DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 12

[Docket No. 96–25]

RIN 1557–AB42

Recordkeeping and Confirmation Requirements for Securities Transactions

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

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending its rule that prescribes recordkeeping and confirmation requirements for securities transactions. The final rule is another part of the OCC's Regulation Review Program to update and streamline OCC regulations and eliminate unnecessary regulatory costs and other burdens. The final rule reorganizes the OCC's regulation by placing related subjects together, clarifies areas where the rule was confusing, incorporates significant OCC interpretive positions, and updates various provisions to address market developments and regulatory changes by other regulators that affect requirements for recordkeeping and confirmation of securities transactions by national banks.

EFFECTIVE DATE: December 31, 1996.

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SUPPLEMENTARY INFORMATION:

Background

The OCC adopted 12 CFR part 12 on July 24, 1979 (44 FR 43252) to require national banks to establish uniform procedures and records relating to the handling of securities transactions for customers. The requirements reflected in part the recommendations of the Securities and Exchange Commission's (SEC) *Final Report of the Securities and Exchange Commission on Bank Securities Activities* (June 30, 1977). Part 12's recordkeeping and confirmation requirements were patterned after the SEC's rules applicable to broker/dealers and were intended to serve similar purposes for banks involved in effecting customers' securities transactions.[1] The OCC amended part 12 on December 31, 1979 (44 FR 77137) to include additional suggestions recommended by commenters, and the part became effective on January 1, 1980. The Board of Governors of the Federal Reserve System (FRB) and the Federal Deposit Insurance Corporation (FDIC) also adopted regulations substantially identical to part 12 in 1979. *See* 12 CFR 208.8(k), 44 FR 43258 (July 24, 1979) (FRB regulation); 12 CFR part 344, 44 FR 43261 (July 24, 1979) (FDIC regulation).

On December 22, 1995, the OCC published a notice of proposed rulemaking (60 FR 66517) (proposal) to revise 12 CFR part 12, the OCC's Recordkeeping and Confirmation Requirements for Securities Transactions regulation. The purpose of the proposal was to modernize part 12, address various market developments and regulatory changes, and reduce regulatory burden, where possible. The FRB published a substantively similar yet somewhat differently worded proposed rule on December 26, 1995. *See* 60 FR 66759. The FDIC published an advance notice of proposed rulemaking on May 24, 1996, soliciting comment on issues similar to those raised in the OCC's and FRB's proposed rules, but has not yet proposed a rule. *See* 61 FR 26135.

Comments Received and Changes Made

The OCC received ten comments on the proposal. The comment letters included eight from banks and bank holding companies, one from a trade association, and one on behalf of a mutual fund sponsor and distributor. Commenters generally supported the proposal, but several commenters requested changes. The OCC carefully considered each of the comments and has made a number of changes in response to the comments received.

Overall, the final rule adopts most of the changes to part 12 as proposed by the OCC. The section-by-section discussion of this preamble identifies and discusses the comments received and changes made to certain sections of the proposal. A derivation table identifying sections of former part 12 changed by the final rule is included at the end of this preamble.

[1] Brokers and dealers generally must register with the SEC under the Securities Exchange Act of 1934. *See* 15 U.S.C. 78o(a)(1). Banks are excluded from the definitions of ''broker'' and ''dealer'' and thus are not subject to the registration provisions. *See* 15 U.S.C. 78c(a) (4) and (5).

Section-by-Section Discussion

Authority, Purpose, and Scope (§ 12.1)

The proposal revised and expanded the scope section to clarify the securities transactions to which part 12 applies and identify the types of transactions that are subject to other regulatory requirements. Generally, any national bank effecting a securities transaction for a customer is subject to the requirements of part 12, unless the transaction specifically is excepted. For example, part 12 requirements apply to transactions in mutual funds as well as other securities.

National banks conducting government securities transactions for their customers also are within the scope of part 12.[2] Consistent with regulations issued pursuant to the Government Securities Act of 1986, 15 U.S.C. 78o–5, part 12 (§ 12.1(c)(2)(ii)) exempts a national bank that conducts fewer than 500 government securities *brokerage* transactions per year from complying with the recordkeeping requirements under § 12.3. *See* 17 CFR 401.3(a)(2)(i) and 404.4(a).[3] This exemption does not apply to government securities *dealer* transactions by national banks, however.

The ''scope'' section (§ 12.1(c)(1)) also clarifies that a national bank's transactions in municipal securities that are *not* subject to the Municipal Securities Rulemaking Board's (MSRB) rules, *are* subject to part 12.[4] Thus,

[2] The Department of the Treasury, under its authority pursuant to the Government Securities Act of 1986 (GSA), 15 U.S.C. 78o–5, has issued regulations in 17 CFR parts 400 through 405, 449, and 450, applicable to many government securities transactions by national banks (GSA regulations). The GSA regulations define the terms ''government securities broker'' and ''government securities dealer'' to include financial institutions. See 17 CFR 400.3 (k) and (l). Part 404 of the GSA regulations provides specific recordkeeping requirements for government securities brokers and dealers that are financial institutions. *See* 17 CFR 404.4.

[3] National banks, because they are subject to part 12 recordkeeping requirements, are not required to follow the recordkeeping requirements of the GSA regulations at 17 CFR 404.2 and 404.3. *See* 17 CFR 404.4(a). National banks, however, must follow other recordkeeping requirements under the GSA regulations. *See* 17 CFR 404.4 (a)(3), (b), and 450.4 (c), (d), and (f). Part 12 *confirmation* requirements apply to all government securities transactions by national banks.

[4] The MSRB adopts rules with respect to transactions in ''municipal securities'' effected by brokers, dealers, and ''municipal securities dealers.'' *See* 15 U.S.C. 78o–4; Rules of the MSRB, MSRB Manual (CCH) ¶ 3501 *et seq.* As defined in the Exchange Act, a ''municipal securities dealer'' includes a bank, as well as a ''separately identifiable department or division of a bank,'' that is engaged in the business of buying and selling municipal securities for its own account through a broker or otherwise. *See* 15 U.S.C. 78c(a)(30). Under the SEC's regulatory requirements, however, a bank

under § 12.1(c)(2)(iii), transactions in municipal securities conducted by a national bank registered with the SEC as a ''municipal securities dealer'' are exempt from part 12. However, municipal securities brokerage transactions by a national bank not registered as a municipal securities dealer are subject to part 12 requirements.

The proposal's ''scope'' section provided exceptions from part 12 requirements for: (1) Banks conducting a small number of securities transactions; (2) certain government securities transactions; (3) certain municipal securities transactions; and (4) securities transactions conducted by a foreign branch of a national bank. The proposal also clarified that notwithstanding the exceptions from part 12, the OCC expects a national bank conducting securities transactions for its customers to maintain effective systems of records and controls to ensure safe and sound operations.

