

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 101**

**[Docket ID OCC-2018-0020]**

**RIN 1557-AE45**

**Covered Savings Associations**

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Final rule.

**SUMMARY:** The OCC is issuing a final rule to implement a new section of the Home Owners' Loan Act (HOLA). The Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) amended HOLA to add a new section that allows a Federal savings association with total consolidated assets equal to or less than \$20 billion, as reported by the association to the Comptroller as of December 31, 2017, to elect to operate as a covered savings association. A covered savings association has the same rights and privileges as a national bank and is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations as a national bank. A covered savings association retains its Federal savings association charter and existing governance framework. The new section of HOLA requires the OCC to issue rules that, among other things, establish streamlined standards and procedures for elections to operate as covered savings associations and clarify requirements for the treatment of covered savings associations.

**DATES:** The final rule takes effect on July 1, 2019.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Charlotte Bahin, Senior Advisor for Thrift Supervision, 202-649-6281, Lazaro Barreiro, Director for Governance and Operational Risk Policy, 202-649-6550, Alison MacDonald, Special Counsel,

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On September 18, 2018, the OCC published a proposed rule<sup>1</sup> to implement section 206 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), Public Law 115-174, 132 Stat. 1310. Section 206 of EGRRCPA amended the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 et seq.) to add a new section 5A (12 U.S.C. 1464a). Section 5A allows a Federal savings association with total consolidated assets equal to or less than \$20 billion, as reported by the association to the Comptroller as of December 31, 2017, to elect to operate as a covered savings association. A covered savings association has the same rights and privileges as a national bank that has its main office situated in the same location as the home office of the covered savings association. A covered savings association is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to such a national bank. However, a covered savings association retains its Federal savings association charter and continues to be treated as a Federal savings association for purposes of governance, including procedures and requirements for incorporation, charters and bylaws (e.g., form, amendments), boards of directors (e.g., elections, term of service), shareholders (e.g., meetings, voting requirements, requirements for stakeholders such as mutual members), and distribution of dividends (e.g., payment, prior approval, and other restrictions). A covered savings association

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<sup>1</sup> Covered Savings Associations, 83 FR 47101 (September 18, 2018) (Proposed Rule).

also is treated as a Federal savings association for purposes of consolidation, merger, dissolution, conversion (including conversion to a stock bank or another charter), conservatorship, and receivership, as well as for other purposes determined by OCC regulation. A covered savings association may continue to operate any branch or agency that the covered savings association operates on the date an election to operate as a covered savings association takes effect. A covered savings association will continue to be treated as a covered savings association even if its total consolidated assets exceed \$20 billion after it makes an election.

## **II. Summary of General Comments**

The OCC received 16 comments in response to the notice of proposed rulemaking. The commenters included Federal savings associations, industry trade associations, an unincorporated association, a U.S. Senator, a law firm (on behalf of a client), and a grandfathered unitary savings and loan holding company.

The comments generally supported the proposed rule implementing section 5A of HOLA. One commenter urged the OCC to focus on the underlying purpose of section 5A, which the commenter believes is to provide flexibility for Federal savings associations without imposing undue impediments. As explained in the preamble to the proposed rule, the OCC views section 5A of HOLA as a way to provide Federal savings associations with additional flexibility to adapt to new economic conditions and business environments without the cost and time involved in a change of charter.<sup>2</sup> The OCC has considered various factors in implementing section 5A, including the importance of providing an effective regulatory framework for Federal savings associations seeking to make an election and ensuring that the institutions that make an election

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<sup>2</sup> Proposed Rule at 47102.

can continue to operate safely and soundly. The final rule balances these considerations. To that end, consistent with section 5A, the final rule provides a regulatory framework that ensures that covered savings associations that make an election are treated in the same manner as similarly located national banks except where differences are necessary or appropriate to permit covered savings associations to retain their existing charter and governance framework.

Four commenters requested that the OCC work closely with other federal regulators to ensure consistency in the interpretation of section 5A. Several commenters specifically raised questions regarding the treatment of savings and loan holding companies, including grandfathered unitary savings and loan holding companies. In addition, a number of commenters recommended that the OCC clarify that covered savings associations would not be required to be members of the Federal Reserve System, with some adding that membership should be voluntary. The Board of Governors of the Federal Reserve System (FRB) has primary responsibility for supervising savings and loan holding companies and administering Federal Reserve membership. The OCC will continue to consult with the FRB on interpretive issues regarding the application of section 5A to savings and loan holding companies and regarding issues related to membership. The OCC recommends that individuals or institutions with specific questions about membership or the treatment of holding companies of Federal savings associations that elect to operate as covered savings associations contact the FRB.

Several other commenters were concerned about how covered savings associations would be treated within the Federal Home Loan Bank (FHLBank) system. Two commenters asserted that the FHLBanks rate institutions that meet the qualified thrift lender (QTL) test under HOLA higher than institutions that do not meet the QTL test. Another commenter requested that the OCC work with the FHLBanks to ensure that an election does not negatively impact membership

privileges. The OCC understands that the Gramm-Leach-Bliley Act amended the Federal Home Loan Bank Act to eliminate certain provisions applicable only to non-QTL compliant members.<sup>3</sup> The OCC recommends that individuals or institutions with specific questions about the activities and authorities of the FHLBanks contact either the Federal Housing Finance Agency, which has primary responsibility for supervising the FHLBank system, or the appropriate FHLBank.

As discussed more fully in subsequent sections of this preamble, the OCC has revised the final rule in response to issues raised by commenters. These revisions and explanations that address other comments received are described in the section-by-section description of the final rule.

### **III. Section-by-Section Description**

*101.1 Authority and purposes.* Section 101.1(a) of the proposed rule provided that the rule would be issued pursuant to sections 3, 4, 5, and 5A of HOLA (12 U.S.C. 1462a, 1463, 1464, and 1464a), section 5239A of the Revised Statutes (12 U.S.C. 93a), and section 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5412(b)(2)(B)).

Section 101.1(b) of the proposed rule described the purposes of the proposed rule. Those purposes were to establish standards and procedures for a Federal savings association's election to operate as a covered savings association, to clarify the requirements that apply to covered savings associations, and to establish standards and procedures for terminations of elections and for reelections.

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<sup>3</sup> Section 604 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338.

The OCC did not receive comment on this section of the proposed rule. The OCC adopts this section of the proposed rule without change.

*101.2 Definitions and computation of time.* Section 101.2(a) of the proposed rule set out definitions for the final rule. Section 101.2(b) of the proposed rule provided that, for purposes of the rule, the OCC would compute time in the same manner as set forth in 12 CFR 5.12. Section 5.12 provides that, in computing a period of days, the OCC does not include the day of the act (in this case, the date the OCC receives a Federal savings association's notice of election or termination) from which the period begins to run. If the last day of the time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. The OCC did not receive comment on the definitions included in this section or the manner of computation of time. The OCC adopts this section as proposed, with one change. As discussed in more detail later in this preamble, because the final rule refers consistently to "the OCC" throughout, the final rule does not include a definition of the term "appropriate OCC supervisory office."

*101.3 Procedures.* Section 101.3 of the proposed rule set out streamlined procedures and standards of review for a Federal savings association's election to operate as a covered savings association.

Section 101.3(a)(1) of the proposed rule would have allowed a Federal savings association that had total consolidated assets of \$20 billion or less as of December 31, 2017, to make an election to operate as a covered savings association by submitting a notice to the appropriate OCC supervisory office. The OCC proposed to use the Consolidated Reports of

Condition and Income (Call Reports) submitted for the quarter ending December 31, 2017, to determine if a Federal savings association met this threshold.

The proposal provided that institutions that were not Federal savings associations as of December 31, 2017, would not be eligible to make an election to operate as covered savings associations. Therefore, under the proposed approach, an institution that was a credit union, state savings association, or state bank on December 31, 2017, but that later converted to a Federal savings association charter, would not be eligible to make an election to operate as a covered savings association. Similarly, a de novo Federal savings association chartered after December 31, 2017, would not be eligible to make an election. The proposal noted that a Federal savings association in stock form could convert directly to a national bank charter, but for institutions in mutual form, a national bank charter is not available without first converting to stock form. The OCC invited comment on whether the option to elect to operate as a covered savings association should be limited to institutions that were Federal savings associations on December 31, 2017.

One commenter supported the proposed approach, but four commenters expressed concern. Three were concerned about limiting the ability of state-chartered institutions and credit unions to make elections following a conversion to a Federal savings association charter. Two urged the OCC to allow state savings associations, savings banks, or cooperative banks that were in existence prior to December 31, 2017, to make an election following a conversion, and the third urged the OCC to support legislative efforts to eliminate the eligibility date. Another commenter argued that Congress did not intend to exclude de novo savings associations from eligibility.

The OCC is adopting § 101.3(a)(1) as proposed, with one technical change to ensure that the final rule consistently refers to “the OCC” rather than to “the appropriate OCC supervisory

office.” Section 5A of HOLA provides that “a Federal savings association” with total consolidated assets of \$20 billion or less “as reported by the association to the Comptroller as of December 31, 2017,” may make an election to operate as a covered savings association. Based on this statutory language, the OCC believes that section 5A precludes institutions that were not Federal savings associations as of December 31, 2017, from making an election. Although commenters identified potentially undesirable policy implications of this approach, no commenter offered a legal argument that would allow the OCC to disregard the limits imposed by the statute.

The OCC notes that de novo institutions, state savings associations, and state savings banks that are not in mutual form may apply for a national bank charter if they are seeking a Federal charter and want to exercise the powers of a national bank. This option would not be available to state savings associations or state savings banks that are in mutual form unless they first convert to stock form.

The OCC also received comments on other aspects of § 101.3(a)(1). One commenter asked the OCC to clarify whether institutions that are not eligible to make an election can become eligible by merging into an eligible Federal savings association. Under section 5A of HOLA and the final rule, an institution that was a Federal savings association with total consolidated assets of \$20 billion or less as of December 31, 2017, is eligible to make an election, regardless of whether that institution later grows in asset size as a result of a merger with another institution or otherwise. If an institution that is not otherwise eligible to make an election merges into a Federal savings association that is eligible to make an election, and the eligible Federal savings association is the surviving charter, then that Federal savings association

would not lose its eligibility to operate as a covered savings association because of the acquisition.

