



**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 51**

**[Docket ID OCC-2016-0017]**

**RIN 1557-AE07**

**Receiverships for Uninsured National Banks**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is proposing a rule addressing the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC) (uninsured banks) and for which the FDIC would not be appointed as receiver. The proposed rule would implement the provisions of the National Bank Act (NBA) that provide the legal framework for receiverships of such institutions.

**DATES:** Comments must be received no later than [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Receiverships for Uninsured National Banks” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

**Federal eRulemaking Portal—“Regulations.gov”:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2016-0017” in the Search box and click “Search.” Click on “Comment Now” to submit public comments.

- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.

- **E-mail:** *regs.comments@occ.treas.gov*.

- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.

- **Hand Delivery/Courier:** 400 7<sup>th</sup> Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.

- **Fax:** (571) 465-4326.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC-2016-0017” in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2016-0017” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen and then “Comments.” Comments can be filtered by clicking on “View All” and then using the filtering tools on the left side of the screen.

- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. Supporting materials may be viewed by clicking on “Open Docket Folder” and then clicking on “Supporting Documents.” The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 400 7<sup>th</sup> Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

**FOR FURTHER INFORMATION CONTACT:**

Mitchell Plave, Special Counsel, Legislative and Regulatory Activities Division, (202) 649-5490, or Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 649-5500, or for persons who are deaf or hard of hearing, TTY, (202) 649-5597, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The proposed rule addresses how the OCC would conduct the receivership of an uninsured national bank.<sup>1</sup> The proposed rule would implement the provisions of the NBA that provide the legal framework for receiverships for such institutions, 12 U.S.C. 191 – 200.<sup>2</sup>

There are only a small number of uninsured national banks in operation today. The OCC,

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<sup>1</sup> Unlike national trust banks, all Federal savings associations (FSAs), including FSA trust banks, are required to be insured. For this reason, this proposed rule would not apply to FSAs, given that receiverships for FSAs would be conducted by the FDIC.

<sup>2</sup> The proposed rule establishes the basic receivership framework, which may be supplemented over time with more detailed guidance, for example, concerning the details of the receiver’s administration of the receivership estate.

however, retains the authority to grant new charters to entities whose business plan does not call for them to obtain deposit insurance if the OCC determines that the entities have a reasonable chance of succeeding and can operate in a safe and sound manner, among other considerations. Although the OCC has not placed an uninsured national bank into receivership since the Great Depression, there are several reasons to consider articulating a framework for such receiverships now. First, since the financial crisis of 2007-2008, regulators have undertaken, on both a domestic and coordinated global basis, to evaluate, discuss, and maintain preparedness for effective governmental responses to critical financial distress. This focus highlights the need to consider an appropriate resolution framework for entities, such as uninsured national banks, that currently lack such a framework. Second, the establishment of a framework for receivership for these uninsured institutions would provide clarity to market participants about how they will be treated in receivership. The proposed rule would set forth a framework the OCC can use should an uninsured institution weaken and fail, be it an uninsured trust bank or another uninsured special purpose bank.

## **II. Background**

### *Statutory Authority for Receiverships*

From the beginning of the national banking system in 1863 until the creation of the FDIC in 1933, receiverships of national banks were conducted by the Comptroller and by a receiver who was appointed by, and worked under the direction of, the Comptroller.<sup>3</sup> The Comptroller and receiver had the powers and responsibilities set out in the receivership provisions of the NBA and exercised the powers available at common law for receivers.<sup>4</sup> During this time, a substantial body of case law developed applying the statutory provisions and common law

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<sup>3</sup> See *Earle v. Penn*, 178 U.S. 449 (1900); *Cook County Nat'l Bank v. United States*, 107 U.S. 445 (1883).

<sup>4</sup> See 12 U.S.C. 191-200.

principles to national bank receiverships.

In 1933, the FDIC was established and, among its other responsibilities, was designated as the receiver for national banks.<sup>5</sup> As receiver, the FDIC has both the powers available to national bank receivers under the NBA and additional powers provided to the FDIC in the Federal Deposit Insurance Act (FDIA). When the FDIC serves as receiver, it does not operate under the direction of the Comptroller, unlike the pre-1933 non-FDIC receivers.<sup>6</sup> From 1933 through 1989, the FDIC was designated to be appointed receiver for national banks generally, both insured and uninsured.<sup>7</sup>

The receivership regime for national banks was significantly changed again when Congress adopted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). Among many other consequences, the amendments to the FDIA in FIRREA resulted in the FDIC being specified as the mandatory receiver only for insured depository institutions. Thus, today the FDIC is the required receiver only for an insured national (or state) bank.<sup>8</sup> Congress also subsequently amended the receivership appointment provisions of the NBA, 12 U.S.C. 191, to provide that the Comptroller may appoint a receiver for any national bank and that, if the bank is an insured bank, the receiver must be the FDIC.<sup>9</sup> Post-FIRREA and post-

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<sup>5</sup> See Banking Act of 1933, 73d Cong., 1<sup>st</sup> Sess., ch. 89, section 12B(1), 48 Stat. 172 (1933).

<sup>6</sup> See 12 U.S.C. 1821(c)(2)(C).

<sup>7</sup> For example, before its amendment in 1989, section 11(c) of the FDIA, 12 U.S.C. 1821(c) stated that, whenever the Comptroller appointed a receiver for any insured or uninsured national bank or Federal branch, the Comptroller “shall appoint” the FDIC receiver for such closed bank. 12 U.S.C. 1821(c) (1988). Federal branches were added to section 1821(c) in 1978 when Federal branches were created in the International Banking Act, 12 U.S.C. 3101 *et seq.*

<sup>8</sup> Section 11(c)(2)(A)(ii) of the FDIA provides that the FDIC “shall” be appointed receiver, and “shall” accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law. 12 U.S.C. 1821(c)(2)(A)(ii). The term “Federal depository institution” includes national banks. 12 U.S.C. 1813(c)(4).

<sup>9</sup> In 1991, in the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Congress amended 12 U.S.C. 191 to provide that the Comptroller may appoint the FDIC “as receiver for any national banking association.” Pub. L. 102-242, section 133, 105 Stat. 2236, 2271. FDICIA also amended section 191 to set out the current grounds for receivership. Prior to the amendment, section 191 provided that the Comptroller may appoint a receiver

FDICIA, the FDIA no longer expressly addresses receiverships of uninsured national banks, and there are no statutory limits on the Comptroller's discretion with respect to whom to appoint as receiver of an uninsured bank.

Based on this statutory history, it appears that today, unlike in the period between 1933 and 1989, the FDIA would not apply to a receivership of an uninsured bank conducted by the OCC, and that such a receivership would be governed exclusively by the NBA provisions, the common law of receivers, and cases applying the statutes and common law to national bank receiverships.<sup>10</sup> FIRREA and FDICIA greatly expanded the FDIC's powers in resolving failed insured depository institutions. The OCC believes that those additional powers are not available to the OCC as receiver of uninsured banks under the NBA.

