Office of Thrift Supervision **January 8, 1998**
Department of the Treasury

Transmittal
TR–190

Federal Register, Vol. 63, No. 4, pp. 1044-1050 **Number: TR–190**

Well run, healthy savings associations that satisfy specified criteria would no longer have to notify their federal regulator before paying cash dividends under the attached rule proposed by the Office of Thrift Supervision (OTS).

Institutions would not have to file a notice with OTS before making capital distributions if they meet the following requirements:

1. The institution is not a subsidiary of a holding company,
2. The institution is eligible for expedited treatment under OTS' Application Processing Regulation, in that it:
   * has a CAMELS rating of 1 or 2,
   * has a CRA rating of satisfactory or better,
   * has a compliance rating of 1 or 2,
   * meets all capital requirements before and after the capital distribution, and
   * is not considered a problem or troubled institution by OTS.
3. The institution will be at least adequately capitalized following the capital distribution,
4. The total amount of the proposed distribution plus all previous capital distributions for the fiscal year does not exceed net income to date for that year plus retained net income for the preceding two years,
5. The distribution does not involve the redemption or retirement of any part of a savings association's common or preferred stock, or debt instruments such as notes or debentures included in capital, and
6. The distribution does not violate any statute, regulation or agreement.

Other capital distributions would require either a notice to OTS or prior approval from the agency, depending on the condition of the institution and the amount and nature of the capital distribution.

Loans to affiliates to finance redemptions of stock or debt would be considered capital distributions, as would payments made in connection with a corporate restructuring, including cash-out mergers.

The proposed rule would bring OTS' capital distribution regulations into greater conformity with those of the other federal banking regulators. It conforms with the Regulatory Reinvention Initiative of the Vice President's National Performance Review.

The notice of proposed rulemaking was published in the, January 7. 1998, edition of the *Federal Register*, Vol. 63, No. 4, pp. 1044-1050. Written comments must be received on or before March 9, 1998, and should be addressed to: Manager, Dissemination Branch, Records Management and Information Policy Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552. Comments may be mailed or hand-delivered, faxed to 202/906-7755 or e-mailed to: public.info@ots.treas.gov. All commenters should include their name and telephone number.

For further information contact:

Edward J. O'Connell III 202/906-5694
Evelyne Bonhomme 202/906-7052

Attachment

— Ellen Seidman
Director
Office of Thrift Supervision

federal register

Wednesday
January 7, 1998

Part IV

Department of the Treasury

Office of Thrift Supervision

12 CFR Parts 563 and 536b

Capital Distributions: Withdrawal of Proposed Rule and Regulation Amendments; Proposed Rules

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[No. 97–127]

RIN 1550–AA72

Capital Distributions; Withdrawal of Proposed Rule

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Proposed rule; withdrawal.

SUMMARY: The OTS is withdrawing the proposed rule amending its capital distributions regulation originally published on December 5, 1994. Elsewhere in today's issue of the **Federal Register**, the OTS has published a new proposal making more extensive revisions to the regulation.

DATES: Proposed amendment to § 563.134 is withdrawn on January 7, 1998.

FOR FURTHER INFORMATION CONTACT: Edward J. O'Connell, III, Project Manager, (202) 906–5694; Robyn Dennis, Manager, (202) 906–5751, Supervision Policy; Evelyne Bonhomme, Counsel (Banking and Finance), (202) 906–7052; or Karen Osterloh, Assistant Chief Counsel, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

Background

In 1990, the OTS adopted the current capital distributions rule at 12 CFR 563.134. The rule permits a savings association to make a capital distribution based on its level of capitalization. The regulation was originally intended to restrict capital distributions by savings associations that did not meet the capital requirements imposed in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

On December 5, 1994, the OTS issued a proposed rule revising the capital distributions regulation. 59 FR 62356. The proposed rule was designed to incorporate statutory changes contained in the prompt corrective action statute at 12 U.S.C. 1831o (PCA requirements) and to reflect the improved capital position of the thrift industry.

Section 303 of the CDRIA (12 U.S.C. 4803) requires the OTS to streamline and modify its regulations to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability. Section 303 also requires the OTS to remove inconsistencies and outmoded and duplicative requirements from its regulations.

Consistent with these requirements, elsewhere in today's **Federal Register** the OTS is proposing a new rule that updates, simplifies, and streamlines § 563.134. Like the 1994 proposal, today's proposed rule reflects PCA requirements. The new proposal also contains changes designed to simplify the rule and to conform OTS's capital distributions requirements with those that apply to banks. The proposal utilizes plain English drafting techniques to make the regulation easier to understand.

Withdrawal of the Proposed Rule

In light of the newly proposed revisions to § 563.134, the OTS withdraws its proposal published in the **Federal Register** on December 5, 1994 at 59 FR 62358.

Dated: December 10, 1997.

By the Office of Thrift Supervision.

Ellen S. Seidman,

Director.

[FR Doc. 98–204 Filed 1–6–98; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 563, 563b

[No. 97–128]

RIN 1550–AA72

Capital Distributions

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) is proposing amendments to its capital distributions regulation. Today's rule updates, simplifies, and streamlines this regulation to reflect OTS's implementation of the system of prompt corrective action (PCA) established under the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). The proposal is also designed to conform OTS's capital distribution requirements to those of the other banking agencies.