Another commenter requested the OCC to clarify that a Federal savings association that meets the asset threshold as of December 31, 2017, remains eligible to make an election or reelection even if it subsequently grows beyond the threshold. Neither section 5A of HOLA nor the final rule imposes an expiration date on a Federal savings association's eligibility to make an election, nor do they require that a Federal savings association maintain assets equal to or less than \$20 billion to retain its eligibility. This means that a Federal savings association that was in existence and met the asset threshold as of December 31, 2017, may make an election at any time after implementation of the final rule. The Federal savings association does not lose its eligibility even if it has grown beyond the \$20 billion asset threshold at the time of its election. The OCC does not believe that it is necessary to include language to this effect in the rule. Instead, the OCC has added a paragraph (c) to § 101.4 of the final rule to highlight the express language of section 5A(g) of HOLA. Section 5A(g) provides that a covered savings association may continue to operate as a covered savings association if, after the date of the election, the covered savings association has total consolidated assets greater than \$20 billion.

Section 101.3(a)(2) of the proposed rule would have required that a Federal savings association's notice of an election: be signed by a duly authorized officer of the Federal savings association; identify each branch or agency that the Federal savings association will operate on the effective date of the election that has not been the subject of an application or notice under 12 CFR part 5; and identify and describe each nonconforming subsidiary, asset, or activity that the Federal savings association operates, holds, or conducts at the time it submits the notice, each of

which must be divested, conformed, or discontinued pursuant to § 101.5. The OCC received several comments regarding the contents of the notice.

Four commenters requested that the OCC make clear that no shareholder or member vote would be required to make an election, with several commenters noting that boards of directors are responsible for business plans. As explained in the preamble of the proposed rule, the statute does not require that a Federal savings association obtain shareholder or member approval to make an election to operate as a covered savings association. For this reason, the OCC did not include any requirements for a shareholder or member vote in the proposed rule and will not include any such requirement in the final rule. Nevertheless, the election to operate as a covered savings association could have implications not only for the electing association but also for its savings and loan holding company, shareholders, or members. Therefore, each Federal savings association that makes an election should review its respective charter and bylaws, as well as any other applicable law, to determine whether an election to operate as a covered savings association will require shareholder or member approval or additional changes to the association's charter and bylaws.

Two commenters asserted that the requirement to provide information relating to existing branches and agencies under § 101.3(a)(2)(ii) is unduly burdensome. One commenter argued that the proposed regulatory text could be read to require Federal savings associations to submit information on a significant number of branches and agencies, not just newly established ones. The commenter noted that many branch applications or notices were submitted prior to the integration of 12 CFR part 5. This commenter also noted that applications or notices are generally not required for a Federal savings association to establish an agency. The commenter believes such a requirement would be unnecessary, would require time and cost that do not serve

a compelling supervisory or regulatory purpose, and would require a covered savings association to disclose more information than a Federal savings association or national bank would be required to disclose. This commenter recommended that the OCC either eliminate this requirement or further clarify its scope. Another commenter stated that the requirement to provide information on existing branches and agencies is unnecessary and burdensome, noting that it may be difficult to provide information on branches that have been operational for a number of years. This commenter suggested that all branches that are open or operational or that have received regulatory approval or non-objection should be presumed to be compliant and documentation should not be required. Neither commenter believes that the OCC has clearly indicated why it needs this information.

The final rule does not require Federal savings associations to identify branches or agencies in a notice of an election. The OCC believes that it can obtain sufficient information about the branches and agencies of a prospective covered savings association by reviewing information the association submits on its nonconforming subsidiaries, assets, or activities.<sup>4</sup> This information will allow the OCC to monitor covered savings associations for compliance with the final rule without imposing any additional burden that could be associated with submitting information identifying branches and agencies. After an election, a covered savings association seeking to establish new branches will be subject to the terms and conditions for the establishment of branches applicable to a similarly located national bank.<sup>5</sup> A covered savings association seeking to establish new non-branch offices (e.g., loan or deposit production offices)

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<sup>4</sup> This would include information identifying activities conducted in an agency that would cause the agency to be defined as a branch under national bank law, as discussed later in this preamble.

<sup>5</sup> See, e.g., 12 U.S.C. 36 and 12 CFR 5.30.

will also be subject to any terms and conditions (including limitations) on the operation of non-branch offices applicable to a similarly located national bank.<sup>6</sup>

Section 101.3(a)(2)(iii) of the proposed rule would have required Federal savings associations to identify nonconforming subsidiaries, assets, and activities because these are the subsidiaries, assets, and activities the Federal savings association would need to divest, conform, or discontinue pursuant to section 5A(f)(3) of HOLA and § 101.5 of the rule after an election takes effect. The OCC solicited feedback on whether the final rule should specify metrics for determining the size or scope of a subsidiary, asset, or activity. The OCC did not receive any comments responding to this solicitation and is adopting this provision (which is designated as § 101.3(a)(2)(ii) in the final rule) as proposed. The OCC did receive comments on the proposed treatment of nonconforming subsidiaries, assets, and activities. These comments are addressed in the discussion of § 101.5 later in this preamble.

Section 101.3(b) of the proposed rule provided that a Federal savings association's election to operate as a covered savings association would automatically take effect 60 days after the OCC receives a notice from the Federal savings association, unless the OCC notifies the Federal savings association that it is not eligible in accordance with paragraph (c). The proposal also provided that the OCC could notify a Federal savings association that it is eligible to operate as a covered savings association before 60 days have elapsed. The OCC did not receive any comments on this provision of the proposal. The OCC is adopting § 101.3(b) with one conforming change to reflect the elimination of § 101.3(c) as discussed later in this preamble.

Section 101.3(c) of the proposed rule would have permitted the OCC to notify a Federal savings association in writing that it is not eligible to make an election to operate as a covered

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<sup>6</sup> See, e.g., 12 CFR 7.1003, 7.1004, 7.1005, 7.4004 and 7.4005.

savings association if the Federal savings association is not an “eligible savings association” as that term is defined in 12 CFR 5.3(g). Under the definition in 12 CFR 5.3(g), an eligible savings association is a Federal savings association that 1) is well capitalized as defined in 12 CFR 6.4; 2) has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMELS); 3) has a Community Reinvestment Act (CRA) rating of “outstanding” or “satisfactory,” if applicable; 4) has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System; and 5) is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the savings association may be treated as an “eligible savings association” for purposes of 12 CFR part 5. Because the purposes of 12 CFR part 5 and the purposes of the proposed rule were different, the proposed rule specified that a Federal savings association that is subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive would not be eligible to elect to operate as a covered savings association unless the OCC informed it in writing that it is eligible for purposes of part 101 (that is, for purposes of the proposed rule).

The preamble to the proposed rule noted that the concept of an “eligible savings association” as described in 12 CFR 5.3(g) is well understood and relatively straightforward to apply. In the licensing context, an “eligible savings association” may receive expedited review of filings because it is generally the type of savings association that can operate safely and soundly. The preamble to the proposed rule explained that a Federal savings association that meets the definition of “eligible savings association” typically would not raise the types of concerns that would suggest it should not operate as a covered savings association.

The OCC invited comment on whether there are standards other than those in the definition of “eligible savings association” in 12 CFR 5.3(g) that would allow the OCC to determine, without imposing undue burden, whether a Federal savings association is eligible to operate as covered savings association. The OCC also invited comment on whether there are situations in which, or Federal savings associations for which, it would not be appropriate to use the definition of “eligible savings association” to make determinations about the eligibility of a Federal savings association to operate as a covered savings association. Additionally, the OCC invited comment on whether the rule should identify other factors for consideration when determining a Federal savings association’s eligibility to operate as a covered savings association.

Although one commenter supported the OCC’s proposed approach, four commenters disagreed with the use of the “eligible savings association” criteria as the basis for eligibility, noting that the criteria are not expressly required by the statute. Some commenters also contended that these criteria would be inconsistent with the purpose of section 5A because they would add hurdles to making an election. The commenters also suggested that the OCC has the expertise to supervise a covered savings association following an election.

The OCC agrees with the commenters who expressed concern with the proposed approach and is eliminating the “eligible savings association” criteria in the final rule. The OCC believes that elimination of these criteria is consistent with section 5A, which directs the OCC to establish “streamlined standards and procedures . . . for an election.” Removal of these criteria will increase the number of institutions that can elect to operate as covered savings associations. The OCC believes that it can use its existing supervisory and enforcement mechanisms, as appropriate, to address any concerns that may arise when an institution elects to operate as a

covered savings association, regardless of the condition of the institution at the time of an election. In light of this change, the OCC is also changing the heading of § 101.3 from “Procedures and Standards of Review” to “Procedures.”

The OCC also received several comments asking about the impact of a failure to meet the “eligible savings association” criteria on an ongoing basis after an election. Because the final rule eliminates these criteria, this is no longer an issue.

Although the final rule, like the proposed rule, does not require the OCC to send written notice to a Federal savings association that becomes a covered savings association by operation of law 60 days after an election, the OCC would expect to send such notice as a matter of course. The notice would include a reminder that covered savings associations are subject to the same laws, regulations, and safety and soundness expectations as a similarly located national bank, including any appropriate enforcement action for failure to comply with applicable laws and regulations.

*101.4 Treatment of covered savings associations.* Section 5A(c) of HOLA provides that a covered savings association has the same rights and privileges as a similarly located national bank and is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to such a national bank. Section 5A(d) further provides that a covered savings association will be treated as a Federal savings association for purposes of the governance of the savings association, as well as for purposes of consolidation, mergers, dissolution, conversion, conservatorship, and receivership. A covered savings association also will be treated as a Federal savings association for any other purposes the Comptroller identifies by regulation.

Section 101.4(a)(1) of the proposed rule offered two alternative ways of explaining what it means for a covered savings association to have the rights and privileges of a similarly located national bank while being subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations as a similarly located national bank. The first alternative (option A) would have required a covered savings association to comply with the same provisions of law that would apply to a similarly located national bank and would not have required the covered savings association to comply with the provisions of law that apply to Federal savings associations, except in specific areas. The second alternative (option B) focused on the activities that would be permissible for a covered savings association. It was modeled on the language used in the OCC's regulations on national bank and Federal savings association operating subsidiaries set out in 12 CFR 5.34(e) and 5.38(e). This alternative would have provided that a covered savings association may engage in any activity that is permissible for a national bank to engage in as part of, or incidental to, the business of banking, or explicitly authorized by statute for a national bank, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank, as determined by the OCC. Both options would have been subject to specific categories of Federal savings association law that would apply to covered savings associations.