#### *Uninsured Banks Supervised by the OCC*

As of May 2016, the OCC supervises 52 uninsured banks. Currently, all of these institutions are trust banks. The OCC may charter national banks whose operations are limited to those of a trust company and related activities (national trust bank).<sup>11</sup> The activities of national trust banks are similar to those of trust departments of full-service banks. But unlike a trust department, they are not part of a larger bank that also engages in commercial banking. All but a handful of the national trust banks do not engage in the business of receiving deposits and instead hold trust funds, which are off-balance sheet assets that are not considered to be deposits and are not insured by the FDIC.

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for one of three grounds previously set out in the statute. In October 1992, before the amendment went into effect, Congress revised the language to provide that the receiver shall be the FDIC "if the national bank is an insured bank." Act of October 28, 1992, Pub L. 102-550, Title XVI, Subtitle A, section 1609, 106 Stat. 4090 (1992).

<sup>10</sup> While the receivership operations will be governed by the NBA provisions, the common law of receivers, and cases applying the statutes and common law to national bank receiverships, the grounds for appointment of a receiver in the NBA for a national bank, including an uninsured bank, incorporate by reference the grounds for appointment in the FDIA. See 12 U.S.C. 191(a)(1) (referring to 12 U.S.C. 1821(c)(5)).

<sup>11</sup> See, e.g., 12 U.S.C. 27(a); 12 CFR 5.20(l). The OCC also charters Federal savings associations. Unlike national trust banks, all Federal savings associations are required to be insured.

National trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. These banks exercise fiduciary and custody powers, do not make loans, do not rely on deposit funding, and consequently have simple liquidity management programs. In view of these differences, the OCC typically requires these banks to hold capital in a specific minimum amount; as a result they hold capital in amounts that substantially exceed the “well capitalized” standard that pertains when national banks calculate their capital pursuant to the OCC’s rules in 12 CFR part 3.

The business model of national trust banks is to generate income in the form of fees by offering fiduciary and custodial services that generally fall into one or more of a few broad categories. Some of these national trust banks focus on institutional asset management, providing trust and custodial services for investment portfolios of pension plans, foundations and endowments, and other entities, often with an investment management component. These firms often also offer private wealth management and individual retirement savings services. These services provided by national trust banks are similar to those provided by other non-bank investment management firms.

A few other national trust banks serve primarily as a fiduciary and custodian to facilitate the establishment of Individual Retirement Accounts by customers of an affiliated mutual fund complex or broker-dealer firm. While it is not common, a few national trust banks have been established for a special purpose within a larger financial company to accomplish a transition or other specific purpose over a limited time period, such as facilitating a consolidation.

Some national trust banks provide custodial services. One example of this type of service is corporate trust accounts, under which the bank performs services for others in connection with

their issuance, transfer, and registration of debt or equity securities. Other custody accounts may be a holding facility for customer securities, where the bank assists institutional customers with global settlement and safekeeping of the customer's securities.

Many of the uninsured national trust banks are subsidiaries or affiliates of a full-service insured national bank. Another group are affiliates of an insured state bank. In these cases where the national trust bank is part of a bank holding company, the bank and the company have decided for a variety of business reasons to offer some fiduciary services to their customers in a separate national trust bank charter. National trust banks affiliated with other banks can vary greatly in complexity, in the type of fiduciary or custody businesses they engage in, and in the amount of assets under management or administration. Typically they maintain a few thousand accounts for individuals or family trusts containing assets totaling in the range of \$10 billion, or in other cases maintaining as many as 10,000 corporate custody accounts totaling in the range of \$20 billion.

Other uninsured national trust banks are not affiliated with an insured depository institution, but are affiliated with an investment management firm or other financial services firm. These national trust banks provide fiduciary and custody services for customers of the firm. National trust banks affiliated with an investment management firm or other financial services firm also can vary greatly in complexity, in the type of fiduciary or custody businesses they engage in, and in the amount of assets under management or administration. While these national trust banks may, in exceptional cases, hold as much as \$1 trillion in fiduciary and custodial assets, they more commonly hold assets in the \$5-\$50 billion range across a few thousand accounts.

Still other national trust banks have no affiliation with a larger parent company. These



independent firms typically manage a few billion dollars in fiduciary and custodial assets across a few thousand accounts, while others might be described as boutique trust firms, not affiliated with a larger parent company, with a few employees, fewer than 500 customers, and \$1 billion or less in fiduciary assets.

The OCC has not appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930-1933. Because of the fundamentally different business model of national trust banks, compared to commercial and consumer banks and savings associations noted above, national trust banks face very different types of risks. National trust banks primarily face operational, compliance, strategic, and reputational risks without the credit and liquidity risks that additionally impact the solvency of commercial and consumer banks. While any of these risks can result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver.<sup>12</sup>

The OCC believes it would nevertheless be beneficial to financial market participants and the broader community of regulators for the OCC to clarify the receivership framework for uninsured banks. Although the OCC conducted 2,762 receiverships pursuant to this framework in the years prior to the creation of the FDIC,<sup>13</sup> and the associated legal issues are the subject of a robust body of published judicial precedents, the details have not been widely articulated in recent jurisprudence or legal commentary. This proposal may also facilitate synergies with the

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<sup>12</sup> In some instances, uninsured trust banks enter into safeguard agreements with the OCC to facilitate early resolution through a sale, merger or liquidation, thereby avoiding the need for a receivership. These safeguard agreements are entered into as part of the licensing process and concern operations, capital, and liquidity.

<sup>13</sup> *Annual Report of the Comptroller of the Currency for the Year Ended October 31, 1934* at 33 (discussing the status of active and closed receiverships under the jurisdiction of the Comptroller between 1865 and 1934).

ongoing efforts of U.S. and international financial regulators since the financial crisis to enhance our readiness to respond effectively to the different critical financial distresses that could manifest themselves unexpectedly in the diverse types of financial firms presently operating in the market.

#### *Other Types of Uninsured National Banks*

The OCC has the authority to charter and supervise special purpose banks with operations limited solely to providing fiduciary services.<sup>14</sup> In addition to national trust banks, the OCC also may charter other special purpose banks with business models that are within the business of banking. The OCC's rules provide that a special purpose bank must conduct at least one of the three core banking functions, namely receiving deposits, paying checks, or lending money.<sup>15</sup> As part of the agency's initiative on responsible innovation in the Federal banking system, the OCC is considering how best to implement a regulatory framework that is receptive to responsible innovation, such as advances in financial technology.<sup>16</sup> In conjunction with this effort, the OCC is considering whether a special purpose charter could be an appropriate entity for the delivery of banking services in new ways. For this reason, the OCC requests comment on the utility of the receivership structure in the proposed rule for receivership of such a special purpose bank.

*Question 1.* Would application of the NBA's legal framework for receiverships of uninsured banks to such innovative special purpose banks raise any unique considerations?

#### *Uninsured Federal Branches and Agencies*

In addition to conducting receiverships for uninsured national banks, the OCC has

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<sup>14</sup> 12 U.S.C. 27(a); 12 CFR 5.20(e)(1), 5.20(l).

<sup>15</sup> 12 CFR 5.20(e)(1).