Most commenters supported the clarifications to the proposed scope section. With respect to the scope section as discussed in the proposal's preamble, two commenters requested further clarification. One commenter requested clarification of whether part 12 requires a national bank to provide a confirmation of a trade placed by a customer directly with a registered broker/dealer for settlement in the customer's custodial account. In these circumstances, a national bank need not provide a confirmation if the customer receives a confirmation from the registered broker/dealer.

Another commenter suggested clarifying that part 12 generally would not apply when dual employees are involved in a networking operation with a registered broker/dealer. As noted in the proposal's preamble, the OCC recognizes that a national bank may enter into various arrangements with registered broker/dealers that permit the broker/dealers to operate on the bank's premises. Part 12 generally does not apply to securities transactions executed by these registered broker/dealers for their customers. As registered broker/dealers, they already are subject to the SEC's recordkeeping and confirmation rules.[5] The OCC agrees that when a dual employee is performing work for and under the control of a registered broker/dealer pursuant to an arrangement between the bank and a registered broker/dealer, part 12 requirements do not apply. However, if the dual employee is performing work for and under control of the bank, then the part 12 requirements do apply. *See* Interpretive Letter No. 680 (July 26, 1995), *reprinted in* [1994–95 Transfer Binder] Fed. Banking L. Rep. (CCH) 83628.

Accordingly, the final rule adds a new provision (§ 12.1(c)(2)(v)) clarifying that part 12 does not apply to securities transactions effected by a broker or dealer registered with the SEC, including securities transactions effected by a bank employee when the employee is acting as an employee of an SEC-registered broker/dealer. The final rule also adopts the amendments to the scope section as proposed and revises § 12.1(c)(1) to state more clearly that both part 12 and 12 CFR part 9 govern fiduciary transactions effected by a national bank.[6]

Definitions (§ 12.2)

The proposal added new definitions of *asset-backed security, completion of the transaction, crossing of buy and sell orders, debt security, government security,* and *municipal security,* and modified the definitions of *collective investment fund, customer, investment discretion, periodic plan,* and *security.*

Several commenters asked the OCC to make clarifications. One commenter questioned whether the definition of *customer* includes a bank when that bank acts as the fiduciary of an account and effects transactions for that account. That is not the intent of part 12. While both the former rule and the proposal define *customer* to include any person or account (including fiduciary accounts) for which a national bank makes or participates in making the purchase or sale of securities, the account is the *customer* when the bank acts as fiduciary and has investment discretion over the account. Accordingly, the final rule clarifies that part 12 does not require that the bank notify itself of a transaction.

Another commenter asked whether, for purposes of the notification requirements for transactions involving periodic plans or employee benefit plans, the *customer* is the plan trustee or the plan participant. The OCC does not intend part 12 to require a bank acting as a trustee of an employee benefit plan to provide notifications to itself where the bank as trustee is the shareholder of record of the securities being bought and sold. Generally, a written agreement between the trustee and the participants governs these plans and dictates the type of notifications required. The primary law governing employee benefit plans and trusts is the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. The final rule clarifies that the definition of *customer* does not include a bank as trustee acting as shareholder of record for the purchase and sale of securities.

Several commenters raised questions about the proposed definition of *investment discretion.* The proposal, like the former rule, tracked the definition of ''investment discretion'' in the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(35). Under this definition, a bank exercises investment discretion with respect to an account if the bank directly or indirectly: (1) Is authorized to determine what securities or other property to purchase or sell, or (2) makes decisions as to what securities or other property to purchase or sell even though some other person may have responsibility for these investment decisions. The significance of a finding under part 12 that a bank exercises investment discretion is that the bank then may choose from more options when providing a customer with notice of a transaction. For example, instead of complying with the generally applicable rule requiring a bank to provide notification at or before completion of the transaction, a bank exercising investment discretion in an agency capacity may send an itemized statement to a customer every three months.

Three commenters recommended revising the part 12 definition of *investment discretion* to conform to the proposed definition of *investment discretion* in 12 CFR part 9, the OCC's regulation governing fiduciary powers of national banks.[7] The final rule does not substantively change the former part 12 definition of *investment discretion.* Given that the broader definition of the term in part 12 serves to reduce burden on national banks by providing more flexibility to banks in giving notices of securities transactions, the OCC believes it appropriate to retain the definition as proposed. The OCC will review the definition of *investment discretion* used in part 9 in the course of adopting amendments to that rule.

need not register as a ''municipal securities broker.'' *See* 15 U.S.C. 78c(a) (4) and (31).

[5] As noted in the proposal, however, if the bank is using this registered broker/dealer solely to clear securities transactions effected by the bank for the bank's own customers, then the requirements of part 12 do apply to the bank because the bank has executed the transactions.

[6] The final rule also changes the caption of § 12.1(c)(2) from ''exemptions'' to ''exceptions'' to better reflect that § 12.1(c)(2) does not necessarily exempt the specified transactions from all part 12 requirements.

[7] The OCC published a notice of proposed rulemaking on 12 CFR part 9 on December 21, 1995. *See* 60 FR 66163.

Three commenters asked the OCC to clarify that the definition of *periodic plan* also includes cash management sweep services, such as arrangements where funds are transferred or ''swept'' out of a bank to purchase money market mutual funds. Both the former and proposed rules define *periodic plan* to include dividend reinvestment plans, automatic investment plans, employee stock purchase plans, and other plans where the bank has written authority to act as agent for the customer to purchase and sell specific securities, in specific amounts, at specific time intervals. Cash management services, whereby a bank will allow a depositor to transfer or ''sweep'' all funds or all funds above a specified amount from deposits into investment vehicles, often money market mutual funds, on a daily basis and to automatically redeem securities as needed, are not expressly included in the former or proposed rules.

The OCC agrees with the views of the commenters that the definition of *periodic plan* encompasses cash management sweep services. Many banks today engage in cash management sweep services to allow customers to earn an investment return on otherwise idle cash balances. The types of cash management services banks offer vary and banks should take care to comply with all applicable requirements with respect to any particular arrangement. Accordingly, the final rule revises the definition of *periodic plan* to specifically include these services. The final rule also adopts a separate timeframe for notifications for cash management sweep services, as discussed in § 12.5.

Finally, one commenter urged the OCC to retain the exception in the definition of *security* for letters of credit and other forms of bank indebtedness incurred in the ordinary course of business. The proposed definition closely tracks the definition of *security* in the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(10), which does not explicitly contain this exception. However, the final rule retains this exception, because, upon further consideration, the OCC has concluded that this exception avoids extending the regulation's coverage to transactions where the requirements of part 12 are unnecessary.