The OCC invited comment on which of these alternatives would best clarify the requirements for the treatment of covered savings associations, including the provisions of law that would apply to covered savings associations. Five commenters supported option A, which they considered to be a broader and less definitive approach that would permit timely creativity and innovation by covered savings associations. They also noted that updating a list of applicable laws by regulatory action can take time and that guidance is of limited reliability.

Two commenters supported option B, while two others appeared to support option B but were less definitive. One commenter believed option B would provide greater flexibility for the OCC, which the commenter argued would be preferable even if it would be less certain and would require more consultation with the OCC. Two commenters that supported option B would also support option A if it included a reservation of authority to allow the OCC to determine that a provision of national bank law does not apply to covered savings associations.

The OCC is adopting option B to clarify the requirements for the treatment of covered savings associations. This option provides general guidance about the types of activities in which a covered savings association would be permitted to engage. Covered savings associations would be able to refer to OCC publications to find activities that are permissible for national banks and understand the authorization, terms, and conditions that apply to those activities.<sup>7</sup> Option B is more narrowly tailored than option A, and it preserves the OCC's authority to determine that a particular provision of national bank law does not apply to covered savings associations.

Section 101.4(a)(2) of the proposed rule set out specified areas in which a covered savings association would have continued to be treated as a Federal savings association. These included the categories specifically identified in the statute (governance of the covered savings association (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends), consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership). The proposed rule also identified three additional areas in which it would be appropriate to treat covered savings associations as Federal savings associations. These areas were: (1) provisions that allow Federal mutual savings

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<sup>7</sup> Many of these documents and resources are available on OCC.gov. These documents do not constitute an exhaustive list of all activities permissible for national banks. Further, institutions are responsible for determining whether any changes to applicable laws or regulations impact the permissibility of an activity.

associations to conduct business as mutual institutions; (2) provisions that set out procedural and operational requirements for Federal savings associations but that do not result in substantively different outcomes for Federal savings associations and national banks; and (3) areas where there is a specific Federal savings association rule with no corresponding specific national bank rule, but the Federal savings association rule sets out requirements that are consistent with supervisory expectations for national banks or is substantially similar to an interagency rule. In the preamble to the proposed rule, the OCC provided several charts to illustrate the types of provisions that the OCC would expect to identify in guidance as provisions of law that apply to Federal savings associations.

The OCC invited comment on whether particular provisions should be considered provisions of law that relate to governance (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends), consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership and whether there are other provisions of law that the OCC should identify. The OCC also invited comment on whether these provisions should be specifically identified in the rule rather than in guidance. The OCC received a number of comments on this section of the proposed rule.

Five commenters requested clarification that covered savings associations would not be required to change their name to include the word “National.” National banks are required by statute to include the word “National” in their name.<sup>8</sup> Although section 5A of HOLA provides flexibility for certain Federal savings associations to engage in activities permissible for national banks, these covered savings associations are not national banks and, as such, retain their Federal savings association charter. Because covered savings associations retain their Federal savings

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<sup>8</sup> 12 U.S.C. 22; 12 U.S.C. 30.

association charters, covered savings associations will not be required to change their names to include the word “National.”

One commenter requested that the OCC clarify that the rules governing directors remain the same for Federal savings associations that elect to operate as covered savings associations, noting in particular that electing directors is a governance requirement. As discussed in the preamble to the proposed rule, section 5A of HOLA sets out specific categories of Federal savings association laws that will continue to apply to covered savings associations, including those governance provisions relating to boards of directors (e.g., elections, term of service). Accordingly, covered savings associations will continue to be required to comply with Federal savings association laws with respect to boards of directors and will not be subject to national bank laws with respect to boards of directors. For example, covered savings associations will not be subject to the statutory citizenship and residence requirements that apply to directors of national banks.<sup>9</sup>

Another commenter agreed that provisions of Federal savings association law that relate to members of a Federal mutual savings association should continue to apply to mutual covered savings associations. However, the commenter was concerned that the preamble’s justification for this treatment could suggest that the rights of members of a Federal mutual savings association are the same as the rights of shareholders of a Federal stock savings association. The OCC does not intend to use this rule to change the rights of members of a Federal mutual savings association or equate those rights to the rights of shareholders of a Federal stock savings association. Rather, the OCC believes that the term “shareholder,” as it is used in the specific context of section 5A(d)(1) of HOLA and this rule, indicates that provisions of Federal savings

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<sup>9</sup> 12 U.S.C. 72. The same principle would apply to other requirements specific to the directors of national banks. See, e.g., 12 U.S.C. 71 (election of directors); 12 U.S.C. 76 (president as member of the board).

association law that relate to governance by the Federal savings association’s stakeholders—including shareholders and members—should continue to apply to stock and mutual covered savings associations, respectively. This includes provisions of Federal savings association law that describe the rights of members of Federal mutual savings associations. This interpretation of the term “shareholder” is specific to section 5A of HOLA and is not intended to be applied outside that context. To clarify this interpretation, the OCC is adding “members” to the list of types of Federal savings association governance provisions that apply to covered savings associations in § 101.4(a)(2)(i).

One commenter supported two of the categories of Federal savings association law that the OCC proposed to apply to covered savings associations: (1) operational and procedural requirements that do not create substantively different outcomes; and (2) certain requirements for which there is no corresponding national bank requirement. Another commenter supported the proposal’s application of laws with particular relevance for Federal mutual savings associations, such as those regarding mutual capital certificates. These provisions of the proposed rule remain unchanged in the final rule. The OCC has updated § 101.4(a)(2)(xiii) of the final rule to expressly include the accounting and disclosure standards in 12 CFR part 162.

Another commenter suggested that the OCC should preserve the differences between national banks and Federal savings associations unless section 5A expressly provides otherwise. The OCC does not believe this approach is consistent with the language of section 5A of HOLA, which provides that covered savings associations have the same rights and privileges and are subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations as national banks except where section 5A or the OCC’s rules specifically provide otherwise.

Three commenters requested that the OCC clarify that the preemption standards for national banks and Federal savings associations are the same and would not change following an election. Another commenter requested that the OCC permit covered savings associations to rely on whichever law most supports the OCC's preemptive authority, expressing concern that covered savings associations would not benefit from any preemption determinations applicable only to Federal savings associations. The commenter also argued that Federal savings associations benefit from more expansive preemption of state law through established case law and authority reserved to the OCC, even following the changes to preemption made in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

The OCC agrees with commenters who stated that the preemption standards applicable to national banks and Federal savings associations are the same. Section 1046 of the Dodd-Frank Act added a new section 6 to HOLA (12 U.S.C. 1465), which provides that Federal savings associations are subject to the same laws and legal standards as national banks regarding the preemption of state law. This amendment is codified in the OCC's regulations at 12 CFR 7.4010 and 34.6.

Two commenters recommended that the OCC include a mechanism that would allow the agency to identify additional provisions of Federal savings association law applicable to covered savings associations. One of these commenters believes that this approach would provide the OCC with flexibility to tailor the applicable regulations and that publishing interpretive letters or updating relevant publications, with accompanying public notice, would provide sufficient clarity. Although the OCC agrees that this approach would provide additional flexibility, section 5A(d) of HOLA requires that the additional purposes for which a covered savings association is treated as a Federal savings association be "determined by regulation of the Comptroller." If the

OCC identifies additional categories of Federal savings association law that should be applicable to covered savings associations, the OCC will initiate a rulemaking to amend part 101.

Several commenters requested that the OCC clarify that covered savings associations will not be subject to Federal savings association regulations on interest rate risk management procedures and asset classification, with two commenters asserting that these regulations do not fall within the governance category. In the preamble to the proposed rule, the OCC characterized the interest rate risk management provisions in 12 CFR 163.176 as governance provisions that apply to boards of directors because the provisions set out board responsibilities with respect to interest rate risk management. On further consideration, the OCC agrees that 12 CFR 163.176 should not be classified as a governance provision for purposes of section 5A of HOLA.<sup>10</sup>

Although 12 CFR 163.176 sets out requirements for the board of directors and management, it is more appropriately viewed as a duty that applies to a Federal savings association's activities. The interest rate risk management provisions reflect the unique risk profile of Federal savings associations, which historically often held balance sheet concentrations in longer-term assets. Because of these concentrations, Federal savings associations had to more closely monitor sensitivity to market risk. A covered savings association may be able to diversify its portfolio and therefore its interest rate risk exposure. The risk-based examination approach taken by the OCC includes supervision for interest rate risk. Further, all insured OCC-supervised institutions, including covered savings associations, other Federal savings associations, and national banks, continue to be subject to the operational and managerial standards under 12 CFR part 30, Appendix A, which specifically include standards for managing interest rate risk exposure. This

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<sup>10</sup> This determination relates to the OCC's interpretation of the language of section 5A of HOLA and is not intended to change the meaning of the term "governance" for other purposes. For example, OCC examiners will continue to supervise Federal savings associations as set out in Comptroller's Handbook: Corporate and Risk Governance, Version 1.0, July 2016 at 77.

approach will give the OCC the flexibility to tailor its supervision of a covered savings association to risks associated with the business model of that covered savings association.

The proposed rule did not specifically address asset classification regulations. The final rule does not subject covered savings associations to the asset classification regulations applicable solely to Federal savings associations, such as 12 CFR 160.160, as these regulations do not fall within the categories of Federal savings association laws that the final rule makes applicable to covered savings associations (e.g., it is not a governance provision or a merger provision, nor is it specifically designated in the final rule as a provision of Federal savings association law that applies to covered savings associations). In addition, covered savings associations and OCC examiners can use the standards under 12 CFR part 30, appendix A, and the real estate lending standards under 12 CFR part 34 applicable to national banks to identify, classify, and otherwise address problem assets as needed, consistent with safety and soundness.