<sup>16</sup> See OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective* at 2 (March 2016) available at <http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>.

statutory authority to appoint and oversee a receiver for uninsured Federal branches and agencies (uninsured Federal branches).<sup>17</sup> While there are some powers and functions that overlap in conducting receiverships for uninsured banks and Federal branches, there are differences that make receiverships for Federal branches more complex.

The International Banking Act of 1978<sup>18</sup> (IBA) sets forth the legal framework for the establishment and operation of federally licensed branches and agencies of foreign banks. Under the IBA, a receiver appointed by the Comptroller for an uninsured Federal branch would exercise the same rights, privileges, powers, and authority in conducting the receivership as it would in conducting a receivership for an uninsured bank.<sup>19</sup> As such, with some exceptions, the provisions in the NBA for receiverships would generally apply to receiverships for Federal branches.<sup>20</sup> However, the nature of an uninsured Federal branch's more typical commercial banking type of business model, the overlay of other Federal laws including provisions on receiverships in the IBA, and concerns being deliberated currently on a global basis among financial regulators about the resolution of global systemically important banks make the subject of uninsured Federal branch resolutions a more complicated topic.

For this reason, the scope of this proposed rule does not extend to receiverships for uninsured Federal branches. The OCC will continue reviewing the regulatory and legal issues relating to receiverships for Federal branches and will confer with other regulators on these issues. The OCC may seek public input on this subject as part of our deliberations on the topic in the future.

#### *Cost Implications of OCC Receivership Function*

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<sup>17</sup> 12 U.S.C. 3102(j).

<sup>18</sup> 12 U.S.C. 3101 *et seq.*

<sup>19</sup> 12 U.S.C. 3102(j).

<sup>20</sup> This approach is consistent with the "national treatment" requirement in the IBA, 12 U.S.C. 3102(b).

The OCC's establishment of a receivership framework may also raise cost implications for the OCC. In addition to the OCC's costs incidental to the selection and supervision of a receiver, and approval of claims against the receivership for a share of the receiver's liquidating dividends, the receiver for an uninsured national bank will, as a matter of necessity, incur administrative costs in performing liquidation functions. As discussed below, the NBA provides that the receiver's administrative expenses are to be paid first out of the assets of the receivership, but there may be circumstances where the receiver's administrative expenses exceed those resources.

The OCC is considering how it might cover these types of costs. One approach would be to build resources to defray these costs into our structure for collection of assessments from the uninsured institutions we supervise, in accordance with 12 CFR part 8. Any change to the OCC's assessments would be set forth in a separate notice of proposed rulemaking.

*Question 2.* The OCC requests comment on alternatives that might be implemented to take account of these cost considerations.

### **III. Proposed Rule and Request for Comment**

#### *Overview*

The proposed rule, as described below, incorporates the framework set forth in the NBA for the Comptroller to appoint a receiver for an uninsured bank, generally under the same grounds for appointment of the FDIC as receiver for insured national banks. The uninsured bank may challenge the appointment in court, and the NBA affords jurisdiction to the appropriate United States district court for this purpose. The OCC will provide the public with notice of the appointment, as well as instructions for submitting claims against the uninsured bank in receivership. The OCC may appoint any person as receiver, including the OCC or another

government agency.

The receiver carries out its duties under the direction of the Comptroller. Under the NBA, the OCC functions in two capacities. Its primary capacity is that of a regulatory agency, in which the OCC oversees national banks, Federal savings associations, and Federal branches and Federal agencies, supervising them under the charge of assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.<sup>21</sup> The OCC is also directed by the NBA to act in a receivership capacity, under which the OCC appoints and oversees receivers for uninsured banks, thereby facilitating the winding down of bank operations, assets, and accounts while minimizing disruptions to customers and creditors of the institution. These capacities are separate in a way that parallels the separate capacities of the FDIC which, in its corporate capacity, serves as the insurer of depository institutions and oversees state non-member banks, and, in its receivership capacity, oversees the winding down of failed insured depository institutions. These two capacities are distinct both functionally and legally and reflect different public policy roles. A separate legal status attaches to each capacity.<sup>22</sup> A receiver acting under either the NBA in the case of the OCC or the FDIA in the case of the FDIC “step[s] into the shoes of” the failed institution.<sup>23</sup>

Under the “separate capacities” doctrine, which has long been recognized in litigation

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<sup>21</sup> 12 U.S.C. 1.

<sup>22</sup> See *O’Melveny & Meyers v. FDIC*, 512 U.S. 79, 85 (1994) (finding that FDIC-Receiver “steps into the shoes” of the failed institution and is “not the United States”). The *O’Melveny & Meyers* case concerns a choice of law question in a professional malpractice suit brought against the former counsel for the savings and loan. The Court concluded that the FDIC as receiver asserts the rights of the failed bank in receivership, not of “FDIC-Corporate,” and therefore state law, not Federal common law, applies. See also *Bullion Services v. Valley State Bank*, 50 F.3d 705, 708-709 (9th Cir.1995) (noting that, under Federal law, the FDIC is empowered to operate to act in two entirely separate and distinct capacities) (citations omitted); *FDIC v. Fonesca*, 795 F.2d 1102, 1109 (1<sup>st</sup> Cir. 1986) (stating that “‘Corporate’ FDIC and ‘Receiver’ FDIC are separate and distinct legal entities”); *Jones v. FDIC*, 748 F.2d 1400, 1402 (10th Cir.1984) (same).

<sup>23</sup> See *supra*, note 22.

involving the FDIC, it is well established that the agency, when acting in one capacity, is not liable for claims against the agency acting in its other capacity.<sup>24</sup> As a corollary to this doctrine, the assets the agency oversees in the receivership are limited to the funds making up the failed bank's estate. For these reasons, payment of claims or judgments concerning the receivership are made from the receivership estate, not from the agency's operating budget and funds.

The proposed rule reflects this well-established understanding of the functional and legal distinctions between the corporate and receiver capacities. The proposed rule follows the statutory framework under the NBA, under which persons with claims against an uninsured bank in receivership would file their claims with the receiver for the failed uninsured bank, for review by the OCC. In the event the OCC denies the claim, the only remedy available to the claimant is to bring a judicial action against the uninsured bank's receivership estate and assert the claim *de novo*. A person is also free to initiate its claim by bringing an action against the receivership estate in court for adjudication, and then submit the judgment to the OCC to participate in ratable dividends of liquidation proceeds along with other approved and adjudicated claims.<sup>25</sup>

Approved or adjudicated claims are paid solely out of the assets of the uninsured bank in receivership. As described in the proposed rule, the receiver liquidates the assets of the uninsured bank, with court approval, and pays the proceeds into an account as directed by the

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<sup>24</sup> See *Dababneh v. FDIC*, 971 F.2d 428, 432 (10th Cir.1992) (“[b]ecause they are discrete legal entities, Corporate FDIC is not liable” for obligations and liabilities of the FDIC as receiver) (citations omitted); *accord FDIC v. Nichols*, 885 F. 2d 633, 636 (9th Cir. 1989) (recognizing the corporate-receiver distinction in a case involving the purchase of receivership assets by FDIC in its corporate capacity); *FDIC v. Fonseca*, 795 F.2d 1102, 1109 (1st Cir.1986) (refusing to address claims asserted against FDIC in its corporate capacity that were based on actions taken by the FDIC as receiver); *Mill Creek Group, Inc. v. FDIC*, 136 F. Supp. 2d 36, 48 (D. Conn. 2001) (finding that FDIC in its corporate capacity could not be held liable for breach of a contract entered into by FDIC in its receiver capacity).