Recordkeeping (§ 12.3)

The proposal provided that a national bank may maintain the records required by § 12.3(a) in any manner, if the records clearly and accurately reflect the information required and provide an adequate basis for auditing the information (§ 12.3(b)). This provision is intended to give banks flexibility in the maintenance of records required by part 12. The OCC requested comments addressing whether and in what manner banks rely upon this provision. The OCC received two comments on this issue. The commenters suggested that the OCC clarify the extent to which a national bank may use electronic or automated records.

The OCC recognizes that better and more affordable technology will increase banks' interest in replacing paper files with electronic data bases and filing systems. The OCC has no objection to a national bank using an electronic or automated recordkeeping system as long as the records are maintained in conformity with § 12.3(b). Accordingly, the final rule specifically permits the use of electronic or automated records as long as the records are easily retrievable and readily available for inspection and the bank has the capability to reproduce the records in hard copy form.

Content and Time of Customer Notification (§ 12.4)

Under the proposal a national bank may give or send the required written notification to a customer for whom the bank has effected a securities transaction by providing either (1) a copy of a registered broker/dealer's confirmation prepared for the bank and a statement regarding remuneration, or (2) a bank-generated confirmation containing essentially the same information as the SEC requires for registered broker/dealer confirmations. The written notification conveys information to the bank's customers about their securities transactions, thereby giving them an opportunity to verify the terms of their transactions and evaluate the accuracy of the bank's execution.

The proposal did not include former part 12's provision permitting an additional five business days for a national bank to provide notification to a customer by using a copy of the registered broker/dealer's confirmation to the bank. The OCC, however, specifically requested comments on the need for additional time by a national bank opting to provide notification by using a copy of the registered broker/dealer's confirmation.

The OCC received four comments on this issue. One commenter opposed giving a bank additional time and stated that it was not necessary and not conducive to a uniform regulatory environment. Three commenters favored continuing to allow a bank additional time. In light of the comments, the final rule retains the provision allowing a bank additional time. However, the final rule changes the length of the additional time allowed from five days to one day from receipt by the bank of the registered broker/dealer's confirmation. The former regulation's five-day period was based on the industry practice of having the settlement of a securities transaction on the fifth business day after the trade day (T+5). The industry now must settle most securities transactions by the third business day after the trade day (T+3). Given the advances in electronic technology for providing confirmations and market developments, the OCC believes one additional business day is sufficient for providing a customer a notification in this manner. Accordingly, the final rule adopts this change in the time of notification when a bank opts to provide notification by using a copy of a registered broker/dealer's confirmation.

The OCC also requested comments on the adoption of the timeframe *at or before completion of the transaction* for a national bank to provide a written notification. Sending the notification at or before completion of the transaction is consistent with the SEC's broker/dealer confirmation rule. *See* Securities Exchange Act of 1934 Rule 10b–10, 17 CFR 240.10b–10(a) (SEC Rule 10b–10). The SEC also defines *completion of the transaction* similar to the proposed part 12 definition, generally meaning payment of funds and delivery of the securities. *See* 17 CFR 240.10b–10(d)(2).

The OCC received four comments on this issue. One commenter supported the adoption of this timeframe and two commenters expressed concern about a bank's ability to provide the information so quickly. Another commenter noted that in a typical custody arrangement, customers employ an outside broker (e.g., a registered broker/dealer) to make investments for them and the bank does not process any activity on its customer's account records until it receives authorization from the registered broker/dealer. However, the commenter interpreted the proposal to mean that the bank must provide the customer a notification within the T+3 timeframe. With respect to this last comment, the OCC notes that part 12 does not apply when a registered broker/dealer is effecting the securities transactions and the bank is acting only as custodian.

The final rule adopts the timeframe *at or before completion of the transaction* in order to reflect current securities industry practice. This timeframe requires a national bank to give or send notification of its customers' securities transactions in the same way as a

nonbank registered broker/dealer. The OCC believes this change promotes consistency among regulators and keeps banks on a level playing field with nonbank registered broker/dealers. The OCC also believes that the additional day to provide the confirmation when using a copy of a registered broker/dealer's confirmation will allow a bank adequate time to provide a notification. Further, the OCC notes that the final rule only requires the bank to give or send the notification by the settlement of the securities transaction, i.e. the completion of the transaction, and not that the customer must receive the notification by settlement.

Consistent with SEC Rule 10b–10, the proposal added § 12.4(b) (8), (9), (10), and (11), requiring disclosure of yield information on debt securities (renumbered in the final rule as § 12.4(a)(8), (9), (10), and (11)). The proposal also added § 12.4(b)(12) requiring disclosure that a debt security has not been rated by a nationally recognized statistical rating organization, if that is the case (renumbered in the final rule as § 12.4(a)(12)).

The OCC sought comments on the applicability and need for these disclosure requirements. Both commenters that addressed this issue focused on the requirement for unrated debt securities, and both supported including these requirements. One commenter stated that its trade confirmation already shows ''NR'' for unrated securities. The OCC recognizes that there are a variety of situations where certain securities may be unrated. The disclosure is intended to alert customers that they may wish to obtain further information or clarification from the bank on the nature of these securities. For the reasons stated in the proposal and in light of the comments, the final rule adopts these additional disclosure requirements.

The proposal also requested comments on whether part 12 should include a provision similar to SEC Rule 10b–10(c) stating the required period of time for a national bank to furnish information pursuant to a customer's request. SEC Rule 10b–10(c) requires broker/dealers to furnish to customers requested information within five business days of the receipt of the request, or within 15 business days if the broker/dealer effected the transaction more than 30 days before the receipt of the request. *See* 17 CFR 240.10b–10(c). Former part 12 did not contain a similar provision. Two commenters addressed this issue and were opposed to incorporating the SEC's standard. The commenters noted that furnishing information pursuant to a customer's request ''within a reasonable time'' is sufficient. The OCC agrees with the commenters. Accordingly, the final rule does not contain this provision.

The proposal included a new provision concerning the disclosure of other remuneration similar to that in the SEC's Rule 10b–10. *See* 17 CFR 240.10b–10(a)(2)(i)(D). Under proposed § 12.4(b)(6) (renumbered in the final rule as § 12.4(a)(6)), a national bank may choose not to disclose the source and amount of *other* remuneration to the bank, if the bank: (1) Informs the customer in writing that it has received or will receive other remuneration; and (2) the bank states that it will furnish the source and amount of the other remuneration upon the customer's written request.

The OCC received two comments supporting the inclusion of this provision but suggesting further clarification. In light of these comments, the final rule adopts the provisions on remuneration disclosure as proposed with the following clarification. First, the final rule clarifies that a notification by means of the written statements permitted by § 12.4(a)(6) is available only in lieu of disclosing the source and amount of *other* remuneration, not in lieu of disclosing the remuneration paid by the customer. Second, § 12.4(a)(6) reflects that the bank will furnish information pursuant to a customer's request within a reasonable time.