One commenter recommended that a November 1, 2000, Office of Thrift Supervision memorandum with supervisory and examiner guidance be supplemented and not superseded by national bank examination guidance. The OCC rescinded CEO Memo 153, “Examinations of Mutual Savings Associations” in 2012.<sup>11</sup>

Six commenters requested clarification on how covered savings associations would be treated for purposes of the QTL requirements in HOLA and requested that the OCC’s final rule expressly state that covered savings associations are not required to comply with QTL. One

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<sup>11</sup> See OCC Bulletin 2012-15, OTS Integration: Rescission of OTS Documents, Attachment A, available at <https://www.occ.gov/news-issuances/bulletins/2012/2012-15a.pdf>. See also OCC Bulletin 2014-35, Mutual Federal Savings Associations: Characteristics and Supervisory Considerations, July 22, 2014, available at <https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-35.html>.

commenter added that compliance with QTL should not be required absent a safety and soundness concern.

As discussed in the preamble to the proposed rule, unlike national banks, Federal savings associations<sup>12</sup> are required to comply with the QTL test set forth in section 10(m) of HOLA, which requires a Federal savings association to qualify as a domestic building and loan association as defined in 26 U.S.C. 7701(a)(19) or to maintain a certain percentage of qualified thrift investments in the Federal savings association's portfolio.<sup>13</sup> The preamble described the QTL test as a key difference between the rights and privileges of a savings association and a national bank. The OCC continues to believe that a covered savings association will not be able to exercise the rights and privileges conferred on it under section 5A while simultaneously being subject to the limitations of the QTL test.<sup>14</sup>

Section 101.4(a) of the final rule provides that a covered savings association may engage in any activity that is permissible for a similarly located national bank to engage in, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank. Lending and investment are activities that national banks are permitted to engage in as part of the business of banking.<sup>15</sup> When making loans and investments, covered savings associations are subject to the same authorization, terms, and conditions that would apply to similarly located national banks. There are no authorizations, terms, or conditions that require national banks to maintain status as qualified thrift lenders. Furthermore, unlike governance, conservatorship, and

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<sup>12</sup> The OCC acknowledges that some provisions of section 10(m) of HOLA apply to savings associations and other provisions apply to savings and loan holding companies. The discussion in this preamble focuses on the provisions of section 10(m) that apply to savings associations.

<sup>13</sup> 12 U.S.C. 1467a(m).

<sup>14</sup> As discussed later in this preamble, a similar analysis applies to the lending limitations imposed on Federal savings associations by section 5(c) of HOLA. Section 5(c) permits Federal savings associations to make residential real property and other housing related loans without limit, but consumer and commercial loans are subject to specific limitations established in the statute.

<sup>15</sup> 12 U.S.C. 24(Seventh); see also 12 U.S.C. 371.

receivership, lending and investment are not purposes for which section 5A(d) of HOLA or the final rule require that a covered savings association be treated as a Federal savings association. Accordingly, a covered savings association operating under section 5A is not subject to, among other things, the penalties in 12 U.S.C. 1467a(m)(3) for failing to meet the QTL test. The OCC believes this is consistent with both the language of § 101.4(a) of the final rule and the statutory mandate that covered savings associations exercise the rights and privileges of similarly located national banks. Requiring compliance with the QTL test would be inconsistent with and frustrate the purpose of allowing Federal savings associations to make an election. The OCC does not believe it is necessary to state explicitly in the final rule that the QTL test does not apply to a covered savings association.

The OCC applies a similar analysis to section 5(c) of HOLA. Section 5(c) sets out lending and investment restrictions that apply to Federal savings associations. These authorizations, terms, and conditions do not apply to the activities of national banks. Consequently, they do not apply to covered savings associations.

The OCC also applies a similar analysis to public welfare and community development investments. One commenter argued that covered savings associations should be treated as Federal savings associations for purposes of public welfare and community development investments. Four commenters also suggested that the OCC consider grandfathering public welfare or community development projects existing at the time of an election. National banks are permitted to make public welfare investments, subject to specific authorization, terms, and conditions (namely, limits on the total amount of such investments). Covered savings associations also will be permitted to make public welfare investments, subject to the same authorization, terms, and conditions (including the limits on the total amount of such

investments) as a national bank. Any public welfare or community development projects existing at the time of an election that would not comply with the authorizations, terms, and conditions applicable to a national bank will be subject to § 101.5 of this final rule, which the OCC believes provides adequate time and flexibility for divestiture or conformance.

In the preamble to the proposed rule, the OCC applied a similar analysis to the affiliate transaction restrictions in section 11(a) of HOLA. While two commenters agreed that covered savings associations should not be subject to the affiliate transaction rules specific to Federal savings associations, they requested that the OCC clarify this in the final rule. Affiliate transaction restrictions for savings associations are set out in section 11(a) of HOLA and 12 CFR 223.72. These provisions present potential complications that the QTL restrictions, community development restrictions, and lending and investment restrictions do not. The OCC will continue to consult with the FRB on interpretive issues regarding the application of these provisions to covered savings associations. The OCC recommends that individuals or institutions with specific questions about the application of these provisions to covered savings associations contact the FRB.

Several commenters requested that the OCC clarify in the final rule which merger provisions would apply when a covered savings association merges with another entity. One commenter asserted that the proposed rule could limit a covered savings association's ability to engage in certain interstate merger transactions if covered savings associations are treated as national banks for purposes of interstate merger laws. The commenter asked the OCC to confirm that covered savings associations are subject only to the merger provisions that apply to Federal savings associations and not to interstate or other provisions applicable to national banks. Several

commenters noted that the proposal does not clarify how applicable branching laws and merger requirements will work together.

National banks and Federal savings associations are subject to different laws regarding business combinations.<sup>16</sup> For instance, national banks are subject to a specific statutory framework that sets out the authorization, terms, and conditions for merger and consolidation activities.<sup>17</sup> There are fewer statutory requirements for the merger and consolidation activities of Federal savings associations.<sup>18</sup> The OCC has detailed regulations to address the authority of national banks and Federal savings associations to engage in mergers and consolidations, including procedural requirements. Where consistent with underlying statutory authorities, the OCC has harmonized the regulations for business combination activities of national banks and Federal savings associations, respectively, although some differences remain.<sup>19</sup> The regulations for business combination activities involving national banks and Federal savings associations are set forth in 12 CFR 5.33.

Section 5A of HOLA provides that a covered savings association shall be treated as a Federal savings association for purposes of consolidation and merger.<sup>20</sup> In the preamble to the proposed rule, the OCC explained that where the business combination provisions in 12 CFR 5.33 set out different requirements for Federal savings associations and national banks, the Federal savings association requirements would apply to a covered savings association.

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<sup>16</sup> The term “business combination” includes mergers and consolidations. See 12 CFR 5.33(d)(2).

<sup>17</sup> See, e.g., 12 U.S.C. 214a, 214b, 215, 215a, 215a-1, 215a-3, 215b, 215c, 1828(c), and 1831u. Some of these provisions also apply to savings associations (e.g., 12 U.S.C. 1828(c)).

<sup>18</sup> See, e.g., 12 U.S.C. 1467a(s).

<sup>19</sup> Integration of National Banks and Federal Savings Association Regulations: Licensing Rules, 80 FR 28346, 28368 (May 18, 2015).

<sup>20</sup> 12 U.S.C. 1464a(d)(2). Furthermore, by including a specific provision allowing branches in operation on the date an election is approved to continue to operate after an election, section 5A(e) suggests that, after an election, national bank branching requirements should apply.

However, the OCC understands that merger provisions and branching provisions can intersect in certain situations, such as the interstate branch acquisition provisions covered by 12 U.S.C. 1831u. This can lead to additional complications because, under the final rule, covered savings associations may engage in any activity that is permissible for a similarly located national bank to engage in as part of, or incidental to, the business of banking, or explicitly authorized by statute for a national bank, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank.<sup>21</sup> Branching is such an activity. As a result, under the final rule, a covered savings association will be permitted to establish or retain new branches, or to close branches, subject to the authorization, terms, and conditions that apply to a similarly located national bank. This is true whether or not the branch is retained or closed as part of a merger. The OCC has concluded that, for purposes of section 5A of HOLA and the final rule, the provisions of law relating to retention of branches in mergers and those that establish interstate branching restrictions in the merger context should be considered branching requirements rather than merger requirements. For a covered savings association, this means that while the authority to engage in a proposed merger or consolidation transaction will be governed under the laws applicable to Federal savings associations, the ability to establish or retain branches will be subject to the same authorization, terms, and conditions that would apply to a similarly located national bank (including conditions on the establishment of interstate branches). Any other interpretation could permit covered savings associations to acquire, through a merger, new branches under terms or conditions that would not be permissible for a similarly located

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<sup>21</sup> Section 5A(c)(2) provides that covered savings associations are subject to the duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to a similarly located national bank, except as provided in section 5A(d). Section 5A(d) does not include branching as a purpose for which a covered savings association will be treated as Federal savings association. Furthermore, by including a specific provision allowing branches in operation on the date an election is approved to continue to operate after an election, section 5A(e) suggests that, after an election, national bank branching requirements should apply. If covered savings associations were permitted to operate branches that national banks are not, section 5A(e) would be surplusage.

national bank to acquire. Allowing covered savings associations to engage in branching activities under terms or conditions that are not available for similarly located national banks would be counter to the language of section 5A of HOLA.

Several commenters requested that the OCC clarify in the final rule that trust-only covered savings associations would not be required to maintain deposit insurance where similarly located trust-only national banks would not be subject to this requirement. The proposed rule did not explicitly address whether a trust-only covered savings association must have deposit insurance, although it did provide that a covered savings association would be required to comply with 12 CFR 5.20, which requires deposit insurance as a condition of obtaining a Federal savings association charter. The commenters argued that the requirement to have deposit insurance is a “condition,” “limitation,” and “restriction” on a “right” or “privilege” and, therefore, should not apply to trust-only covered savings associations. One commenter noted that this disparity in the treatment of non-depository Federal savings associations and national banks should be eliminated absent a safety and soundness concern. One commenter argued that deposit insurance is a restriction, condition, and limitation similar to the QTL requirements, which the proposal makes inapplicable. The commenter believes that providing parity on deposit insurance requirements would advance the goal of uniform treatment. The commenter also believes that the OCC’s authority to determine the laws applicable to covered savings associations is limited by the requirement that trust-only covered savings associations be treated the same as comparable national banks.