The same reasoning has been applied to cases involving the former Resolution Trust Corporation. See, e.g., *U.S. v. Schroeder*, 86 F.3d 114, 117 (8<sup>th</sup> Cir. 1996) (stating that it is “well established that the RTC, when acting in one capacity, is not liable for claims against the RTC acting in one of its other capacities”); see also *Howerton v. Designer Homes by Georges, Inc.*, 950 F.2d 281, 283 (5th Cir.1992) (“The RTC, in its corporate capacity, is not liable for claims against the RTC in its capacity as conservator or receiver.”)

<sup>25</sup> See *First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank*, 81 U.S. 383, 401 (1871).

OCC. The categories of claims and the priority thereof for payment are set out in the proposed rule. The proposed rule also clarifies certain powers held by the receiver, and describes the receiver's duties in winding up the affairs of the uninsured bank.

#### *Section-by-Section Analysis*

Proposed § 51.1 identifies the purpose and scope of the proposed rule and clarifies that the proposal would apply to receiverships conducted by the OCC under the NBA for national banks that are not insured by the FDIC. The proposed rule does not extend to receiverships for uninsured Federal branches, although elements of the framework may be similar for uninsured Federal branch receiverships, which would also be resolved under provisions of the NBA.

Proposed § 51.2 is based on 12 U.S.C. 191 and 192 and concerns appointment of a receiver. The proposed rule sets out the Comptroller's authority to appoint any person, including the OCC or another government agency, as receiver for an uninsured bank and provides that the receiver performs its duties subject to the approval and direction of the Comptroller.<sup>26</sup> If the Comptroller were to appoint the OCC as receiver, the OCC would act in a receivership capacity with respect to the uninsured bank in receivership, rather than in the OCC's supervisory capacity.

As discussed above, this dual capacity (OCC as supervisor versus OCC as receivership sponsor for an uninsured bank) recognizes that, while the NBA makes the receivership oversight and claims review functions of the Comptroller part of the OCC's responsibilities, the receivership oversight role is unique and distinct from the OCC's role as a Federal regulatory agency and supervisor of national banks and Federal savings associations. This is comparable to the dual capacity of the FDIC's receivership function for insured depository institutions pursuant

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<sup>26</sup> *But see* 12 U.S.C. § 1821(c)(6) (Comptroller may appoint the FDIC as conservator or receiver and the FDIC has discretion to accept such appointment); *id.* at § 1821(c)(2)(C) (FDIC "not subject to any other agency" when acting as conservator or receiver"). Read together, these provisions likely mean that the provision in § 51.2 concerning oversight of the receiver by the Comptroller would not apply to the FDIC acting as conservator or receiver for an uninsured institution, should the Comptroller appoint the FDIC and the FDIC accept such an appointment.

to the FDIA.

Proposed § 51.2 also provides that the Comptroller may require the receiver to post a bond or other security and the receiver may hire staff and professional advisors, with the approval of the Comptroller, if needed to carry out the receivership. This section also identifies the grounds for appointment of a receiver for an uninsured bank and notes that uninsured banks may seek judicial review of the appointment, pursuant to 12 U.S.C. 191.

Proposed § 51.3 provides that the OCC would provide notice to the public of the appointment of a receiver for the uninsured bank. The proposed rule specifies that one component of this notice will include publication in a newspaper of general circulation selected by the OCC for three consecutive months, as required by 12 U.S.C. 193. As a component of the OCC's notice to the public about the receivership, the OCC would also provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

The OCC believes that the purpose of section 193 may be better served by publication through means other than publication in a newspaper. For example, the OCC could provide direct notice to customers and creditors of the uninsured bank, to the extent the uninsured bank's records included current contact information. The OCC could also arrange to provide notice through electronic channels that customers would typically use to contact the uninsured bank, such as the uninsured bank's website. The OCC believes that an effective set of notice protocols would best be established on a case-by-case basis, in light of a specific uninsured bank's fiduciary and custodial activities, the types of customers served by the bank, coordination with other notice protocols under way for any related entity that is also undergoing resolution activity, and similar factors.

*Question 3.* The OCC invites comment on the appropriate types of, and channels for,



notices of receiverships, as well as how frequently to provide these notices. Commenters are also invited to address whether customized notice should be provided in addition to the requirement for newspaper publication, which would apply in every case.

Proposed § 51.4 addresses the submission of claims to the receiver for an uninsured bank. Under proposed § 51.4(a), a person with a claim against the receivership may submit a claim to the OCC, which would consider the claim and make a determination concerning its validity and approved amount. This process reflects the provisions in 12 U.S.C. 193 and 194 regarding presentation of claims and payment of dividends on claims that are proved to the satisfaction of the Comptroller. Proposed § 51.4 also provides that the Comptroller would establish a deadline for filing claims with the receiver, which could not be earlier than 30 days after the three-month publication of notice required by proposed § 51.3. This provision reflects NBA case law that permitted the Comptroller to establish a date for filing claims against the receiver for a failed bank, before this responsibility shifted to the FDIC.<sup>27</sup>

Proposed § 51.4(b) clarifies that persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication, in addition to, or as an alternative to, filing a claim with the OCC. If successful in court, such persons would be required to submit a copy of the final judgment to the OCC to participate in ratable dividends of liquidation proceeds along with claims against the bank in receivership submitted to, and approved by, the OCC. The proposed rule requires submission of a copy of the court's final judgment to the OCC. This provision is based on 12 U.S.C. 193 and 194.

In this regard, the receivership regime established by the NBA differs somewhat from the approach set out in other resolution regimes, such as the bankruptcy provisions of the United States Code and the receivership provisions of the FDIA. Under those resolution regimes,

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<sup>27</sup> See *Queenan v. Mays*, 90 F.2d 525, 531 (10th Cir. 1937).

creditors and claimants must generally submit their claims to the receivership estate for centralized administration and disposition, and claims that are not submitted by the claims deadline are barred from any participation in liquidation payments. The NBA provisions are different in that claimants are provided the opportunity to submit claims to the OCC for evaluation, but are not foreclosed from pursuing judicial resolution by filing litigation (or continuing a pre-existing lawsuit) in a court of competent jurisdiction against the uninsured bank in receivership.

The claims filing deadline established by the Comptroller pursuant to proposed § 51.4(a) is the date by which claimants seeking review under the OCC's claims process must make their submission. Nevertheless, a claimant that has not made a submission to the OCC by the deadline is not barred from initiating judicial claims against the uninsured bank in receivership solely by virtue of missing the claims deadline.<sup>28</sup>

The NBA's receivership provisions are like the receivership regime established by the FDIC under the FDIA, however, in that the avenue available to a party whose claim has been denied by the FDIC or OCC performing the agencies' receivership claims functions is to file (or continue) a *de novo* judicial action asserting the facts and legal theory of the claim against the receivership of the bank. The NBA does not contemplate or support anything in the nature of further action by the claimant in an administrative or judicial forum against the OCC seeking review of the claim determination.