Proposed § 12.4(c), captioned ''Notification by agreement,'' retains the option in the former rule for the bank and the customer to agree in writing to a different time and form of notification for a securities transaction where the national bank does not exercise investment discretion. The OCC received three comments on this issue. Two commenters asked for clarification on the use of the notification by agreement option. Another commenter suggested moving § 12.4(c) back to § 12.5, the section on alternative forms and times of notification, as under the former rule.

In response to these comments, the OCC notes that a bank does not need to provide a notification under § 12.4 (a) or (b) when using the notification by agreement option, unless specifically requested by the customer. The OCC has not substantively changed the notification by agreement option and intends a national bank using this option to provide notification in the same way as under the former part 12 provision. The final rule relocates the notification by agreement option to § 12.5(a) in an effort to further clarify §§ 12.4 and 12.5.

Finally, in response to several commenters' suggestions for stylistic changes intended to reduce confusion and enhance readability, the final rule changes the name of the section, some introductory language, and the captions. The final rule also reverses the order of the notification options of § 12.4(a) and § 12.4(b) to emphasize the information a bank must provide its customer in a notification regardless of which type of notification under this section the bank elects to provide.

Notification by Agreement; Alternative Forms and Times of Notification (§ 12.5)

In addition to the notification requirements in § 12.4, the proposal also authorized alternative forms and times of notification under § 12.5 for certain specific types of transactions. These were: (1) Transactions in which the bank exercises investment discretion in other than an agency capacity; (2) transactions in which the bank exercises investment discretion in an agency capacity; (3) transactions for a collective investment fund; and (4) transactions for a periodic plan. The OCC asked commenters to address the continuing need for the alternative forms of notification.

Two commenters addressed this issue. One commenter expressed support for the continued inclusion of the alternative forms of notification. Another commenter suggested that § 12.5(c) (regarding notifications for collective investment fund transactions) was unnecessary because banks follow the requirements of 12 CFR part 9, the OCC's fiduciary regulation. The OCC agrees with this comment and has revised the final rule to state simply that for collective investment fund transactions a bank must follow the requirements of 12 CFR part 9. The final rule also changes the name of the section, some introductory language, and the captions in an effort to eliminate confusion and enhance readability.

The proposal clarified that for § 12.5 purposes generally, it is the ''transaction'' that triggers the notification requirements, not the type of account. The OCC requested comments about any effects of the proposed change regarding alternative forms of notification based upon types of transactions instead of types of accounts.

The OCC received one comment on this proposed change. The commenter suggested that the type and form of notification should be negotiated as part of the original agreement between the customer and the bank, and that automated means then should be used

to comply with the notification requirements for all transactions in the account. The commenter was concerned that the proposed change would preclude this option of agreeing to the type and form of the notification.

The OCC agrees with the commenter that the customer and the national bank should have the option to determine the type and form of notification initially with the account opening. The OCC does not believe that the change set out in the proposal would preclude the customer and the bank agreeing beforehand on the form and time of the notification required. For example, a national bank effecting securities transactions for an account in which the bank exercises investment discretion may have an agreement with the customer to provide a monthly account statement. The alternative notification procedures set forth in § 12.5 continue to permit the national bank and the customer to agree in writing to another type and form of notification. However, even though the national bank and the customer may agree on the type and form of notification at the opening of the account, the OCC views the ''transaction'' as triggering the part 12 notification requirements. The OCC does not intend for the proposed change to substantively affect a national bank's compliance with the part 12 notice requirements. Thus, the final rule adopts this change in terminology that the transaction triggers the notification requirements.

The proposed rule amended the notification time for periodic plan transactions under § 12.5(d) (renumbered in the final rule as § 12.5(e)) to not less than once every three months rather than notification as promptly as possible after each transaction. One commenter noted their support for this change in notification time. Two other commenters specifically suggested the OCC clarify in the final rule how the periodic plan notification requirements apply to cash management sweep services. One commenter noted that a separate confirmation requirement, for example, for every money market mutual fund transaction in a sweep arrangement, would impose an unnecessary paperwork burden on national banks and their customers and place banks at a competitive disadvantage relative to nonbank registered broker/dealers. Under the SEC's Rule 10b–10, broker/dealers must provide a confirmation after the end of each monthly period for transactions in money market mutual funds. *See* 17 CFR 240.10b–10(b)(2).

The OCC agrees that national banks offering cash management sweep services should provide notification similar to that provided by nonbank registered broker/dealers offering similar services. As discussed in § 12.2, the OCC has revised the definition of periodic plan in the final rule to include cash management sweep services. Section 12.5(e) in the final rule provides the timeframe for notification for periodic plans. The final rule clarifies that, with respect to cash management sweep services, the time for notification is each month in which a purchase or sale of securities takes place in the customer's deposit account and not less than once every three months if there are no securities transactions in the account. The final rule also adopts the change as proposed for other periodic plans, namely, that the time for notification is not less than once every three months. The OCC believes that these timeframes are consistent with current industry practice and the SEC's notification requirements. These timeframes also will serve to eliminate unnecessary regulatory burden by reducing the number of required notifications.

The OCC reminds national banks engaging in cash management sweep services that the securities involved in the sweep services remain subject to any other applicable rules and regulations. In some instances notification requirements other than those of part 12 may apply. For example, a bank offering a sweep repurchase agreement program involving government securities, commonly called a ''sweep repo,'' may be subject to daily confirmation requirements under the Government Securities Act of 1986 regulations, 17 CFR parts 400 through 405, 449, and 450. *See* OCC Advisory Letter 96–2 (March 22, 1996).

Fees (§ 12.6)

The proposal placed the former provisions in §§ 12.4 and 12.5 regarding fees into a new § 12.6. The OCC received no comments on this section. The final rule adopts the section substantially as proposed except that certain provisions are reordered.

Securities Trading Policies and Procedures (§ 12.7)

The proposal retained the requirement under § 12.7(a)(1) that a bank establish written policies and procedures assigning supervisory responsibility for personnel engaged in different aspects of the trading process. The proposal did not propose specific language concerning the separation of supervisory responsibility for sales activities and ''back room'' functions. The OCC received one comment suggesting that the OCC include a specific reference to establishing separate supervisory procedures and reporting lines for ''back room'' personnel. On reconsideration and in light of the recent developments involving the lack of internal controls in certain highly publicized cases,[8] the final rule includes a provision (§ 12.7(a)(1)(iii)) that explicitly states the need for separate supervisory procedures for back room functions.

The OCC received several comments related to the filing of personal trading reports by national bank officers and employees under proposed § 12.7(a)(4). One commenter recommended revising § 12.7(a)(4)(iii) to apply only to employees who perform the securities trading functions for the bank. The OCC declines to narrow the scope of the requirement in the final rule given the important purpose behind the personal reporting requirement and recent concerns in the securities industry on personal trading by insiders.[9] This requirement, which is similar to requirements under the securities laws and regulations, addresses potential conflicts of interests between bank personnel and customers and deters improper or illegal use of information by bank insiders.