Two commenters noted that the proposal lists 12 CFR 5.20 as a governance provision but argued that 12 CFR 5.20(e)(3), which addresses deposit insurance, is not properly viewed as a governance provision. These commenters requested that the OCC clarify that 12 CFR 5.20(e)(3)

is not a governance provision and does not apply to trust-only covered savings associations. One commenter made several arguments in support of this view: (1) governance provisions are the standards that govern incorporation and the relationship between a Federal savings association and its shareholders, members, and management, not the laws implicating substantive areas of banking or savings association powers, authorities, and activities; (2) unlike deposit insurance, the other governance provisions identified in the proposal are analogous to state corporate governance laws; (3) unlike other identified governance provisions, deposit insurance is not included in the OCC's model charter or bylaws; (4) deposit insurance is not analogous to the other examples of governance provisions identified in the statute or the proposal; and (5) it would be simpler for a trust-only covered savings association to drop its deposit insurance than to comply with new governance requirements.

One commenter articulated the burdens associated with being required to maintain deposit insurance as a trust-only entity, including (1) the requirement to have a minimum of \$500,000 in insured deposits to retain deposit insurance; (2) the requirement to have 99% of deposits be trust funds to qualify for the trust-only savings and loan holding company exclusion;<sup>22</sup> (3) and the costs associated with seeking trust-only carve outs from laws that apply to "insured depository institutions."<sup>23</sup> One commenter addressed the OCC's enforcement, receivership, and conservatorship authority over an uninsured trust-only covered savings association, arguing that section 5A provides the OCC with the full array of such authority. The commenter argued that the OCC's enforcement authorities in section 8 of the Federal Deposit

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<sup>22</sup> The commenter noted that the FRB permitted the company to exclude the \$500,000 deposit from its 99% calculation in the course of approving the commenter's application to deregister as a savings and loan holding company.

<sup>23</sup> The commenter believes that this phrase is often used as a proxy to indicate that an institution is engaged in all commercial banking activities.

Insurance Act (FDIA) are clearly “restrictions, penalties, liabilities, conditions, and limitations” and, therefore, should apply to uninsured covered savings associations in the same way as they apply to uninsured national banks. The commenter also recommended that the OCC rely on its authority to issue rules that clarify the provisions of law applicable to covered savings associations and in the interest of safety and soundness to provide that uninsured covered savings associations would be subject to section 8. The commenter argued that the OCC’s authority to issue rules “in the interest of safety and soundness” provide the agency with sufficient authority to issue regulations for appointing conservators and receivers of uninsured covered savings associations. The commenter cited the OCC’s rule for receiverships of uninsured national banks as a model.

For the reasons that follow, the OCC concludes that HOLA requires all savings associations, whether they elect to operate as covered savings associations or not, to have deposit insurance. The OCC bases this determination on the language of HOLA rather than a determination that 12 CFR 5.20(e)(3) is a governance provision. Under the HOLA definition of “savings association,” all Federal savings associations, including those that engage only in trust activities and those that elect to operate as covered savings associations, are required to have deposit insurance.<sup>24</sup> Under section 5A of HOLA and §§ 101.2(a)(2) and 101.3(a)(1) of the final rule, only Federal savings associations are eligible to elect to operate as covered savings associations. An election to operate as a covered savings association does not change a Federal savings association’s charter, its status as a savings association, or its stock or mutual form.

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<sup>24</sup> Section 2(2) of HOLA (12 U.S.C. 1462(2)) defines a “savings association” as “a savings association, as defined in section 3 of the Federal Deposit Insurance Act [12 U.S.C. 1813], the deposits of which are insured by the Corporation.” Furthermore, section 5(d) of HOLA, which gives the OCC enforcement authority over Federal savings associations, defines “savings association” for purposes of that subsection as “any savings association or former savings association that retains deposits insured by the Corporation, notwithstanding termination of its status as an institution insured by the Corporation.” Because Federal savings associations are a type of savings association, these requirements also apply to Federal savings associations.

Because only Federal savings associations can elect to operate as covered savings associations, and because all Federal savings associations are required to have deposit insurance, a Federal savings association must have deposit insurance in order to elect to operate as a covered savings association. The OCC does not believe that the “rights and privileges” or “duties, restrictions, penalties, liabilities, conditions, and limitations” language in section 5A is sufficient to overcome the requirement that a covered savings association be a Federal savings association. Therefore, because a trust-only covered savings association still retains its Federal savings association form and charter, HOLA’s definitional deposit insurance requirement continues to apply after an election and a trust-only covered savings association must continue to maintain deposit insurance.

The language of section 5A of HOLA supports the conclusion that covered savings associations must continue to maintain deposit insurance after making an election. Section 5A states that a covered savings association shall be treated as a Federal savings association for purposes of “conservatorship” and “receivership.”<sup>25</sup> The existing conservatorship and receivership framework for Federal savings associations (including trust-only institutions) only covers *insured* Federal savings associations, and HOLA contemplates “only the Federal Deposit Insurance Corporation as receiver for a savings association for the purpose of liquidation or winding up the affairs of such savings association.”<sup>26</sup> Moreover, the plain language of section 5A prevents the OCC from applying the national bank conservatorship and receivership rules (including those that cover uninsured trust-only national banks) to covered savings associations. For these reasons, the final rule does not include a new receivership and conservatorship framework for trust-only covered savings associations.

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<sup>25</sup> 12 U.S.C. 1464a(d)(2).

<sup>26</sup> 12 U.S.C. 1464(d)(2)(E)(ii).

Six commenters requested that the OCC allow covered savings associations to continue to engage in any activities and retain any investments grandfathered under section 5(i)(4) of HOLA. That provision of HOLA 1) allows any Federal savings bank chartered as such prior to October 15, 1982, to continue to make any investment or engage in any activity not otherwise authorized under section 5 of HOLA, to the degree it was permitted to do so as a Federal savings bank prior to October 15, 1982; and 2) allows any Federal savings bank in existence on August 9, 1989, and formerly organized as a mutual savings bank under State law to continue to make any investment or engage in any activity not otherwise authorized under section 5 of HOLA, to the degree it was authorized to do so as a mutual savings bank under State law. Four commenters stated that eliminating this authority would disproportionately impact institutions with grandfathered equity powers, with three adding that forcing divestiture may have unintended consequences. One commenter requested that the OCC consider a more flexible approach by reviewing long-term investment portfolios on a case-by-case basis. The commenter noted that these activities were reaffirmed as safe and sound in 1991 in section 24 of the FDIA and that many associations use the authority for long-term investing, not active trading. One commenter asserted that there is no indication that Congress intended to repeal section 5(i)(4) and that OCC should not interpret section 5A to eliminate this authority.

The OCC agrees that a Federal savings association engaged in activities or retaining investments grandfathered under section 5(i)(4) of HOLA should continue to be permitted to engage in those activities and retain those investments if the association elects to be treated as a covered savings association. The volume of these activities and the amount of these investments are capped by the language of section 5(i)(4) of HOLA, and those limits would continue to apply after an election. The OCC has, on at least one prior occasion, permitted a state bank with

activities and investments permitted by the state to continue to engage in those activities and retain those investments after converting to a national bank. Section 101.4(a)(2) of the final rule provides that covered savings associations can continue to engage in the specific, limited types of grandfathered nonconforming activities and investments permitted under section 5(i)(4) of HOLA.

Several commenters argued that covered savings associations should not be precluded from operating or investing in service corporations that engage only in activities permissible for national banks. One commenter argued that allowing covered savings associations to operate new and existing service corporations that engage only in national bank permissible activities is critical to achieving the full exercise of the election. Another commenter argued that if a service corporation's activities are permissible for both FSAs and national banks, CSAs should not be required to re-characterize the investment to rely on national bank authority or to change documentation to reflect that authority. The commenter believes that this would be inconsistent with a streamlined process and would result in material burden. A third commenter recommends that the OCC not require a change in legal form for any subsidiary, asset, or activity that is permissible for a national bank, unless the OCC can demonstrate that a material adverse financial effect would be imminent following the election.

Other commenters asked whether a service corporation would automatically become an operating subsidiary or whether this would be an unnecessary governance change. One commenter believes that service corporations should be allowed to continue their operations following an election.

Under the final rule, covered savings associations are not permitted to retain nonconforming subsidiaries, assets, or activities. A nonconforming subsidiary, asset, or activity

includes an investment in a subsidiary or other entity that is not permissible for a covered savings association. Federal savings associations have authority to invest in service corporations under section 5 of HOLA.<sup>27</sup> National banks do not have express statutory authority to invest in service corporations. Consequently, a covered savings association may not retain an existing service corporation or establish and invest in a new service corporation.

A Federal savings association that elects to operate as a covered savings association would be required to comply with § 101.5 of the final rule by divesting or conforming any investment in a service corporation within the timeframe set out in § 101.5. The covered savings association could do so simply by divesting any investment in a service corporation. The covered savings association could also choose to conform the investment by redesignating the service corporation as an operating subsidiary, because national banks are permitted to have operating subsidiaries.

An operating subsidiary of a covered savings association is only permitted to engage in the activities permissible for the covered savings association to engage in directly (i.e., those permissible for a national bank). A covered savings association that chooses to redesignate a service corporation as an operating subsidiary must ensure that the operating subsidiary is only engaged in such permissible activities – in other words, it must discontinue any nonconforming activities.

The OCC did not receive comment on § 101.4(b) of the proposed rule, which would have implemented section 5A(e) of HOLA by providing that a covered savings association may continue to operate any branch or agency that the covered savings association operated on the

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<sup>27</sup> 12 U.S.C. 1464(c)(4)(B).

effective date of the election. The OCC adopts this provision of the proposed rule without change.