The OCC believes that the proposed claims process offers many claimants advantages

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<sup>28</sup> See *First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank*, 81 U.S. 383, 401 (1871); *Queenan*, 90 F.2d at 531. As noted above, it is incumbent on a claimant that pursues the judicial route and ultimately obtains judicial relief to submit the final judicial determination and award to the OCC, in order to participate in the OCC's periodic ratable dividends of liquidation proceeds of the receivership estate. Except with respect to a valid and enforceable security interest in specific property of the uninsured bank established as part of a final judicial determination, there are no assets or funds available to a successful judicial claimant other than the ratable dividend process set out in 12 U.S.C. 194 and described in proposed § 51.8.

over other methods of claims resolution. In particular, for customers of the institution, and for holders of receivables and other contractual credit claims against the uninsured bank, the extent and validity of the claim will frequently be clear from the books and records of the bank, account statements provided to customers, and similar documents. The claims process provides an efficient way for identification, in a timely way, of the largest group of claimants who will be eligible to participate in ratable distributions of liquidation dividends, as described in proposed § 51.8. The OCC's public notices of the receivership will provide claimants with information on how to obtain more detailed instructions for submitting claims to the OCC and on disposition of claims.

If a claimant asserts that a claim incorporates a valid and enforceable security interest in assets of the uninsured bank, the OCC believes that it may be in that claimant's interest to apprise the OCC of that claim through the claims process. While the NBA does not restrict the holder of a valid security interest in uninsured bank assets from enforcing that interest through applicable state law, making the OCC aware of the claim and presenting an opportunity for it to be evaluated creates an opportunity to explore whether the receivership estate might negotiate an arrangement that would provide the claimant the value of the security interest in a more efficient way. Also, if it turns out that a portion of the claim remains unsecured, the claimant will have presented their claim to the OCC, and would participate in ratable dividends if the OCC approved the claim. For these reasons, the OCC has included language in proposed § 51.4(a) referring equally to secured and unsecured claims.

Proposed § 51.4(c) provides that if a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off will be considered as a claim.

To this end, proposed § 51.4(a) also includes language referring to claims for set-off. The right of set-off where parties have mutual obligations has long been recognized as an equitable principle.<sup>29</sup> Well-settled case law has held that a receivership creditor's or other claimant's equitable right to a set-off is not precluded by the ratable distribution requirement of the NBA, provided such set-off is otherwise legally valid.<sup>30</sup> If, after set-off, an amount is owed to the creditor, the creditor may file a claim for the net amount remaining as any other unsecured creditor. Conversely, if, after set-off, an amount is owed to the bank, the creditor does not have a claim and the net amount remaining is an asset of the uninsured bank, which the receiver may obtain in connection with marshalling the assets (as further described in proposed § 51.7(a)).

*Question 4.* The OCC requests comment on whether there are additional characteristics of set-offs or other situations in which set-off may arise that should be included in the rule.

Proposed § 51.5 sets out the order of priorities for payment of administrative expenses of the receiver and claims against the uninsured bank in receivership. Under this section, the OCC would pay these expenses and claims in the following order: (1) administrative expenses of the receiver; (2) unsecured creditors, including secured creditors to the extent their claim exceeds their valid and enforceable security interest; (3) creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and (4) shareholders of the uninsured bank. The order is based on case law and, in the case of the first priority for administrative expenses, on 12 U.S.C. 196.<sup>31</sup>

A creditor or other claimant with a security interest that was valid and enforceable as to

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<sup>29</sup> *Scammon v. Kimball*, 92 U.S. 362 (1876); *Blount v. Windley*, 95 U.S. 173 (1877), 177; *Carr v. Hamilton*, 129 U.S. 252 (1889).

<sup>30</sup> See *Scott v. Armstrong*, 146 U.S. 499, 510 (1892); *InterFirst Bank of Abilene, N.A. v. FDIC*, 777 F.2d 1092, 1095-1096 (5th Cir. 1985); *FDIC v. Mademoiselle of California*, 379 F.2d 660, 663 (9th Cir. 1967).

<sup>31</sup> See *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 410-411 (1938); *Merrill v. Nat'l Bank of Jacksonville*, 173 U.S. 131, 146 (1899); *Scott v. Armstrong*, 146 U.S. 499, 510 (1892); *Bell v. Hanover Nat'l Bank*, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

its terms prior to the appointment of the receiver is entitled to exercise that security interest, outside the priority of distributions set out in the proposed rule.<sup>32</sup> If the collateral value exceeds the amount of the claim as it was immediately prior to the receiver's appointment, the surplus remains an asset of the uninsured bank, and the receiver may obtain it in connection with marshalling the assets (as further described in proposed § 51.7(a)).<sup>33</sup>

Liens arising from judicial determinations after the initiation of the receivership, as well as contractual liens that are triggered due to the appointment of a receiver or other post-appointment events, are not enforceable. This is because recognition of these liens would afford these claimants a priority that is not recognized under the established legal priorities described in proposed § 51.5. Similarly, a secured creditor is not entitled to a priority distribution of any portion of the claim that is not covered by the value of the collateral, because the creditor is in the position of an unsecured creditor for that portion of the claim, and must participate in ratable liquidation distributions on par with other unsecured creditors.<sup>34</sup>

Assets held by the uninsured bank in a fiduciary or custodial capacity, as identified on the bank's books and records, are not general assets of the bank. Section 51.8(b) of the proposed rule states this, for the absence of doubt. In the same vein, the claim of the customer to fiduciary or custodial assets is separate from, and not subject to, the priority set out in proposed § 51.5. Fiduciary and custodial customers of the bank have direct claims on those assets pursuant to their fiduciary or custodial account contracts. However, the priority of a fiduciary or custodial customer's other claims against the bank, if any, would remain subject to the priority described in proposed § 51.5. For example, a fiduciary customer's claim for a refund of prepaid

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<sup>32</sup> *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 410-411 (1938); *Bell v. Hanover Nat'l Bank*, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

<sup>33</sup> *Bell v. Hanover Nat'l Bank*, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

<sup>34</sup> *Merrill v. Nat'l Bank of Jacksonville*, 173 U.S. 131, 146 (1899).

investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer, generally would be an unsecured claim covered by proposed § 51.5(b). The claims process described in § 51.4(b) of the proposed rule is available to a fiduciary customer, for both a direct claim on fiduciary assets, as well as a receivership claim for an obligation of the bank.

*Question 5.* The OCC requests comment on whether there are other Federal statutes regarding specific types of claims that may be applicable to a receivership of an uninsured bank under the NBA and that would give certain claims a different priority, such as claims owed to the Federal government.

