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*1 Federal Deposit Insurance Corporation (F.D.I.C.)
Financial Institution Letters

Filing and Documentation Procedures for State Banks Engaging, Directly or
Indirectly, in Activities or Investments that are Permissible for National Banks

FIL-54-2014
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Summary: A State bank (or its subsidiary) engaging in activities or investments (Activities) permissible for a national bank (or its subsidiary) should establish and maintain files documenting that those Activities (as well as the organizational structure of the subsidiary) are permissible for a national bank (or its subsidiary). A State bank is not required to file an application or notice pursuant to Part 362 to engage in Activities that are permissible for a national bank if the bank maintains certain documentation.

Statement of Applicability to Institutions With Less Than \$1 Billion in Total Assets: This Financial Institution Letter applies to all State banks.

Distribution: · FDIC-Supervised State Banks

Highlights:

If a State bank (or its subsidiary) engages in an Activity that the Office of the Comptroller of the Currency (OCC) has determined is permissible for a national bank, the State bank should maintain documentation that the Activity is permissible for a national bank.

If a State bank's subsidiary engages in an Activity permissible for a national bank's subsidiary and the subsidiary is a limited liability company, limited partnership, or other similarly unincorporated entity, the documentation should indicate the subsidiary meets the requirements imposed by the OCC for similar business forms.

No notice or application is required if documentation as described above is maintained by the State bank.

Activities exempt from Part 362 do not require a notice or application, but should be conducted in a safe-and-sound manner.

A State bank (or its subsidiary) that proposes to engage in an Activity that the OCC has not deemed permissible for a national bank (or its subsidiary) should file a notice or application in accordance with 12 CFR Parts 362 and 303, Subpart G.

Continuation of FIL-54-2014

Suggested Routing:

- Chief Executive Officer
- Chief Financial Officer

Related Topics:

· [Activities and Investments of Insured State Banks, 12 CFR Part 362 63 Fed. Reg. 66276 \(Dec. 1, 1998\)](http://www.fdic.gov/regulations/laws/Federal/98actr.pdf), <http://www.fdic.gov/regulations/laws/Federal/98actr.pdf>

· [62 Fed. Reg. 47969, 47971 \(Sept. 12, 1997\)](http://www.fdic.gov/regulations/laws/Federal/ais997.pdf), <http://www.fdic.gov/regulations/laws/Federal/ais997.pdf>

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Note:

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To receive FILs electronically, please visit <http://www.fdic.gov/about/subscriptions/fil.html>.

*2 Paper copies may be obtained through the FDIC's Public Information Center, 3501 Fairfax Drive, E-1002, Arlington, VA 22226 (877-275-3342 or 703-562-2200).

Filing and Documentation Procedures for State Banks Engaging, Directly or Indirectly, in Activities or Investments that are Permissible for National Banks

This Financial Institution Letter applies to all State banks regardless of asset size.

A State bank (or its subsidiary) generally may engage in an activity or investment (collectively, an Activity) that is permissible for a national bank (or its subsidiary) and is also permissible under State law. Further, a State bank (or its subsidiary) may engage in an Activity that may not be permissible for a national bank (or its subsidiary) if the FDIC determines that: (1) the Activity would pose no significant risk to the Deposit Insurance Fund; and (2) the State bank is, and continues to be, in compliance with applicable capital standards.¹

The phrase “activity permissible for a national bank” means “any activity authorized for national banks under any statute including the National Bank Act ...as well as activities recognized as permissible for a national bank in regulations ...or written interpretations of the Office of Comptroller of the Currency (OCC).”²

Documentation that Should be Maintained When a State Bank (or its subsidiary) Engages in a Permissible Activity

If a State bank (or its subsidiary) seeks to engage in an Activity that the OCC has determined to be permissible for a national bank (or its subsidiary), the State bank need only maintain, to the FDIC's satisfaction, documentation of such determination in its files.³ Appropriate documentation that an Activity is permissible for a State bank (or its subsidiary)

may take the form of a legal opinion from the State bank's counsel; a copy of a relevant statute or OCC regulation; a copy of a relevant OCC official circular, bulletin, order, or interpretive letter; or other written documentation satisfactory to the FDIC.

If an Activity has been deemed permissible for a national bank (or its subsidiary), but subject only to certain conditions or restrictions imposed by the OCC, generally speaking, a State bank (or its subsidiary) must abide by those conditions or restrictions if it wishes to conduct the Activity without first obtaining the FDIC's consent. Documentation that the State bank (or its subsidiary) initially satisfied (and continues to satisfy) such conditions or restrictions should be included in the State bank's files.