The proposal did not change the scope of former § 12.6 (renumbered as § 12.7 in the proposal). The OCC requires the filing of a report from national bank officers or employees who make investment recommendations or decisions for the accounts of customers, participate in the determination of the recommendations or decisions, or who, in connection with their duties, obtain information concerning which securities are being purchased or sold or recommended for purchase or sale. The OCC notes that these individuals do not have to be regularly or frequently involved in the recommendation or decision-making process or obtain information on a regular basis to be subject to the reporting requirement. However, the mere fact that an officer or employee learns of a securities transaction after it has been effected, or an investment recommendation after it has been transmitted to a customer, would not subject that officer or

[8] *See, e.g.*, David Brilliant, *Tone at the Top: Boards and Managers Must Ensure Quality Business and Controls*, The Banker 26 (Nov. 1995); *Out of Control: Greater Supervision is Urged by the Report into the Barings Fiasco*, The Banker 15 (Aug. 1995); Maureen Duffy, *Barings' Systems: The Blame Game*, 12 Wall Street & Technology 16 (1995).

[9] *See, e.g.*, Division of Investment Management, SEC, Personal Investment Activities of Investment Company Personnel (1994); Investment Company Institute, Report of the Advisory Group on Personal Investing (1994).

employee to the reporting requirements of § 12.7.

Another commenter requested that the OCC amend the requirement to file personal trading reports ''within ten days'' so that it reads ''within ten business days'' to accommodate large banking organizations. The suggested change is consistent with past informal practices to which the OCC has not objected. Accordingly, the final rule reflects this change.

Under § 12.7(d), the proposal requested comment on clarifying that a national bank acting as an investment adviser to an investment company is subject to section 17 of the Investment Company Act, 15 U.S.C. 80a–17, and, in particular, the requirements of Rule 17j–1 of the Investment Company Act, 17 CFR 270.17j–1 (SEC Rule 17j–1). The additional provision in the proposal simply reminded banks of the separate existing requirement under SEC Rule 17j–1. As noted in § 12.7(d), certain officers and employees of a national bank acting as an investment adviser to an investment company must comply with a reporting requirement regarding personal securities trading under both part 12 and SEC Rule 17j–1.

The OCC received two comments addressing this issue. The commenters suggested that the OCC clarify that filing one report with the bank will suffice for purposes of both part 12 and SEC Rule 17j–1 if the information required is the same. The OCC believes this would reduce burden while enabling the OCC and the SEC to have access to the report. Accordingly, the final rule permits national bank officers and employees to file one report where the required information is the same. Nonetheless, the OCC cautions national banks to recognize that the part 12 requirements, in some respects, are broader than those under the Investment Company Act because part 12 applies to investment advisory activities by national banks whether the bank provides the advice to an investment company or to another type of customer.

The final rule also includes a technical correction to § 12.7(d) to clarify that SEC Rule 17j–1 requires personal securities transactions to be reported to the investment adviser and maintained for review by the SEC.

Waivers (§ 12.8)

The proposal clarified that a national bank may file a written request with the OCC for waiver of one or more of the requirements set forth in §§ 12.2 through 12.7, either in whole or in part. The OCC received no comments on this section. The final rule adopts § 12.8 as proposed.

Settlement of securities transactions (§ 12.9)

The proposal added § 12.9 to establish a securities settlement timeframe for national banks effecting or entering into contracts for the purchase or sale of securities for customers. The OCC intends this provision to parallel the SEC's adoption of the ''T+3'' securities settlement timeframe. *See* Securities Exchange Act of 1934 Rule 15c6–1, 17 CFR 240.15c6–1; 58 FR 52891 (Oct. 13, 1993); 60 FR 26604 (May 17, 1995) (amendments to the rule). The OCC requested comment on the need for and effect of adopting the T+3 securities settlement requirement for national banks.

The OCC received one comment on this issue. The commenter pointed out that many small banks do not have access to SEC rules and would prefer to have part 12 specify the actual requirement. The commenter also noted that incorporating the SEC's rule by reference would permit banks to take advantage of any changes by the SEC immediately rather than waiting for the OCC to amend part 12. After careful consideration of this matter, the OCC decided that national banks would benefit more from having immediate access to the text of the SEC's rule rather than only having a cross-reference to the SEC's rule in the OCC's regulation. For this reason, the final rule adopts § 12.9 as proposed.

Interpretations (§§ 12.101 and 12.102)

The proposal added two interpretive rulings to part 12. The first interpretation (§ 12.101) related to the disclosure of remuneration for mutual fund transactions. Consistent with the SEC's practice, the OCC stated it would allow a bank to fulfill its disclosure requirement regarding the source and amount of remuneration for mutual fund transactions by providing this information to the customer in a current prospectus, at or before completion of the securities transaction.

The second interpretive ruling (§ 12.102) recognized the use of electronic communications to satisfy part 12's customer notification requirements. This would allow a national bank to send a customer notification by facsimile transmission or by some other electronic media under certain circumstances. Since the OCC published the proposal, the SEC has issued further guidance for broker/dealers using electronic media to deliver information to customers under the SEC's confirmation rule, SEC Rule 10b–10, 17 CFR 240.10b–10. *See* Securities and Exchange Commission Release No. 33–7288, 61 FR 24644 (May 15, 1996). The SEC's guidance supersedes its earlier guidance as cited in the proposal. However, SEC Release No. 33–7288 retains a general approach consistent with the OCC's proposed interpretive ruling.

The OCC received two comments strongly supporting the addition of the interpretive rulings. Since the OCC's proposed interpretive rulings are consistent with the SEC's approach, the final rule adopts the interpretive rulings as proposed.

DERIVATION TABLE

[Only substantive modifications, additions and changes are indicated]

Revised provision	Original provision	Comments
§ 12.1(a)	§ 12.1(a).	
§ 12.1(b)	§ 12.1(a).	
§ 12.1(c)(1)	.....	Added.
§ 12.1(c)(2)(i)	§ 12.7(a).	
§ 12.1(c)(2)(ii)	.....	Added.
§ 12.1(c)(2)(iii)	§ 12.7(b)	Modified.
§ 12.1(c)(2)(iv)	§ 12.7(c).	
§ 12.1(c)(2)(v)	.....	Added.
§ 12.1(c)(3)	.....	Added.
	§ 12.1(b)	Removed.
§ 12.2(a)	.....	Added.
§ 12.2(b)	§ 12.2(a).	
§ 12.2(c)	.....	Added.