Proposed § 51.6 provides that all administrative expenses of the receiver for an uninsured bank will be paid out of the assets of the receivership before payment of claims against the receivership. This reflects the requirements in 12 U.S.C. 196. The proposed rule also states that receivership expenses would include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership. To further illustrate the kinds of expenses that section 196 affords a first priority claim on the uninsured bank's receivership assets, proposed § 51.6 enumerates examples of such administrative expenses, such as wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental agreement, and payments to third-party or affiliated service providers, when the receiver determines these expenses are of benefit to the receivership.

Proposed § 51.7 contains provisions describing the powers and duties of the receiver and the disposition of fiduciary and custodial accounts. As described in proposed § 51.7, the receiver would take over the assets and operation of the uninsured bank, take action to realize on debts

owed to the uninsured bank, sell the property of the bank, and liquidate the assets of the uninsured bank for payment of claims against the receivership. Proposed § 51.7(a)(1)-(5) lists some of the major powers and duties for the receiver set out in 12 U.S.C. 192 and clarified by the courts, including taking possession of the books and records of the bank, collecting on debts and claims owed to the bank, selling or compromising bad or doubtful debts (with court approval), and selling the bank's real and personal property (also with court approval).

Proposed § 51.7(b) provides for the receiver to close the uninsured bank's fiduciary and custodial appointments, or transfer such accounts to a successor fiduciary or custodian under 12 CFR 9.16 or other applicable Federal law. The uninsured banks currently in existence focus on fiduciary and custodial services, so this function of the receiver would be of primary importance. This provision recognizes that the receiver's power to wind up the affairs of the uninsured bank in receivership, acting with court approval to make disposition of bank assets, should properly encompass the power to transfer fiduciary or custodial appointments and any associated assets in appropriate circumstances.

Transfer of fiduciary appointments may occur under the terms of the instrument creating the relationship, if it provides for transfer, or under a fiduciary transfer statute, if one is applicable. The OCC believes there are strong public policy interests in endeavoring to replace fiduciaries and custodians expeditiously, without an interruption in service to their customers, if transfer can be arranged to a qualified successor, maintaining the same duties and standards of care with respect to the customers that previously pertained to their accounts at the uninsured bank in receivership. The alternative, given that the uninsured bank must be wound down and cannot provide services in the future, is to stop managing and reinvesting the customer's assets, stop responding to directions to transfer or receive assets in custody, close the accounts, and seek

instructions from the account holders or the courts regarding return of associated assets. For institutional customers, this is likely to cause significant interruption of the intricate machinery of their financial operations. For individuals, it can potentially result in loss of asset value in adverse markets, or loss of income due to foregone reinvestments.

Across the United States, there are disparate and often conflicting legal rules restricting or conditioning transfers of an appointment of a fiduciary for a beneficiary residing within the state. Depending on the geographic area across which the uninsured bank has established fiduciary relationships with its customers, and the standardization of its fiduciary account agreements or appointing instruments, it may be practicable for the receiver to transition an uninsured bank's fiduciary and custody accounts to a qualified successor through the mechanisms provided by applicable local law. On the other hand, if faced with dispersed customers, diverse account agreements or appointments of different vintage, or even the absence of an applicable law of transfer for customers in certain states, reliance on these methods may be so cumbersome as to effectively prevent accomplishment of the transfers in a timely way.

In order to address these potential problems, the OCC, relying on the support of existing case law, is including language in the proposed rule to make it clear that the uninsured bank receiver's power under 12 U.S.C. 192 to sell, with court approval, the real and personal property of the bank includes the power to transfer the bank's fiduciary accounts and related assets, subject to the approval of the court exercising jurisdiction over the receiver's efforts to transfer the bank's assets. The proposed rule is consistent with case law recognizing that a receiver for a national bank may properly arrange asset purchase and liability assumption transactions to move the business of a failed bank to a successor on an integrated basis, as part of the power to transfer assets, as well as analogous case law concerning the transfer of fiduciary and custodial assets by



the FDIC, acting as receiver of failed insured depository institutions.<sup>35</sup>

Proposed § 51.7(c) incorporates, in general terms, the powers, duties, and responsibilities of receivers for national banks under the NBA and under judicial precedents determining the authorities and responsibilities of receivers for national banks. Examples of these powers include: (1) the authority to repudiate certain contracts, including: (a) purely executory contracts, upon determining that the contracts would be unduly burdensome or unprofitable for the receivership estate,<sup>36</sup> (b) contracts that involve fraud or misrepresentation,<sup>37</sup> and (c) in limited cases, non-executory contracts that are contrary to public policy;<sup>38</sup> (2) the authority to recover fraudulent transfers;<sup>39</sup> and (3) the authority to enforce collection of notes from debtors and collateral, regardless of the existence of side arrangements that would otherwise defeat the collectability of such notes.<sup>40</sup>

Proposed § 51.7(d) requires the receiver to make periodic reports to the OCC concerning the status and proceedings of the receivership.

Proposed § 51.8 contains provisions regarding the payment of dividends on claims against the uninsured bank and the distribution of any remaining proceeds to shareholders. This section provides that, after administrative expenses of the receivership have been paid, the OCC would make ratable dividends from available receivership funds based on the priority of claims in proposed § 51.5, for claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction, as provided in 12 U.S.C. 194. The OCC would make payment

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<sup>35</sup> See *NCNB Texas National Bank v. Cowden*, 895 F.2d 1488 (5<sup>th</sup> Cir. 1990) (holding that the FDIC, as receiver of insolvent bank, had authority to transfer fiduciary appointments to bridge bank prior to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

<sup>36</sup> *Bank One Texas v. Prudential Life Ins. Co.*, 878 F. Supp. 943, 964-66 (N.D. Tex. 1995).

<sup>37</sup> A. Corbin, *Corbin on Contracts* § 228 at 320 (1952) (addressing contracts voidable for fraud, duress, or mistake).

<sup>38</sup> *Cf. Fidelity Deposit Co. of Md. v. Conner*, 973 F.2d 1236, 1241 (5<sup>th</sup> Cir. 1992).

<sup>39</sup> See *Peters v. Bain*, 133 U.S. 670 (1890) (applying state substantive law to determine whether to void a transfer); *Rogers v. Marchant*, 91 F.2d 660, 663 (4<sup>th</sup> Cir. 1937).

<sup>40</sup> *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 458 (1942). A. Corbin, *Corbin on Contracts*, § 228 at 320 (1952) (addressing contracts voidable for fraud duress or mistake).

of dividends, if any, periodically, at the discretion of the OCC, as the receiver liquidates the assets of the uninsured bank.

The proposed rule's inclusion of the "ratable dividend" requirement is designed to incorporate the associated standards about the proper application of this statutory directive, which the judiciary has articulated over the years. The ratable dividend requirement directs the OCC to make distributions on OCC-approved claims and judicial awards on an equal footing, determining the amount of each creditor's claim as it stands at the point of insolvency. As one example, a court's award of interest on an unpaid debt to the date of a judgment rendered in the plaintiff's favor after the receiver was appointed does not increase the amount of the plaintiff's claim for purposes of making ratable dividends. As another example, the ratable dividend requirement generally restricts claims against the bank receivership for debts that were not due and owing at the appointment of the receiver, and arose for the first time as a consequence of the appointment or a post-appointment event.