As discussed in the preamble to the proposed rule, a covered savings association seeking to establish a de novo branch or to relocate or close an existing branch would be subject to the authorization, terms, and conditions that govern the establishment or closing of a national bank branch. Furthermore, if a branch of a covered savings association engages in activities that are included in the definition of a branch under the national bank branching regulation, 12 CFR 5.30, that branch may continue to operate subject to the same authorization, terms, and conditions as a similarly located branch of a similarly located national bank. If an agency of a covered savings association engages in activities that would qualify the agency as a branch under the national bank branching regulation, 12 CFR 5.30, those activities would be considered nonconforming activities, and the covered savings association would be required to discontinue or conform the activities or submit an application and obtain OCC approval under 12 CFR 5.30 to establish the agency as a branch.<sup>28</sup> If a covered savings association wishes to establish a new branch, it would be required to do so under the rules for national bank branches in 12 CFR 5.30. The OCC believes this approach best allows covered savings associations to continue to operate the branches and agencies they operated on the date on which an election was approved but subject to the same authorization, terms, and conditions that would apply to a similarly located national bank.

As noted earlier in this preamble, the final rule adds a new § 101.4(c) to reflect the language of section 5A(g) of HOLA.

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<sup>28</sup> There is overlap between the activities that a Federal savings association may undertake in an agency and the activities that a national bank may undertake in an entity that is not a branch. See 12 CFR 5.30, 5.31, and part 7.

The proposed rule provided that the Federal savings associations regulations applicable to the issuance of subordinated debt and mandatorily redeemable preferred stock for inclusion in tier 2 capital would apply to covered savings associations. Title 12 CFR 5.56(a) provides that Federal savings associations must comply with the requirements of 12 CFR 163.80 (Borrowing limitations) when issuing subordinated debt or mandatorily redeemable preferred stock that is not included in tier 2 capital. The OCC has revised the final rule to clarify that § 163.80 applies to covered savings associations when the covered savings association's issuance of subordinated debt or mandatorily redeemable preferred stock is not included in tier 2 capital.

For the convenience of readers, the following chart summarizes the provisions of law discussed in this preamble and the preamble to the proposed rule and their applicability to covered savings associations. It includes provisions in the categories specifically listed in the statute (governance (including incorporation, bylaws, boards of directors, shareholders and members, and distribution of dividends), consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership). It also includes: (1) provisions that allow Federal mutual savings associations to conduct business as mutual institutions; (2) provisions that set out procedural and operational requirements for Federal savings associations but that do not result in substantively different outcomes for Federal savings associations and national banks; and (3) areas where there is a specific Federal savings association rule with no corresponding specific national bank rule, but the Federal savings association rule sets out requirements that are consistent with supervisory expectations for national banks or is substantially similar to an interagency rule. This chart is not an exhaustive list of the statutes and regulations that apply to covered savings associations. In addition, the provisions of law included in the chart may change, whether as a result of

amendments to a statute or future OCC rulemaking. For example, if the OCC later issues a rule integrating the national bank and Federal savings association rules for adjudicative procedures, the references in this chart to parts 19, 108, and 109 may no longer be accurate.

Provision of Law	Applicability to Covered Savings Associations
<b>Selected Statutory Provisions Applicable to National Banks</b>	
12 U.S.C. 24(Eleventh) and 12 CFR part 24. These sections permit national banks to make public welfare investments, subject to certain limitations.	Applies
12 U.S.C. 22 and 30. These sections require national banks to have the word “National” in their names.	Does not apply
12 U.S.C. 71. This section sets out standards for the election of directors of national banks.	Does not apply
12 U.S.C. 72. This section sets out citizenship and residency requirements for directors of national banks.	Does not apply
12 U.S.C. 76. This section requires the president of a national bank to be a member of the board of directors of the national bank.	Does not apply
<b>Selected Statutory Provisions Applicable to Federal Savings Associations</b>	
12 U.S.C. 1462(2). This paragraph defines a “savings association.” The OCC interprets this definition to require deposit insurance.	Applies
12 U.S.C. 1464(c). This subsection establishes limitations on the lending and investment authority of Federal savings associations, including the authority to make community development investments.	Does not apply
12 U.S.C. 1464(d) and 1821(c). These statutes set forth the authorities for the appointment of a conservator or receiver for Federal savings associations.	Applies
12 U.S.C. 1464(i)(4) and 12 CFR part 143. These provide: (1) that Federal savings banks chartered prior to October 15, 1982, may continue to make any investment or engage in any activity not otherwise authorized under section 5 of HOLA to the degree they were permitted to do so as a Federal savings bank prior to October 15, 1982; and (2) that any Federal savings bank in existence on August 9, 1989, and formerly organized as a mutual savings bank under State law to continue to make any investment or engage in any activity not otherwise authorized under section 5 of HOLA, to the degree it was authorized to do so as a mutual savings bank under State law.	Applies

12 U.S.C. 1467a(m). This subsection sets out the qualified thrift lender test.	Does not apply
<b>Selected Governance Regulations Applicable to Federal Savings Associations</b>	
12 CFR 5.21. This section sets out the requirements for Federal mutual savings associations when adopting or amending the charters or bylaws.	Applies
12 CFR 5.22. This section sets out the requirements for Federal stock savings associations when adopting or amending the charters or bylaws.	Applies
12 CFR 145.121. This section requires Federal savings associations to indemnify directors, officers, and employees.	Applies
12 CFR 160.130. This section prohibits directors and officers from receiving loan procurement fees.	Applies
12 CFR 163.33. This section sets out requirements for the composition of the board of directors of a Federal savings association.	Applies
12 CFR 163.47. This section sets out requirements for employee pension plans of Federal savings associations, which may be amended or terminated by the board of directors.	Applies
12 CFR 163.172(c), (d), and (e). These provisions establish requirements for directors and management of Federal savings associations to oversee and keep records pertaining to derivatives transactions.	Applies
12 CFR 163.200. This section sets expectations for the directors, officers, and employees of Federal savings associations, particularly as it relates to conflicts of interest.	Applies
12 CFR 163.201. This section sets expectations for the directors and officers of Federal savings associations, particularly as it relates to corporate opportunity.	Applies
<b>Selected Merger, Consolidation, Conversation, Reorganization, and Subsidiary Regulations Applicable to Federal Savings Associations</b>	
12 CFR 5.25. This section sets out requirements for conversion from a national bank or Federal savings association to a state bank or state savings association. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.	Applies
12 CFR 5.33. This section sets out requirements for business combinations involving a national bank or Federal savings association, including mergers. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings	Applies

association requirements would apply to a covered savings association.	
12 CFR 5.34, 5.35, and 5.39. These sections set out requirements for the formation of operating subsidiaries, bank service companies, and financial subsidiaries, respectively, by national banks.	Applies
12 CFR 5.36. This section addresses other equity investments by national banks.	Applies
12 CFR 5.48. This section sets out requirements for voluntary liquidation of a national bank or Federal savings association. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.	Applies
12 CFR 5.59. This section addresses Federal savings association service corporations.	Does not apply
12 CFR part 192. This part sets out requirements for savings associations converting from mutual to stock form.	Applies
<b>Selected Capital Distributions and Subordinated Debt Regulations</b>	
12 CFR 5.45. This section establishes requirements for increases in permanent capital for Federal stock savings associations.	Applies
12 CFR 5.46. This section establishes requirements for changes in permanent capital of national banks.	Does not apply
12 CFR 5.47. This section establishes requirements for subordinated debt issued by national banks.	Does not apply
12 CFR 5.55. This section sets out requirements for capital distributions by Federal savings associations, including distributions of dividends. The entire section would apply to a covered savings association.	Applies
12 CFR 5.56. This section establishes requirements for inclusion of subordinated debt securities and mandatorily redeemable preferred stock of Federal savings associations as supplementary capital. <sup>29</sup>	Applies
12 CFR 163.76. This section addresses offers and sales of securities at an office of a Federal savings association.	Applies
<b>Selected Regulations Applicable to the Operations of National Banks and Federal Savings Associations</b>	

<sup>29</sup> 12 CFR 5.56(a) provides that Federal savings associations must comply with the requirements of 12 CFR 163.80 (Borrowing limitations) when issuing subordinated debt or mandatorily redeemable preferred stock that is not included in tier 2 capital. Section 163.80 applies to covered savings associations for purposes of § 5.56 (i.e., when the covered savings association’s issuance of subordinated debt or mandatorily redeemable preferred stock is not included in tier 2 capital).

12 CFR part 12. This part establishes requirements relating to recordkeeping and confirmation for securities transactions by national banks.	Does not apply
12 CFR part 19. This part establishes requirements for adjudicative and investigative proceedings that involve national banks.	Does not apply
12 CFR part 21, subpart A. This subpart establishes security procedures for national banks.	Does not apply
12 CFR parts 108 and 109. These parts establish requirements for adjudicative proceedings that involve Federal savings associations.	Applies
12 CFR part 112. This part establishes requirements for investigative proceedings involving Federal savings associations.	Applies
12 CFR part 128. This part sets out nondiscrimination requirements for Federal savings associations.	Applies
12 CFR part 151. This part establishes recordkeeping and confirmation requirements for securities transactions involving Federal savings associations.	Applies
12 CFR 160.30. This section implements the statutory lending and investment limits applicable to the operations of a Federal savings association, including community development investments.	Does not apply
12 CFR 160.36. This section permits de minimis community development investments for Federal savings associations.	Does not apply
12 CFR 160.160. This section sets out asset classification requirements applicable to Federal savings associations.	Does not apply
12 CFR part 162. This part implements a provision of HOLA that requires Federal savings associations to use generally accepted accounting principles.	Applies
12 CFR 163.27. This section prohibits inaccurate or misrepresentative advertising.	Applies
12 CFR 163.76. This section addresses offers and sales of securities at an office of a Federal savings association.	Applies
12 CFR 163.170(c). This provision sets out expectations for maintenance of records.	Applies
12 CFR part 168. This part establishes security procedures for Federal savings associations.	Applies
12 CFR 163.176. This section establishes requirements for Federal savings associations related to interest rate risk management.	Does not apply
<b>Selected Regulations Applicable to Federal Mutual Savings Associations</b>	
12 CFR 5.21. This section sets out the requirements for Federal mutual savings associations when adopting or amending the charters or bylaws.	Applies

12 CFR part 144. This part sets out rules for communications between members of Federal mutual savings associations. The national bank laws relating to shareholder communications do not adequately address the unique needs and rights of Federal mutual savings association members.	Applies
12 CFR 163.74. This section establishes requirements for mutual capital certificates.	Applies
12 CFR part 169. This part sets out rules for proxies in the mutual context. The national bank laws relating to proxies do not adequately address the unique needs and rights of Federal mutual savings association members.	Applies

*101.5 Nonconforming subsidiaries, assets, and activities.* Section 101.5 of the proposed rule established a transition process for bringing nonconforming subsidiaries, assets, and activities into conformance with the requirements for national banks.