Documentation maintained in the State bank's files is subject to examination by the FDIC. The FDIC may require the State bank to file an application or notice, or may take other appropriate action, if the FDIC determines that the Activity has not been determined to be permissible for a national bank (or its subsidiary) or if the State bank (or its subsidiary) fails to satisfy the OCC's conditions or restrictions as described above.

***Additional Documentation that Should be Maintained When a State Bank
Engages in a Permissible Activity Through an Unincorporated Subsidiary***

*3 In some situations, a State bank may wish to indirectly engage in an Activity that is permissible for a national bank (or its subsidiary) through an unincorporated subsidiary (such as a limited liability company (LLC), a limited partnership, or a similar entity). In such circumstances, in addition to establishing and maintaining documentation that the underlying Activity is permissible for a national bank (or its subsidiary), the FDIC expects the State bank will establish and maintain documentation that the State bank's unincorporated subsidiary meets the standards imposed by the OCC on a national bank that invests in such entities.

The standards regarding the organizational structure of a State bank's subsidiary may differ depending on the control the State bank has over the subsidiary. Generally, the OCC permits a national bank to make a *controlling or majority investment* in a subsidiary organized as an LLC, limited partnership, or similar entity if:

- The OCC has determined the underlying Activity is permissible under [12 U.S.C. 24](#) as part of, or incidental to, the business of banking;
- The bank is shielded from unlimited liability for the acts of the unincorporated subsidiary; and
- The bank has the power to influence and, if necessary, withdraw from membership in the unincorporated subsidiary in the event such subsidiary engages in an Activity impermissible for national banks.⁴

Further, the OCC permits a national bank to make a *non-controlling or minority investment* in a subsidiary organized as an LLC, limited partnership, or similar entity if:

- The OCC has determined the Activity of the entity in which the investment is made is limited to an activity that is part of, or incidental to, the business of banking;
- The investing bank is able to prevent the entity from engaging in an activity that does not meet the foregoing standard, or is otherwise able to terminate its relationship with the entity prior to the entity engaging in any impermissible activities;
- The bank's loss exposure is limited, as a legal and accounting matter, and the bank does not have open-ended liability for the obligations of the entity; and

· The investment is convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.⁵

Exemptions from Part 362

Some activities are exempt from the coverage of Part 362. Within the parameters described in the rule, Part 362 does not cover activities conducted other than “as principal;” real estate used (or intended to be used) as bank facilities; public welfare investments; or equity investments acquired in connection with debts previously contracted.⁶

State banks should ensure that a subsidiary engaging in exempt activities is organized according to applicable state law. Although exempt from Part 362, State banks should ensure that exempt activities are conducted in a safe-and-sound manner.

Application or Notice Requirements

***4** A State bank (or its incorporated subsidiary) that seeks to engage in an Activity determined by the OCC to be permissible for a national bank (or its subsidiary), subject to the same conditions or restrictions imposed by the OCC, does not need to file an application or notice with the FDIC.

A State bank (or its unincorporated subsidiary) that seeks to engage in an Activity determined by the OCC to be permissible for a national bank (or its unincorporated subsidiary), subject to the same conditions or restrictions imposed by the OCC, does not need to file an application or notice with the FDIC, so long as the State bank's unincorporated subsidiary meets the organizational standards described above, and the State bank includes appropriate documentation in its files.

A State bank (or its subsidiary, regardless of the subsidiary's organizational form) that seeks to engage in an Activity that has not been determined by the OCC to be permissible for a national bank (or its subsidiary, regardless of the subsidiary's organizational form) should file an application or notice in accordance with the FDIC's regulations at 12 CFR Part 362 and Part 303, Subpart G.

Footnotes

1 12 U.S.C. § 1831a(a)(1).

2 12 C.F.R. § 362.1(a).

3 62 Fed. Reg. 47969, 47971 (Sept. 12, 1997); *see also* 63 Fed. Reg. 66276, 66296 (Dec. 1, 1998). *And see* 57 Fed. Reg. 30435, 30439 (July 9, 1992); *see also* 57 Fed. Reg. 53213, 53219 (Nov. 9, 1992).

4 OCC Interpretive Letter #735 (July 15, 1996).

5 *Id.*; *see, for example*, OCC Interpretive Letter # 778 (March 20, 1997).

6 *See* 12 CFR § 362.1(b).

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