The OCC requests comment on alternatives to the proposed rule's approach to distributing dividends, under which the OCC would exercise its discretion under section 194 to determine the timing of the distributions on established claims. One alternative would be to refrain from paying any dividends until all claims have been submitted and validated, with final allowed claim amounts established. This approach presents the possibility that proven claims may be delayed for a significant amount of time pending more protracted resolution of other claims. For example, if there is ongoing litigation against the bank regarding a claim, this waiting period rule would mean no dividends would be made to any claimants, even those with well-established claims, until after the litigation is finally resolved.

Another option would be to allow ongoing dividends on proven claims, subject to the

receiver's retaining a percentage of the funds on hand at the time of the distribution as a pool of dividends for catch-up distributions to a successful plaintiff later. The OCC believes it would be appropriate, under such an approach, for the rule to incorporate a mechanism to balance the interests of established claimants in current payment against the interests in future relief to others asserting more protracted claims. The OCC also has an interest in being able to seek termination of a receivership after an appropriate period, in light of the assets that are realistically available, the prospects of success by plaintiffs asserting additional claims, and similar factors.

Accordingly, the rule might commit the OCC to reserve a minimum of 12 percent of funds on hand at the time of distribution during the first year a distribution is made, and reduce this required minimum reserve to 8 percent 12 months later, 4 percent after the next 12 months, and eliminate the reserve requirement beyond that.

*Question 6.* The OCC invites comment on these alternatives for making ratable distributions in accordance with section 194.

Proposed § 51.8(a)(2) recognizes the basic legal premise under the NBA receivership provisions and judicial interpretations thereof that any dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver. This provision is also consistent with the established dichotomy of the OCC's supervisory and receivership capacities in the NBA, as discussed earlier.

Proposed § 51.8(b) similarly recognizes that assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, are not part of the bank's general assets and liabilities held in connection with its other business, and will not be considered a source for payment for unrelated claims of creditors and other claimants. This

provision is intended to make clear that the receiver will segregate identified fiduciary and custodial assets and either transfer those assets to other fiduciaries or custodians as described in connection with proposed § 51.7(b), or close the accounts and endeavor to make the associated assets available to the accountholders or their representatives through other means.

Proposed § 51.8(d) provides that, after all administrative expenses and claims have been paid in full, any remaining proceeds would be paid to shareholders in proportion to their stock ownership, also as provided in 12 U.S.C. 194.

Proposed § 51.9 contains provisions for termination of receiverships in which there are assets remaining after all administrative expenses and all claims had been paid. This is the scenario addressed by 12 U.S.C. 197. In such a case, section 197 requires the Comptroller to call a meeting of the shareholders of the bank at which the shareholders would decide whether to continue oversight by the Comptroller, or whether to end the receivership and appoint a liquidating agent to continue the liquidation of the remaining assets, under the direction of the board of directors and shareholders, as in a liquidation that had commenced under 12 U.S.C. 181.

There may be other circumstances under which termination would take place, such as when there are no receivership assets remaining after completion of receivership activities. Under this scenario, the receiver for an uninsured bank has liquidated all of the bank's assets, closed or transferred all fiduciary accounts to a successor fiduciary, paid all administrative expenses, and either paid creditor claims in full and distributed the remaining proceeds to shareholders, as provided in § 51.8(c), or made ratable dividends of all remaining proceeds to creditors as provided in § 51.8(a), but no additional assets remain in the estate. Under these circumstances, the provisions in 12 U.S.C. 197 for termination would not apply.

*Question 7.* The OCC requests comment on whether the rule should provide termination

procedures for receiverships that are outside the circumstances addressed in 12 U.S.C. 197.

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

##### *A. Paperwork Reduction Act*

Under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*), the OCC may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The proposed rule contains no information collection requirements under the PRA.

##### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. However, the regulatory flexibility analysis otherwise required under the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration (SBA) to include commercial banks and savings institutions, and trust companies, with assets of \$550 million or less and \$38.5 million or less, respectively) and publishes its certification and a brief explanatory statement in the **Federal Register** together with the rule.

The OCC currently supervises approximately 1,032 small entities. The scope of the proposed rule extends to uninsured banks. The maximum number of OCC-supervised small uninsured banks that could be subject to the receivership framework described in the proposal is approximately 18.<sup>41</sup> Accordingly, the OCC certifies that the proposed rule will not have a

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<sup>41</sup> Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if we should classify an institution we supervise as a small entity. We used

significant economic impact on a substantial number of small entities.

*OCC Unfunded Mandates Reform Act of 1995 Determination*

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation). As detailed in the **SUPPLEMENTARY**

**INFORMATION**, the OCC currently supervises 52 uninsured banks, all of which are uninsured trust banks, and has not appointed a receiver for an uninsured bank since 1933. Unlike commercial and consumer banks and savings associations, which generally face credit and liquidity risks, national trust banks primarily face operational, reputational, and strategic risks. While any of these risks could result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver. Given that we believe the OCC is unlikely to place an uninsured trust bank into receivership, the OCC concludes that the proposed rule will not result in an expenditure of \$100 million or more by state, local, and tribal governments, or by the private sector, in any one year.

**List of Subjects in 12 CFR Part 51**

Administrative practice and procedure, Banks, Banking, National banks, Procedural rules, Receiverships.

Authority and Issuance

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December 31, 2015, 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. SBA's *Table of Size Standards*.

For the reasons set forth in the preamble and under the authority of 12 U.S.C. 16, 93a, 191-200, 481, 482, 1831c, and 1867 the Office of the Comptroller of the Currency proposes to add a new part 51 to chapter I of title 12, Code of Federal Regulations as follows:

**PART 51 -- RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS**

Sec.

51.1 Purpose and scope.

51.2 Appointment of receiver.

51.3 Notice of appointment of receiver.

51.4 Claims.

51.5 Order of priorities.

51.6 Administrative expenses of receiver.

51.7 Powers and duties of receiver; disposition of fiduciary and custodial assets.

51.8 Payment of claims and dividends to shareholders.

51.9 Termination of receivership.

Authority: 12 U.S.C. 16, 93a, 191-200, 481, 482, 1831c, and 1867.

**§ 51.1 Purpose and scope.**

(a) Purpose. This part sets out procedures for receiverships of national banks conducted by the Office of the Comptroller of the Currency (OCC) under the receivership provisions of the National Bank Act (NBA). These receivership provisions apply to national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC).

(b) Scope. This part applies to the appointment of a receiver for uninsured national banks (uninsured banks) and the operation of a receivership after appointment of a receiver for an

uninsured bank under 12 U.S.C. 191.<sup>1</sup>

### **§ 51.2 Appointment of receiver.**

(a) In general. The Comptroller of the Currency (Comptroller) may appoint any person, including the OCC or another government agency, as receiver for an uninsured bank. The receiver performs its duties under the direction of the Comptroller and serves at the will of the Comptroller. The Comptroller may require the receiver to post a bond or other security. The receiver, with the approval of the Comptroller, may employ such staff and enter into contracts for professional services as are necessary to carry out the receivership.

