

Comment Letter on OCC Proposal Related to National Bank Subsidiaries, February 2000

February 14, 2000

Docket No. 00-03
Communications Division
Third Floor
Office of the Comptroller of the Currency
250 E Street S.W.
Washington, DC 20219

Re: Notice of Proposed Rulemaking

Dear Sirs:

The Investment Company Institute¹ appreciates the opportunity to file these comments in response to the notice of proposed rulemaking issued by the Office of the Comptroller of the Currency (the "OCC") concerning Financial Subsidiaries and Operating Subsidiaries.²

According to the notice, the OCC proposes (1) to amend its regulations to implement Section 121 of the Gramm-Leach-Bliley Act (the "GLB Act"), which authorizes national banks to conduct expanded financial activities through so-called "financial subsidiaries," and (2) to make conforming changes to its operating subsidiary rule. To implement the proposal, the OCC would revise its current regulations on operating subsidiaries, 12 C.F.R. 5.34, and add a new regulation, 12 C.F.R. 5.39, to govern financial subsidiaries.

Proposed Amendments to Section 5.34

Generally speaking, Section 5.34 would revise, consistent with the GLB Act, the activities that may be conducted through an operating subsidiary. The amendments also would obviate the need for a bank to file an application with the OCC prior to engaging in certain permitted activities; instead, a national bank would be required to provide the OCC with a written notice of such activities. The Institute supports the adoption of the amendments proposed to Section 5.34. In particular, we support subdivision (e)(3), which would clarify, consistent with the functional regulation provisions of the GLB Act, that the OCC's examination and supervision authority over operating subsidiaries is subject to the limitations and requirements of Section 45 of the Federal Deposit Insurance Act (the "FDI Act") and Section 115 of the GLB Act. As the OCC noted in the preamble to the proposal, this provision was added to Section 5.34(e) to clarify that "the OCC's authority to examine and take action against certain subsidiaries is subject to the[se] limitations and requirements. The purpose of this change is to recognize the provisions in the GLB Act relating to functional regulation of certain types of bank subsidiaries and affiliates."³

Proposed New Section 5.39

The OCC has also proposed a new section, Section 5.39, to govern financial subsidiaries of a national bank. Unlike the proposed amendments to Section 5.34, however, proposed Section 5.39 would not include an express provision recognizing the functional regulation provisions of the GLB Act.⁴ The Institute believes that proposed Section 5.39 should be revised to add a provision similar to that included in proposed Section 5.34(e)(3), expressly stating that the OCC's authority under Section 5.39 shall be subject to the limitations and requirements of Section 45 of the FDI Act and Section 115 of the GLB Act.

It is clear that the limitations and requirements of Section 45 of the FDI Act and Section 115 of the GLB Act apply equally to the OCC's authority with respect to both operating and financial subsidiaries that are bank subsidiaries and affiliates. Section 45 of the FDI Act states that [n]otwithstanding any other provision of law, [the applicable provisions of new Sections 5(c), 5(g) and 10A of the Bank Holding Company Act] shall also limit whatever authority that a Federal banking agency might otherwise have under any statute

or regulation to require reports, make examinations, impose capital requirements, or take any other direct or indirect action with respect to any functionally regulated affiliate of a depository institution, subject to the same standards and requirements as are applicable [to the Federal Reserve Board under those provisions].⁵

Section 45 therefore limits the authority of the OCC with respect to functionally regulated affiliates under all statutory schemes, including the National Bank Act, the FDI Act, the Federal Reserve Act, and the International Lending and Supervision Act. Thus, if a financial subsidiary is a functionally regulated affiliate of a national bank, the restrictions of Section 45 of the GLB Act would apply to the OCC's authority over such affiliate or subsidiary.

Similarly, Section 115 of the GLB Act precludes the federal banking agencies from inspecting or examining any registered investment company that is not a bank holding company or savings and loan holding company. Thus, if a financial subsidiary is a registered investment company, the restrictions of Section 115 of the GLB Act would apply to the OCC's authority over such subsidiary.

In view of the fact that these provisions of the FDI Act and the GLB Act do not distinguish between financial subsidiaries and operating subsidiaries, the Institute recommends that the OCC revise proposed Section 5.39 to add a provision that is substantively similar to the provision in proposed Section 5.34(e)(3) relating to functional regulation.

Other Supervisory Provisions

As a general matter, we note that the OCC will be encountering circumstances that will involve taking actions, including supervisory or enforcement actions, that will need to take into account Section 45 of the FDI Act and Section 115 of the GLB Act as well as the other functional regulation oversight provisions in Subtitle B of Title I of the GLB Act. We believe that the OCC should make clear in this current rulemaking initiative that these provisions, as a general matter, apply to all previous and proposed actions of the OCC with respect to functionally regulated subsidiaries and affiliates.

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The Institute appreciates your consideration of our comments on these issues. If you have any questions, please do not hesitate to contact me at (202) 326-5815 or Tamara Reed of the Institute at (202) 326-5825.

Sincerely,

Craig S. Tyle
General Counsel

ENDNOTES

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,018 open-end investment companies ("mutual funds"), 495 closed-end investment companies, and 8 sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.802 trillion, accounting for approximately 95% of total industry assets, and over 78.7 million individual shareholders.

² See Docket No. 00-03; RIN 1557-AB80; 65 Fed.Reg. 3157 (January 20, 2000) (the "Notice").

³ See the Notice at p. 3160.

⁴ Moreover, proposed Section 5.34(c) specifically provides that Section 5.34 "does not apply to financial subsidiaries authorized under Section 5.39."

⁵ The term "functionally regulated affiliate" of a depository institution means any affiliate that: (1) is not a depository institution holding company, that is, a bank holding company or savings and loan holding company; and (2) is a nonbank functionally regulated entity, as defined. The term "affiliate" in the FDI Act, 12 U.S.C. 1813(w)(6), has the meaning given to the term in Section 1841(k) of the BHC Act, that is, "any company that controls, is controlled by, or is under common control with another company." 12 U.S.C. 1841(k). Thus, the term includes a subsidiary of a depository institution.