court addressed this issue in the context of upholding the OCC's authority to license a foreign bank's Federal interstate branch or agency in a state that permits foreign banks to establish state-chartered interstate branches or agencies. The court concluded that, subject to the requirements of the IBA, Congress intended that the opening of a foreign bank's initial Federal home-state office is analogous to the opening of a domestic national bank's principal office, and the opening of additional intrastate and interstate Federal offices by the foreign bank under the IBA would be comparable to the opening of branches of a national bank.<sup>3</sup> Thus, the court found that a Federal branch can be treated as a national bank or branch thereof depending on the context. The OCC's regulations and this final rule are consistent with this interpretation.

The legislative history of the IBA indicates that the national treatment language in the IBA was not intended to be an inflexible standard for applying

national bank laws to Federal branches and agencies. Congress recognized that, because Federal branches and agencies are offices of foreign banks and not separately incorporated entities, certain adjustments in the strict application of the national bank laws may be necessary in order to observe this legal and operational reality. Congress charged the OCC with the primary responsibility to administer this comprehensive framework for Federal offices of foreign banks.<sup>4</sup>

The commenter further argues that the IBA does not give Federal branches and agencies the authority to engage in activities permitted for national banks under the National Bank Act (NBA) unless the authority is also found in the IBA. This interpretation also is not consistent with the plain language of the statute or its legislative history.

The legislative history of the IBA describes the language in section 4(b) quoted above to provide that, "[w]ith certain exceptions, statutory or regulatory, the *activities* of a Federal branch or agency shall be conducted in the same manner as a *national bank* (emphasis added)." <sup>5</sup> Moreover, a court found that, in light of the overriding national treatment objective of the IBA, the IBA should be construed in such a way as to minimize the extent to which a Federal branch or agency is treated differently from a national bank.<sup>6</sup> As a result, a Federal branch operating in a state has the same rights and privileges as, and is subject to the same restrictions, penalties, and conditions that apply to, a national bank operating in that same state unless the IBA or the Comptroller provides otherwise. While the IBA does not specifically mention the NBA as the source of authority for a Federal branch's "rights and privileges" to engage in activities, it incorporates all of the laws that provide authority to national banks, including the NBA, subject to any applicable statutory or regulatory exceptions.

For all of these reasons, the OCC adopts § 5.36 as proposed.

#### 3. Federal Branches and Agencies (Revised § 5.70)

The proposal amended § 5.70, which describes filing requirements for corporate activities and transactions involving Federal branches and agencies, to ensure consistency with proposed changes to 12 CFR part 28 described elsewhere in this proposal. The proposal deleted the definition of

<sup>1</sup> 12 U.S.C. 3102(b).

<sup>2</sup> *CSBS v. Conover*, 715 F.2d 604, 616 (D.C. Cir. 1983), cert denied, 466 U.S. 927 (1984).

<sup>3</sup> *Id.* at 616–617. See also 12 U.S.C. 3103(a) (providing that a foreign bank may establish an Federal branch or agency outside of its home state if such establishment would be permitted for a national bank establishing an interstate branch office and subject to certain other criteria (enacted in 1994 in the Riegle-Neal Interstate Banking and Branching Efficiency Act)).

<sup>4</sup> See S. Rep. No. 95–1073, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S.C.C.A.N. at 1427.

<sup>5</sup> *Id.* at 21, reprinted in 1978 U.S.C.C.A.N. at 1441.

<sup>6</sup> See *CSBS v. Conover*, 715 F.2d at 617.