Section 101.5(a) of the proposed rule would have required a covered savings association to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities at the earliest time that prudent judgment dictates but not later than two years after the effective date of an election. Paragraph (a) also would have provided that the OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity, to assist OCC supervisory staff in assessing compliance with the proposed rule. Section 101.5(b) of the proposed rule would have allowed the OCC to grant a covered savings association extensions of not more than two years each up to a maximum of eight years if the OCC determined that: (1) the covered savings association has made a good faith effort to divest, conform, or discontinue the nonconforming subsidiaries, assets, or activities; (2) divestiture, conformance, or discontinuance would have a material adverse financial effect on the covered savings association; and (3) retention or continuation of the nonconforming subsidiaries, assets, or activities is consistent with the safe and sound operation of the covered savings association. This paragraph was intended to provide the OCC with flexibility when a covered savings

association, despite its best efforts, is unable to divest or conform assets or subsidiaries or discontinue activities within the two-year period.

Several commenters generally addressed the timeframes for divestiture, conformance, and discontinuance. One commenter believed that the initial two-year period is reasonable and the ability to seek extensions provides sufficient flexibility for complex investments or depressed market conditions. Another commenter recommended a “reasonable time” standard for divestiture to account for extraordinary circumstances. This commenter noted that service corporation investments in real estate may require longer divestiture periods and that these are not always comparable to other real estate owned (OREO). A third commenter suggested that a timeframe committed to supervisory discretion would be preferable to a specific regulatory deadline.

One commenter asserted that there may be situations where a covered savings association should be allowed to continue a long-standing nonconforming activity. One commenter believes that the statute requires the OCC to establish conditions under which a covered savings association can retain nonconforming subsidiaries, assets, and activities in perpetuity. The commenter believes that retention should be subject to review at election and periodically thereafter but that retention should be presumed permissible.

The OCC adopts the proposed § 101.5(a) and (b) without change. The OCC believes that the standard in the final rule provides sufficient flexibility to address extraordinary circumstances while emphasizing the OCC’s expectation that, in the normal course of events, nonconforming subsidiaries, assets, or activities will be divested, conformed, or discontinued as soon as prudent judgment dictates. The OCC is not persuaded that a responsibly managed service corporation investment in real estate is materially different from real estate held by a national bank, a Federal savings association, or an operating subsidiary, such that more than 10 years would be required

to fully divest. Commenters did not clarify what standard the OCC should use to determine when a service corporation investment in real estate would need to be divested. Furthermore, for the reasons explained earlier in this preamble, the final rule requires that covered savings associations either divest their service corporations or conform their service corporations by redesignating them as operating subsidiaries. Any real estate activities in the operating subsidiaries would need to be activities permissible for a covered savings association operating subsidiary. Without additional detail about the specific types of situations in which additional time might be needed, the OCC declines to extend the 10-year limitation in the final rule.

The OCC does not agree that section 5A of HOLA creates a presumption that nonconforming subsidiaries, assets, and activities are permissible. On the contrary, the statute requires covered savings associations to bring nonconforming assets and subsidiaries into conformance with the requirements for national banks and provides only a mechanism for covered savings associations to apply to the OCC to hold nonconforming assets or subsidiaries after an election. The statute does not require the OCC to grant permission to hold or continue nonconforming assets or subsidiaries indefinitely. Consequently, the final rule permits covered savings associations to request permission to hold or continue nonconforming subsidiaries, assets, and activities for additional two-year periods, up to a total of 8 years, if they are unable to divest, conform, or discontinue within two years as otherwise required.

The timeframes in the rule should, in most cases, provide a covered savings association with sufficient lead-time to minimize potential undue financial harm from divesting, conforming, or discontinuing nonconforming subsidiaries, assets, and activities. This period also is short enough to ensure that covered savings associations are not allowed to gain an advantage by holding or operating assets or subsidiaries or conducting activities that would not be permissible

for a national bank. Additionally, the timeframe is generally consistent with the timeframe that the OCC provides for Federal savings associations to divest nonconforming subsidiaries and assets and discontinue nonconforming activities when they convert to national banks.

Proposed § 101.5(c) provided that Federal savings association law would continue to apply to nonconforming subsidiaries, assets, and activities during the period before the covered savings association divests, conforms, or discontinues the subsidiary, asset, or activity. The OCC did not receive any comments on this provision and adopts it with one clarifying change. The final rule specifies that the provisions of Federal savings association law that continue to apply before divesting, conforming, or discontinuing a subsidiary, asset, or activity include any amendments to those provisions of law. This change is intended to ensure that covered savings associations are not subject to outdated Federal savings association requirements if Federal savings association laws change between the time the covered savings association makes an election and the time it divests, conforms, or discontinues a nonconforming subsidiary, asset, or activity.

*101.6 Termination.* This section of the proposed rule would have established standards and procedures to allow a covered savings association to terminate an election after an appropriate period. The OCC would generally view an appropriate period to be relatively soon after an election takes effect (for example, 60 or 90 days). However, the OCC might determine that a longer period is appropriate where there is evidence that a covered savings association is attempting to use a termination to evade the requirements or purposes of section 5A of HOLA, such as the requirement to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities.

The OCC did not receive any comments on this section and is adopting § 101.6 of the proposed rule with one technical change to ensure that the final rule refers consistently to “the OCC” rather than to “the appropriate OCC supervisory office.”

*101.7 Reelection.* This section of the proposed rule would have allowed a covered savings association to make a subsequent election after terminating an election. Under the proposed rule, a Federal savings association that wishes to make a subsequent election after terminating a previous election would have been subject to the same requirements as a Federal savings association making an election for the first time. However, a Federal savings association that previously made and terminated an election to operate as a covered savings association would have been required to wait five years after the termination before making a subsequent election.

The OCC did not receive any comments on this section and is adopting § 101.7 of the proposed rule without change.

*101.8 Evasion.* This section of the proposed rule would have provided that the OCC may disapprove a notice of election, termination, or reelection if the OCC has reasonable cause to believe the notice is made for the purpose of evading § 101.5 of the proposed rule, including as that section applies to a termination. For example, the OCC might disapprove a covered savings association’s notice of termination if it determined the covered savings association was attempting to terminate to take unfair advantage of an overlap between the period to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities provided for an election and the period to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities provided for a termination.

The final rule provides that the OCC may disapprove a notice of election, termination, or reelection if the OCC determines that notice is made for the purpose of evading § 101.5. This change clarifies that the OCC's determination that a notice is made for purposes of evasion is subject to review under the standards set out in 5 U.S.C. 706(2).

#### **IV. Regulatory Analysis**

##### Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, (RFA), requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of \$550 million or less and trust companies with total revenue of \$38.5 million or less) or to certify that the rule would not have a significant economic impact on a substantial number of small entities. The OCC supervises approximately 886 small entities, of which 258 are Federal savings associations.<sup>30</sup> Because the rule does not contain any new recordkeeping, reporting, or compliance requirements, we anticipate that it will not impose costs on OCC-supervised institutions unless they elect to operate as a covered savings association.<sup>31</sup> Therefore, the OCC

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<sup>30</sup> We base our estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution a small entity. We use December 31, 2017, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See footnote 8 of the U.S. Small Business Administration's Table of Size Standards.

<sup>31</sup> We believe that costs associated with electing to be treated as a covered savings association will be minimal and that Federal savings associations will only choose to be treated as a covered savings associations if the benefits outweigh the costs.

certifies that the final rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.

#### Unfunded Mandates Reform Act of 1995

The OCC has analyzed the final rule under the factors set forth in the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. Under this analysis, the OCC considers whether the Federal mandates imposed by the rule may result in an expenditure of \$100 million or more by state, local, and tribal governments, or by the private sector, in any one year (adjusted annually for inflation). The rule does not impose new mandates. Therefore, the OCC concludes that the rule will not result in an expenditure of \$100 million or more annually by state, local, and tribal governments, or by the private sector. Accordingly, the OCC has not prepared a written statement to accompany this rule.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. The OCC has submitted the information collection requirements imposed by this final rule to OMB for review, as requested by OMB in its notice of action regarding the OCC's submission at the proposed rule stage. The OCC received two comments regarding the information collection.

Two commenters stated that submitting information relating to existing branches and agencies is unduly burdensome. One commenter argued that the rule could be interpreted to require Federal savings associations to submit information on a significant number of branches and agencies, not just newly established ones. The commenter noted that many branch applications or notices were submitted prior to the integration of 12 CFR part 5. The commenter

also stated that applications or notices are generally not required for a Federal savings association to establish an agency. The commenter believes the requirement would be unnecessary, would require time and cost that do not serve a compelling supervisory or regulatory purpose, and would require a covered savings association to disclose more information than a Federal savings association or national bank would be required to provide. The commenter recommended that this requirement be eliminated or that its scope be clarified. The second commenter stated that the requirement to provide information on existing branches and agencies is unnecessary and burdensome, noting that it may be difficult to provide information on branches that have been operational for a number of years. The commenter suggested that all branches that are open or operational or that have received regulatory approval or non-objection should be presumed to be compliant and documentation should not be required. Neither commenter believes that the OCC has clearly indicated why it needs this information. As noted earlier in this preamble, the final rule does not require Federal savings associations to identify branches or agencies in a notice of an election. The OCC believes that it can obtain sufficient information about the branches and agencies of a prospective covered savings association by reviewing information the association submits on its nonconforming subsidiaries, assets, or activities. This information will allow the OCC to monitor covered savings associations for compliance with the final rule without imposing any additional burden that could be associated with submitting information identifying branches and agencies. The OCC has changed the information collection so that it no longer includes a requirement to submit information identifying branches and agencies.

Under the information collection, a Federal savings association seeking to operate as a covered savings association would be required under § 101.3(a) to submit a notice making an

election to the OCC that: (1) is signed by a duly authorized officer of the Federal savings association; and (2) identifies and describes any nonconforming subsidiaries, assets, or activities that the Federal savings association operates, holds, or conducts at the time its submits its notice.