DERIVATION TABLE—Continued

[Only substantive modifications, additions and changes are indicated]

Revised provision	Original provision	Comments
§ 12.2(d)		Added.
§ 12.2(e)	§ 12.2(b)	Modified.
§ 12.2(f)		Added.
§ 12.2(g)		Added.
§ 12.2(h)	§ 12.2(c).	
§ 12.2(i)		Added.
§ 12.2(j)	§ 12.2(d)	Modified.
§ 12.2(k)	§ 12.2(e)	Modified.
§ 12.3(b)	§ 12.3	Modified.
§ 12.4	§§ 12.4, 12.5	Modified.
§ 12.5	§§ 12.4, 12.5	Modified.
§ 12.6	§§ 12.4, 12.5.	
§ 12.7(a)	§ 12.6 (a), (b), (c), and (d).	
§ 12.7(b)	§ 12.6(d)	Modified.
§ 12.7(c)	§ 12.6(d)	Modified.
§ 12.7(d)		Added.
§ 12.8	12.7(d).	
§ 12.9		Added.
§ 12.101		Added.
§ 12.102		Added.

Effective Date

The final rule takes effect on December 31, 1996. The OCC finds good cause, pursuant to 5 U.S.C. 553(d)(3), for prescribing this year-end effective date, because it will enable national banks to adjust their practices to conform with the regulation at the beginning of a calendar quarter. The final rule confers benefits on the public and national banks by streamlining and clarifying current requirements governing recordkeeping and confirmations for securities transactions.

Regulatory Flexibility Act

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This final rule will have minimal economic impact on national banks, regardless of size, since it reduces somewhat regulatory burden but makes no material changes.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, March 22, 1995, 109 Stat. 48 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that 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. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Because the OCC has determined that the final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of more than $100 million in any one year, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered. Nevertheless, as discussed in the preamble, the rule has the effect of reducing somewhat regulatory costs and other burdens, where possible.

Paperwork Reduction Act of 1995

The OCC invites comment on:

(1) Whether the collections of information contained in this final rule are necessary for the proper performance of the agency's functions, including whether the information has practical utility;

(2) The accuracy of the agency's estimate of the burden of the information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collections on respondents, including the use of automated information collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Respondents/recordkeepers are not required to respond to these collections of information unless they display a currently valid OMB control number.

The collections of information contained in this final rule have been approved by the Office of Management and Budget under OMB Control No. 1557–0142 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project 1557–0142, Washington, DC 20503, with a copy to the Legislative and Regulatory Activities Division (Attention: 1557–0142), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

The collections of information in this final rule are found in 12 CFR 12.3 through 12.5 and 12.7 and 12.8. This information is required by the OCC to establish an audit trail. That audit trail is used by the OCC in its regulatory examinations as a tool to evaluate a bank's compliance with the banking and securities laws and regulations, such as the anti-fraud provisions of the Federal securities laws. Further, the records provide a basis for adequate disclosure to customers who effect securities transactions through national banks. Other information provides a basis for the OCC to waive some or all of the recordkeeping and confirmation requirements of 12 CFR part 12. The

respondents/recordkeepers are national banks.

Estimated average annual burden hours per respondent/recordkeeper: The average burden will vary from two hours to more than 700 hours, depending upon individual circumstances, with an estimated average of 53.5 hours.

Estimated number of respondents and/or recordkeepers: 1,047.

Estimated total annual reporting and recordkeeping burden: 56,019. hours

Start-up costs to respondents: None.

List of Subjects in 12 CFR Part 12

National banks, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set out in the preamble, part 12 of chapter I of title 12 of the Code of Federal Regulations is revised to read as follows:

PART 12—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.

Authority: 12 U.S.C. 24, 92a, and 93a.

§ 12.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued pursuant to 12 U.S.C. 24, 92a, and 93a.

(b) *Purpose.* This part establishes rules, policies, and procedures applicable to recordkeeping and confirmation requirements for certain securities transactions effected by national banks for customers.

(c) *Scope*—(1) *General.* Any security transaction effected for a customer by a national bank is subject to this part, except as provided by paragraph (c)(2) of this section. This part applies to a national bank effecting transactions in government securities. This part also applies to municipal securities transactions by a national bank that is not registered as a ''municipal securities dealer'' with the Securities and Exchange Commission. *See* 15 U.S.C. 78c(a)(30) and 78o–4. This part, as well as 12 CFR part 9, applies to securities transactions effected by a national bank as fiduciary.

(2) *Exceptions*—(i) *Small number of transactions.* The requirements of §§ 12.3(a)(2) through (4) and 12.7(a)(1) through (3) do not apply to a national bank having an average of fewer than 200 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(ii) *Government securities.* The recordkeeping requirements of § 12.3 do not apply to national banks effecting fewer than 500 government securities brokerage transactions per year. This exception does not apply to government securities dealer transactions by national banks. *See* 17 CFR 404.4(a).

(iii) *Municipal securities.* This part does not apply to transactions in municipal securities conducted by a national bank registered with the Securities and Exchange Commission as a ''municipal securities dealer'' as defined in title 15 U.S.C. 78c(a)(30). See 15 U.S.C. 78o–4.

(iv) *Foreign branches.* This part does not apply to securities transactions conducted by a foreign branch of a national bank.

(v) *Transactions effected by registered broker/dealers.* This part does not apply to securities transactions effected by a broker or dealer registered with the Securities and Exchange Commission (SEC) where the SEC-registered broker or dealer directly provides the customer a confirmation; including, transactions effected by a national bank employee when acting as an employee of an SEC-registered broker/dealer.

(3) *Safe and sound operations.* Notwithstanding paragraph (c)(2) of this section, every national bank conducting securities transactions for customers shall maintain effective systems of records and controls regarding their customer securities transactions to ensure safe and sound operations. The systems maintained must clearly and accurately reflect appropriate information and provide an adequate basis for an audit.

§ 12.2 Definitions.

(a) *Asset-backed security* means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(b) *Collective investment fund* means any fund established pursuant to 12 CFR 9.18.

(c) *Completion of the transaction* means:

(1) In the case of a customer who purchases a security through or from a national bank, except as provided in paragraph (c)(2) of this section, the time when the customer pays the bank any part of the purchase price, or, if payment is made by a bookkeeping entry, the time when the bank makes the bookkeeping entry for any part of the purchase price;

(2) In the case of a customer who purchases a security through or from a national bank and who makes payment for the security prior to the time when payment is requested or notification is given that payment is due, the time when the bank delivers the security to or into the account of the customer;

(3) In the case of a customer who sells a security through or to a national bank, except as provided in paragraph (c)(4) of this section, if the security is not in the custody of the bank at the time of sale, the time when the security is delivered to the bank, and if the security is in the custody of the bank at the time of sale, the time when the bank transfers the security from the account of the customer;

(4) In the case of a customer who sells a security through or to a national bank and who delivers the security to the bank prior to the time when delivery is requested or notification is given that delivery is due, the time when the bank makes payment to or into the account of the customer.