(b) Grounds for appointment. The Comptroller may appoint a receiver for an uninsured bank based on any of the grounds specified in 12 U.S.C. 191(a).

(c) Judicial review. If the Comptroller appoints a receiver for an uninsured bank, the bank may seek judicial review of the appointment as provided in 12 U.S.C. 191(b).

### **§ 51.3 Notice of appointment of receiver.**

Upon appointment of a receiver for an uninsured bank, the OCC will provide notice to the public of the receivership, including by publication in a newspaper of general circulation for three consecutive months. The notice of the receivership will provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

### **§ 51.4 Claims.**

(a) Submission of claims for consideration by the OCC. (1) Persons who have claims against the receivership for an uninsured bank may present such claims, along with supporting documentation, for consideration by the OCC. The OCC will determine the validity and approve the amounts of such claims.

(2) The OCC will establish a date by which any person seeking to present a claim against

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<sup>1</sup> This part does not apply to receiverships for uninsured Federal branches or uninsured Federal agencies.



the uninsured bank for consideration by the OCC must present their claim for determination. The deadline for filing such claims will not be less than 30 days after the end of the three-month notice period in § 51.3.

(3) The OCC will allow any claim against the uninsured bank received on or before the deadline for presenting claims if such claim is established to the OCC's satisfaction by the information on the uninsured bank's books and records or otherwise submitted. The OCC may disallow any portion of any claim by a creditor or claim of a security, preference, set-off, or priority which is not established to the satisfaction of the OCC.

(b) Submission of claims to a court. Persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication. Such persons must submit a copy of any final judgment received from the court to the OCC, to participate in ratable dividends along with other proved claims.

(c) Right of set-off. If a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off shall be considered as a claim, provided such set-off is otherwise legally valid.

### **§ 51.5 Order of priorities.**

The OCC will pay receivership expenses and proved claims against the uninsured bank in receivership in the following order of priority:

- (a) Administrative expenses of the receiver;
- (b) Unsecured creditors of the uninsured bank, including secured creditors to the extent their claim exceeds their valid and enforceable security interest;
- (c) Creditors of the uninsured bank, if any, whose claims are subordinated to general

creditor claims; and

(d) Shareholders of the uninsured bank.

#### **§ 51.6 Administrative expenses of receiver.**

(a) Priority of administrative expenses. All administrative expenses of the receiver for an uninsured bank shall be paid out of the assets of the bank in receivership before payment of claims against the receivership.

(b) Scope of administrative expenses. Administrative expenses of the receiver for an uninsured bank include those expenses incurred by the receiver in maintaining banking operations during the receivership, to preserve assets of the uninsured bank, while liquidating or otherwise resolving the affairs of the uninsured bank. Such expenses include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership.

(c) Types of administrative expenses. Administrative expenses for the receiver of an uninsured bank include:

(1) Salaries, costs, and other expenses of the receiver and its staff, and costs of contracts entered into by the receiver for professional services relating to performing receivership duties; and

(2) Expenses necessary for the operation of the uninsured bank, including wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental agreement, and payments to third-party or affiliated service providers, that in the opinion of the receiver are of benefit to the receivership, until the date the receiver repudiates, terminates, cancels, or otherwise discontinues the applicable contract.

#### **§ 51.7 Powers and duties of receiver; disposition of fiduciary and custodial accounts.**

(a) Marshalling of assets. In resolving the affairs of an uninsured bank in receivership, the receiver:

(1) Takes possession of the books, records and other property and assets of the uninsured bank, including the value of collateral pledged by the uninsured bank to the extent it exceeds valid and enforceable security interests of a claimant;

(2) Collects all debts, dues and claims belonging to the uninsured bank, including claims remaining after set-off;

(3) Sells or compromises all bad or doubtful debts, subject to approval by a court of competent jurisdiction;

(4) Sells the real and personal property of the uninsured bank, subject to approval by a court of competent jurisdiction, on such terms as the court shall direct; and

(5) Deposits all receivership funds collected from the liquidation of the uninsured bank in an account designated by the OCC.

(b) Disposition of fiduciary and custodial accounts. The receiver for an uninsured bank closes the bank's fiduciary and custodial appointments and accounts or transfers some or all of such accounts to successor fiduciaries and custodians, in accordance with 12 CFR 9.16, and other applicable Federal law.

(c) Other powers. The receiver for an uninsured bank may exercise other rights, privileges, and powers authorized for receivers of national banks under the NBA and the common law of receiverships as applied by the courts to receiverships of national banks conducted under the NBA.

(d) Reports to OCC. The receiver for an uninsured bank shall make periodic reports to the OCC on the status and proceedings of the receivership.

(e) Receiver subject to removal; modification of fees. (1) The Comptroller may remove and replace the receiver for an uninsured bank if, in the Comptroller's discretion, the receiver is not conducting the receivership in accordance with applicable Federal laws or regulations or fails to comply with decisions of the Comptroller with respect to the conduct of the receivership or claims against the receivership.

(2) The Comptroller may reduce the fees of the receiver for an uninsured bank if, in the Comptroller's discretion, the Comptroller finds the performance of the receiver to be deficient, or the fees of the receiver to be excessive, unreasonable, or beyond the scope of the work assigned to the receiver.

#### **§ 51.8 Payment of claims and dividends to shareholders.**

(a) Claims. (1) After the administrative expenses of the receivership have been paid, the OCC shall make ratable dividends from time to time of available receivership funds according to the priority described in § 51.5, based on the claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction.

(2) Dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver.

(b) Fiduciary and custodial assets. Assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, will not be considered as part of the bank's general assets and liabilities held in connection with its other business, and will not be considered a source for payment of unrelated claims of creditors and other claimants.

(c) Timing of dividends. The payment of dividends, if any, under paragraph (a) of this section, on proved or adjudicated claims will be made periodically, at the discretion of the OCC,

as the receiver liquidates the assets of the uninsured bank.

(d) Distribution to shareholders. After all administrative expenses of the receiver and proved claims of creditors of the uninsured bank have been paid in full, to the extent there are receivership assets to make such payments, any remaining proceeds shall be paid to the shareholders, or their legal representatives, in proportion to their stock ownership.

**§ 51.9 Termination of receivership.**

If there are assets remaining after full payment of the expenses of the receiver and all claims of creditors for an uninsured bank and all fiduciary accounts of the bank have been closed or transferred to a successor fiduciary and fiduciary powers surrendered, the Comptroller shall call a meeting of the shareholders of the uninsured bank, as provided in 12 U.S.C. 197, for the shareholders to decide the manner in which the liquidation will continue. The liquidation may continue by:

(a) Continuing the receivership of the uninsured bank under the direction of the Comptroller; or

(b) Ending the receivership and oversight by the Comptroller and replacing the receiver with a liquidating agent to proceed to liquidate the remaining assets of the uninsured bank for the benefit of the shareholders, as set out in 12 U.S.C. 197.

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**Thomas J. Curry,**

Comptroller of the Currency.

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