Under § 101.5(a), the OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity.

A covered savings association may submit a notice to terminate its election to operate as a covered savings association under § 101.6 using similar procedures to those for an election. In addition, after a period of five years, a Federal savings association that has terminated its election to operate as a covered savings association may submit a notice under § 101.7 to reelect using the same procedures used for its original election.

Title: Covered Savings Association Notice.

OMB Control No.: 1557-0341.

Frequency of Response: On occasion.

Affected Public: Businesses or other for-profit organizations.

**Election, Termination, Reelection:**

Estimated Number of Respondents: 295

Estimated Burden per Respondent: 1 hour

Estimated Total Annual Burden: 295 hours

**Plan to Divest:**

Estimated Number of Respondents: 25

Estimated Burden per Respondent: 2 hours

Estimated Total Annual Burden: 50 hours

**Total Annual Burden: 345 hours**

In addition, the OCC will file a nonmaterial change to amend its Licensing Manual Collection (OMB Control No. 1557-0014) to increase the respondent count to reflect additional filings from Federal savings associations.

Comments continue to be invited on:

- (a) Whether the collections of information are necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;
- (b) The accuracy of the OCC's estimates of the burden of the collections of information;
- (c) Ways to enhance the quality, utility, and clarity of the information to be collected;
- (d) Ways to minimize the burden of the collections on respondents, including through the use of automated collection techniques or other forms of information technology; and
- (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Riegle Community Development and Regulatory Improvement Act of 1994

Section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4802(a), (RCDRIA) requires that the OCC, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative

burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA, 12 U.S.C. 4802(b), requires new regulations and amendments to regulations that impose additional reporting, disclosure, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. The OCC has considered the administrative burdens and benefits of the rule in determining the effective date and administrative compliance requirements for this rule. The final rule will be effective no earlier than the first day of the calendar quarter following 30 days from the date on which the final rule is published in the Federal Register.

#### Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801 et seq., the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 12 CFR Part 101**

Administrative practice and procedure, Assets, Reporting and recordkeeping requirements, Savings associations.

For the reasons set forth in the preamble, and under the authority of 12 U.S.C. 93a and 5412(b)(2)(B), chapter I of title 12 of the Code of Federal Regulations is amended by adding part 101 to read as follows:

#### **PART 101 – COVERED SAVINGS ASSOCIATIONS**

Secs.

101.1 Authority and purposes.

101.2 Definitions and computation of time.

101.3 Procedures.

101.4 Treatment of covered savings associations.

101.5 Nonconforming subsidiaries, assets, and activities.

101.6 Termination.

101.7 Reelection.

101.8 Evasion.

**Authority:** 12 U.S.C. 93a, 1462a, 1463, 1464, 1464a, and 5412(b)(2)(B).

**§ 101.1 Authority and purposes.**

(a) *Authority.* This part is issued pursuant to sections 3, 4, 5, and 5A of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1462a, 1463, 1464, and 1464a), section 5239A of the Revised Statutes (12 U.S.C. 93a), and section 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5412(b)(2)(B)).

(b) *Purposes.* This part establishes standards and procedures for a Federal savings association to elect to operate as a covered savings association pursuant to section 5A of the HOLA and clarifies the requirements for the treatment of covered savings associations. It also establishes standards and procedures to terminate an election and to reelect to operate as a covered savings association.

**§ 101.2 Definitions and computation of time.**

(a) *Definitions.* As used in this part:

(1) *Covered savings association* means a Federal savings association that has made an election that is in effect in accordance with § 101.3(b).

(2) *Effective date of the election* means, with respect to a Federal savings association, the date on which the Federal savings association's election to operate as a covered savings association takes effect pursuant to § 101.3(b).

(3) *Nonconforming subsidiary, asset, or activity.* (i) With respect to a covered savings association:

(A) Means any subsidiary, asset, or activity that is not permissible for a covered savings association or, if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a covered savings association; and

(B) Includes an investment in a subsidiary or other entity that is not permissible for a covered savings association; and

(ii) With respect to a Federal savings association that has terminated an election to operate as a covered savings association:

(A) Means any subsidiary, asset, or activity that is not permissible for a Federal savings association or, if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a Federal savings association; and

(B) Includes an investment in a subsidiary or other entity that is not permissible for a Federal savings association.

(4) *Similarly located national bank* means, with respect to a covered savings association, a national bank that has its main office situated in the same location as the home office of the covered savings association.

(b) *Computation of time.* The OCC will compute a period of days for purposes of this part in accordance with 12 CFR 5.12.

### **§ 101.3 Procedures.**

(a) *Notice—(1) Submission.* A Federal savings association that had total consolidated assets of \$20 billion or less as of December 31, 2017, as reported on the Federal savings association's Consolidated Reports of Condition and Income for December 31, 2017, may make an election to operate as a covered savings association by submitting a notice to the OCC.

(2) *Contents.* The notice shall:

(i) Be signed by a duly authorized officer of the Federal savings association; and

(ii) Identify and describe each nonconforming subsidiary, asset, or activity that the Federal savings association operates, holds, or conducts at the time it submits the notice, each of which must be divested, conformed, or discontinued pursuant to § 101.5.

(b) *Effective date of the election*—(1) *In general*. An election to operate as a covered savings association shall take effect on the date that is 60 days after the date on which the OCC receives the notice submitted under paragraph (a) of this section.

(2) *Earlier notice*. Notwithstanding paragraph (b)(1) of this section, the OCC may notify a Federal savings association in writing prior to the expiration of 60 days that it is eligible to make an election, and the election shall take effect on the date the OCC so notifies the Federal savings association.

#### **§ 101.4 Treatment of covered savings associations.**

(a) *In general*—(1) *National bank activities*. Except as provided in this section, a covered savings association may engage in any activity that is permissible for a similarly located national bank to engage in as part of, or incidental to, the business of banking, or explicitly authorized by statute for a national bank, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank, as determined by the OCC for purposes of this part.

(2) *Treatment as a Federal savings association.* A covered savings association shall continue to comply with the provisions of law that apply to Federal savings associations for purposes of:

(i) Governance (including incorporation, bylaws, boards of directors, shareholders, members, and distribution of dividends);

(ii) Consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership;

(iii) Provisions of law applicable only to Federal mutual savings associations;

(iv) Offers and sales of securities at an office of a Federal savings association;

(v) Savings bank activities authorized by section 5(i)(4) of HOLA;

(vi) Issuance of subordinated debt securities and mandatorily redeemable preferred stock;

(vii) Increases in permanent capital of a Federal stock savings association;

(viii) Rules of practice and procedure in adjudicatory proceedings;

(ix) Rules for investigative proceedings and formal examination proceedings;

(x) Removals, suspensions, and prohibitions where a crime is charged or proven;

(xi) Security procedures;

(xii) Maintenance of records and recordkeeping and confirmation requirements for securities transactions;

(xiii) Accounting and disclosure standards;

(xiv) Nondiscrimination; and

(xv) Advertising.

(b) *Existing branches.* A covered savings association may continue to operate any branch or agency that the covered savings association operated on the effective date of the election.

(c) *Assets greater than \$20 billion.* A covered savings association may continue to operate as a covered savings association if, after the effective date of the election, it has total consolidated assets greater than \$20 billion.

**§ 101.5 Nonconforming subsidiaries, assets, and activities.**

(a) *Divestiture, conformance, or discontinuation.* A covered savings association shall divest, conform, or discontinue a nonconforming subsidiary, asset, or activity at the earliest time that

prudent judgment dictates but not later than two years after the effective date of the election. The OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity.

(b) *Extension.* The OCC may grant a covered savings association extensions of not more than two years each up to a maximum of eight years if the OCC determines that:

(1) The covered savings association has made a good faith effort to divest, conform, or discontinue the nonconforming subsidiary, asset, or activity;

(2) Divestiture, conformance, or discontinuation would have a material adverse financial effect on the covered savings association; and

(3) Retention or continuation of the nonconforming subsidiary, asset, or activity is consistent with the safe and sound operation of the covered savings association.

(c) *Applicable law.* Until a covered savings association divests, conforms, or discontinues a nonconforming subsidiary, asset, or activity, the nonconforming subsidiary, asset, or activity shall continue to be subject to the same provisions of law that applied to the nonconforming subsidiary, asset, or activity on the day before the effective date of the election, including any amendments to those provisions of law.

## **§ 101.6 Termination.**

(a) *Termination.* A covered savings association may terminate its election to operate as a covered savings association, after an appropriate period of time as determined by the OCC, by submitting a notice to the OCC.

(b) *Procedures.* A covered savings association wishing to terminate its election shall comply with, and shall be subject to, the provisions of §§ 101.2, 101.3, and 101.5, except that:

(1) The provisions of §§ 101.3 and 101.5 shall be applied by substituting “covered savings association” for “Federal savings association” and “Federal savings association” for “covered savings association” each place those terms appear in those sections;

(2) Section 101.3(a)(1) shall not apply; and

(3) Sections 101.3 and 101.5 shall be applied by substituting “effective date of the termination” for “effective date of the election.”

(c) *Applicable law.* On and after the effective date of the termination, a Federal savings association that has terminated its election to operate as a covered savings association shall be subject to the same provisions of law as a Federal savings association that has not made an election under this part.

### **§ 101.7 Reelection.**

(a) *Reelection.* A Federal savings association that has terminated its election to operate as a covered savings association may submit a notice to reelect to operate as a covered savings association, if at least five years have elapsed since the effective date of the termination. Upon determining that good cause exists, the OCC may permit a Federal savings association to reelect to operate as a covered savings association prior to the expiration of the five-year period.

(b) *Procedures and treatment.* A Federal savings association reelecting to operate as a covered savings association shall comply with, and shall be subject to, the provisions of this part as if it were making an election for the first time.

**§ 101.8 Evasion.**

The OCC may disapprove any notice submitted pursuant to this part if the OCC determines that the notice is made for the purpose of evading § 101.5, including as that section applies to a covered savings association terminating an election.

Dated: May 20, 2019.

\_\_\_\_\_/s/\_\_\_\_\_

Joseph M. Otting,  
Comptroller of the Currency.