(d) *Crossing of buy and sell orders* means a security transaction in which the same bank acts as agent for both the buyer and the seller.

(e) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which a national bank makes or participates in making the purchase or sale of securities, but does not include a broker, dealer, bank acting as a broker or dealer, bank acting as the fiduciary of an account, bank as trustee acting as shareholder of record for the purchase or sale of securities, or issuer of securities that are the subject of the transaction.

(f) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing. This

definition does not include securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*

(g) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (g)(1), (2), or (3) of this section, other than a put, call, straddle, option, or privilege:

(i) That is traded on one or more national securities exchanges; or

(ii) For which quotations are disseminated through an automated quotation system operated by a registered securities association.

(h) *Investment discretion* means that, with respect to an account, a bank directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for these investment decisions.

(i) *Municipal security* means:

(1) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision;

(2) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, any municipal corporate instrumentality of one or more States; or

(3) A security that is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C. 103(c)(2) (1970)) (Code)) the interest on which is excludable from gross income under section 103(a)(1) of the Code (26 U.S.C. 103(a)(1)) if, by reason of the application of paragraph (4) or (6) of section 103(c) of the Code (26 U.S.C. 103(c)) (determined as if paragraphs (4)(A), (5), and (7) were not included in section 103(c) (26 U.S.C. 103(c)), paragraph (1) of section 103(c) (26 U.S.C. 103(c)) does not apply to the security.

(j) *Periodic plan* means:

(1) A written authorization for a national bank to act as agent to purchase or sell for a customer a specific security or securities, in a specific amount (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and setting forth the commission or charges to be paid by the customer or the manner of calculating them. These plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(2) Any prearranged, automatic transfer or ''sweep'' of funds from a deposit account to purchase a security, or any prearranged, automatic redemption or sale of a security with the funds being transferred into a deposit account (including cash management sweep services).

(k) *Security:* (1) Means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a ''security''; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing;

(2) Does not mean currency; any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance not exceeding nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited; a deposit or share account in a Federal or State chartered depository institution; a loan participation; a letter of credit or other form of bank indebtedness incurred in the ordinary course of business; units of a collective investment fund; interests in a variable amount note in accordance with 12 CFR 9.18; U.S. Savings Bonds; or any other instrument the OCC determines does not constitute a security for purposes of this part.

§ 12.3 Recordkeeping.

(a) *General rule.* A national bank effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

(i) Account or customer name for which each transaction was effected;

(ii) Description of the securities;

(iii) Unit and aggregate purchase or sale price;

(iv) Trade date; and

(v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

(i) Purchases and sales of securities;

(ii) Receipts and deliveries of securities;

(iii) Receipts and disbursements of cash; and

(iv) Other debits and credits pertaining to transactions in securities;

(3) *Memorandum order.* A separate memorandum (order ticket) of each order to purchase or sell securities (whether executed or canceled), including:

(i) Account or customer name for which the transaction was effected;

(ii) Type of order (market order, limit order, or subject to special instructions);

(iii) Time the trader or other bank employee responsible for effecting the transaction received the order;

(iv) Time the trader placed the order with the broker/dealer, or if there was no broker/dealer, time the order was executed or canceled;

(v) Price at which the order was executed; and

(vi) Name of the broker/dealer utilized;

(4) *Record of broker/dealers.* A record of all broker/dealers selected by the bank to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year; and

(5) *Notifications.* A copy of the written notification required by §§ 12.4 and 12.5.

(b) *Manner of maintenance.* The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Record maintenance may include the use of automated or electronic records provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy.

§ 12.4 Content and time of notification.

Unless a national bank elects to provide notification by one of the means specified in § 12.5, a national bank effecting a securities transaction for a customer shall give or send to the customer either of the following types of notifications at or before completion of the transaction or, if the bank uses a registered broker/dealer's confirmation, within one business day from the bank's receipt of the registered broker/dealer's confirmation:

(a) *Written notification.* A written notification disclosing:

(1) Name of the bank;

(2) Name of the customer;

(3) Capacity in which the bank acts (i.e., as agent for the customer, as agent for both the customer and some other person, as principal for its own account, or in any other capacity);

(4) Date and time of execution, or a statement that the bank will furnish the time of execution within a reasonable time upon written request of the customer, and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) Amount of any remuneration that the customer has provided or is to provide any broker/dealer, directly or indirectly, in connection with the transaction;

(6) (i) Amount of any remuneration that the bank has received or will receive from the customer, and the source and amount of any other remuneration that the bank has received or will receive in connection with the transaction; unless:

(A) The bank and its customer have determined remuneration pursuant to a written agreement; or

(B) In the case of government securities and municipal securities, the bank received the remuneration in other than an agency transaction.

(ii) If the bank elects not to disclose the source and amount of remuneration it has or will receive from a party other than the customer pursuant to paragraph (a)(6)(i) of this section, the written notification must disclose whether the bank has received or will receive remuneration from a party other than the customer, and that the bank will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the bank was participating in a distribution of that security; or, with respect to a sale, the bank was participating in a tender offer for that security;

(7) Name of the registered broker/dealer utilized; or where there is no registered broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the bank will furnish this information within a reasonable time upon written request from the customer;

(8) In the case of any transaction in a debt security subject to redemption before maturity, a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, unless the transaction is for a debt security that either:

(A) Has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon; or

(B) Is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that continuously are subject to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date, and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield, unless the transaction is for a debt security that either:

(A) Has a maturity date that may be extended by the issuer thereof, with a variable interest rate payable thereon; or

(B) Is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that continuously are subject to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that continuously are subject to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case; or

(b) *Copy of the registered broker/dealer's confirmation.* A copy of the confirmation of a registered broker/dealer relating to the securities transaction and, if the customer or any other source will provide remuneration to the bank in connection with the transaction and a written agreement between the bank and the customer does not determine the remuneration, a statement of the source and amount of any remuneration that the customer or any other source is to provide the bank.

§ 12.5 Notification by agreement; alternative forms and times of notification.

A national bank may elect to use the following notification procedures as an alternative to complying with § 12.4:

(a) *Notification by agreement.* A national bank effecting a securities transaction for an account in which the bank does not exercise investment discretion shall give or send written notification at the time and in the form agreed to in writing by the bank and customer, provided that the agreement makes clear the customer's right to receive the written notification pursuant to § 12.4 (a) or (b) at no additional cost to the customer.

(b) *Trust transactions.* A national bank effecting a securities transaction for an account in which the bank exercises investment discretion other than in an agency capacity shall give or send written notification within a reasonable time if a person having the power to terminate the account, or, if there is no such person, any person holding a vested beneficial interest in the account, requests written notification pursuant to § 12.4 (a) or (b). Otherwise, notification is not required.

(c) *Agency transactions.* (1) A national bank effecting a securities transaction for an account in which the bank exercises investment discretion in an agency capacity shall give or send, not less than once every three months, an itemized statement to each customer that specifies the funds and securities in the custody or possession of the bank at

the end of the period and all debits, credits and transactions in the customer's account during the period.

(2) If requested by the customer, the bank shall give or send written notification to the customer pursuant to § 12.4 (a) or (b) within a reasonable time.

(d) *Collective investment fund transactions.* A national bank effecting a securities transaction for a collective investment fund shall follow 12 CFR 9.18.

(e) *Periodic plan transactions.* (1) A national bank effecting a securities transaction for a periodic plan (except for a cash management sweep service) shall give or send to its customer not less than once every three months, a written statement showing:

(i) The customer's funds and securities in the custody or possession of the bank;

(ii) All service charges and commissions paid by the customer in connection with the transaction; and

(iii) All other debits and credits of the customer's account involved in the transaction.

(2) A national bank effecting a securities transaction for a cash management sweep service or other periodic plan as defined in § 12.2(j)(2) shall give or send its customer a written statement, in the same form as under paragraph (e)(1) of this section, for each month in which a purchase or sale of a security takes place in a deposit account and not less than once every three months if there are no securities transactions in the account, subject to any other applicable laws and regulations.

(3) Upon written request of the customer, the bank shall give or send the information described in § 12.4 (a) or (b), except that the bank need not provide to the customer any information relating to remuneration paid in connection with the transaction when the remuneration is paid by a source other than the customer.

§ 12.6 Fees.

A national bank may charge a reasonable fee for providing notification pursuant to § 12.5(b), (c), and (e). A national bank may not charge a fee for providing notification pursuant to § 12.4 or § 12.5 (a) and (d).

§ 12.7 Securities trading policies and procedures.

(a) *Policies and procedures; reports of securities trading.* A national bank effecting securities transactions for customers shall maintain and adhere to policies and procedures that:

(1) Assign responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with registered broker/dealers;

(ii) Execute transactions in securities for customers; or

(iii) Process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers. Policies and procedures for personnel described in this paragraph (a)(1)(iii) must provide for supervision and reporting lines that are separate from supervision and reporting lines for personnel described in paragraphs (a)(1)(i) and (ii) of this section;

(2) Provide for the fair and equitable allocation of securities and prices to accounts when the bank receives orders for the same security at approximately the same time and places the orders for execution either individually or in combination;

(3) Provide for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction, where permissible under applicable law; and

(4) Require bank officers and employees to report to the bank, within ten business days after the end of the calendar quarter, all personal transactions in securities made by them or on their behalf in which they have a beneficial interest, if the officers and employees:

(i) Make investment recommendations or decisions for the accounts of customers;

(ii) Participate in the determination of the recommendations or decisions; or

(iii) In connection with their duties, obtain information concerning which securities are purchased, sold, or recommended for purchase or sale by the bank.

(b) *Required information.* The report required under paragraph (a)(4) of this section must contain the following information:

(1) The date of the transaction, the title and number of shares, and the principal amount of each security involved;

(2) The nature of the transaction (i.e. purchase, sale, or other type of acquisition or disposition);

(3) The price at which the transaction was effected; and

(4) The name of the registered broker, registered dealer, or bank with or through whom the transaction was effected.

(c) *Report not required.* This section does not require a bank officer or employee to report transactions if:

(1) The officer or employee has no direct or indirect influence or control over the transaction;

(2) The transaction is in mutual fund shares;

(3) The transaction is in government securities; or

(4) The transactions involve an aggregate amount of purchases and sales per officer or employee of $10,000 or less during the calendar quarter.

(d) *Additional reporting requirement.* A national bank that acts as an investment adviser to an investment company is subject to the requirements of Securities and Exchange Commission (SEC) Rule 17j–1 (17 CFR 270.17j–1) issued under the Investment Company Act of 1940. SEC Rule 17j–1 requires an ''access person'' of the investment adviser to report certain personal securities transactions to the investment adviser for review by the Securities and Exchange Commission. ''Access person'' includes directors, officers, and certain employees of the investment adviser. The reporting requirement under paragraph (a)(4) of this section is a separate requirement from any applicable requirements under SEC Rule 17j–1. However, an ''access person'' required to file a report with a national bank pursuant to SEC Rule 17j–1 need not file a separate report under paragraph (a)(4) of this section if the required information is the same.

§ 12.8 Waivers.

A national bank may file a written request with the OCC for waiver of one or more of the requirements set forth in §§ 12.2 through 12.7, either in whole or in part. The OCC may grant a waiver from the requirements of this part to any national bank, or any class of national banks, with regard to a specific transaction or a specific class of transactions.

§ 12.9 Settlement of securities transactions.

(a) A national bank shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract, unless otherwise expressly agreed to by the parties at the time of the transaction.

(b) Paragraphs (a) and (c) of this section do not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association;

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6–1, 17 CFR 240.15c6–1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section does not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, or sold to an initial purchaser by a national bank participating in the offering. A national bank shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(d) For purposes of paragraphs (a) and (c) of this section, the parties to a contract are deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

Interpretations

§ 12.101 National bank disclosure of remuneration for mutual fund transactions.

A national bank may fulfill its obligation to disclose information on the source and amount of remuneration, required by § 12.4, for mutual fund transactions by providing this information to the customer in a current prospectus, at or before completion of the securities transaction. The OCC's view is consistent with the position of the Securities and Exchange Commission (SEC) as provided in a no-action letter dated March 19, 1979, which permits confirmations for mutual funds to refer to the sales load disclosed in the prospectus. *See* Letter to the Investment Company Institute, *reprinted in* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82041 (Mar. 19, 1979). The OCC would reconsider its position upon any change in the SEC's practice.

§ 12.102 National bank use of electronic communications as customer notifications.

(a) In appropriate situations, a national bank may satisfy the ''written'' notification requirement under §§ 12.4 and 12.5 through electronic communications. Where a customer has a facsimile machine, a national bank may fulfill its notification delivery requirement by sending the notification by facsimile transmission. Similarly, a bank may satisfy the notification delivery requirement by other electronic communications when:

(1) The parties agree to use electronic instead of hard-copy notifications;

(2) The parties have the ability to print or download the notification;

(3) The recipient affirms or rejects the trade through electronic notification;

(4) The system cannot automatically delete the electronic notification; and

(5) Both parties have the capacity to receive electronic messages.

(b) The OCC would consider the permissibility of other situations using electronic notifications on a case-by-case basis.

Dated: November 22, 1996.

Eugene A. Ludwig,

Comptroller of the Currency.

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