DATES: Comments must be received on or before March 9, 1998.

ADDRESSES: Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552, Attention Docket No. 97–128. These submissions may be hand-delivered to 1700 G Street, N.W., from 9:00 a.m. to 5:00 p.m. on business days; they may be sent by facsimile transmission to FAX Number (202) 906–7755; or they may be sent by e-mail: public.info@ots.treas.gov. Those commenting by e-mail should include their name and telephone number. Comments will be available for inspection at 1700 G Street, N.W., from 9:00 a.m. until 4:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Edward J. O'Connell, III, Project Manager, (202) 906–5694; Robyn Dennis, Manager, (202) 906–5751, Supervision Policy; Evelyne Bonhomme, Counsel (Banking and Finance), (202) 906–7052; Karen Osterloh, Assistant Chief Counsel, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street NW., Washington, D.C. 20552.

SUPPLEMENTARY INFORMATION:

I. Introduction

The OTS is proposing to update, simplify, and streamline its capital distributions regulation. This proposal follows a detailed review of the regulation to determine whether it should be revised, reduces burden consistent with statutory requirements, and is written in a clear, straightforward style. Today's proposal is made pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review and section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA). Consistent with section 303, the proposed amendments would bring the OTS's capital distributions regulation into greater conformity with the requirements of the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (FRB), and the Federal Deposit Insurance Corporation (FDIC).

The proposal reduces regulatory burden and compliance costs associated with some capital distributions. Under the existing rules, all savings associations must file a notice or an application for approval before making any capital distribution. Under the proposed rule, however, certain savings associations would not be required to file with the OTS. Specifically, for savings associations that would remain at least adequately capitalized following the capital distribution and meet other specified requirements, the OTS is proposing to eliminate any requirement

for notice or application for cash dividends below a specified amount. An application, however, would always be required for any capital distribution in excess of the specified amount. In addition, a notice or application would be required under other circumstances, such as where a distribution would reduce the amount of or retire common or preferred stock (including stock repurchases) or debt instruments included in capital.

II. Background

In 1990, the OTS adopted a capital distributions regulation, 12 CFR 563.134.[1] This regulation was designed to apply a uniform regulatory approach to all capital distributions made by savings associations, including dividends, stock repurchases, and cash-out mergers. The rule established a "tiered" approach, which permitted a savings association to make distributions based on its level of capitalization. Savings associations that met fully phased-in capital requirements had greater flexibility to make capital distributions than other savings associations. All savings associations were required to provide notice to the OTS, or to apply for approval, before making any capital distribution. When the OTS adopted this rule, the thrift industry was generally undercapitalized and thrifts were under pressure to increase capital to meet rapidly rising standards. The regulation was intended to restrict capital distributions by savings associations that did not meet the capital requirements imposed in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

In September 1992, the OTS promulgated its Prompt Corrective Action Final Rule (PCA Rule).[2] The PCA Rule implemented section 131 of FDICIA, which created a system of supervisory actions indexed to capital levels.[3] Well-capitalized and adequately capitalized insured depository institutions are generally not subject to PCA restrictions.[4] However, undercapitalized, significantly undercapitalized, and critically undercapitalized categories are subject to increasing levels of supervisory restrictions. Under the PCA Rule, OTS uses the ratio of total capital to risk-weighted assets, the ratio of core capital to risk-weighted assets, and the ratio of core capital to total average assets (the leverage ratio) to determine a thrift's PCA category.[5]

The PCA statute prohibits an insured depository institution from making a capital distribution if, after making the distribution, the institution would be undercapitalized. 12 U.S.C. 1831o(d)(1). In the preamble to the 1992 PCA rule, the OTS stated "that the permissibility of capital distributions will be determined by the [PCA] regulations. A savings association permitted to make a capital distribution under the [PCA] regulations may do so if the amount and type of distribution would be permitted under [the capital distribution regulation, § 563.134]."[6] The OTS also indicated that it would review its capital distributions regulation and consider making amendments that may be necessary based on the PCA statute.[7]

In December 1994, the OTS proposed to revise its capital distributions regulation to reflect the PCA rule and make other changes.[8] After reconsidering the issues underlying the 1994 proposal, the OTS has decided to make further revisions to the capital distributions rules. Accordingly, in a separate document, published in today's **Federal Register**, the OTS has withdrawn its 1994 proposal in favor of today's proposed revisions.

III. Summary of Proposed Rule

Today's proposal updates, simplifies, and streamlines the OTS capital distributions rule in light of the OTS implementation of the PCA requirements. Today's proposal makes changes designed to conform the OTS capital distributions regulation to the rules of the other banking agencies.

The proposed rule would add a new subpart E to part 563 to govern capital distributions by savings associations. The new subpart utilizes plain language drafting techniques consistent with National Performance Review instructions and new guidance in the Federal Register *Document Drafting Handbook* (January 1997 edition). The primary goal of plain language drafting is to make regulations easier for users to understand. The OTS intends to use plain language drafting in other regulatory projects to the extent possible. The provisions of the proposed new subpart are discussed below.

Proposed § 563.140—What Does This Subpart Cover?

Section 563.140 of the proposed rule describes the scope of the regulation. New subpart E would apply to all capital distributions made by savings associations. Because the application of the capital distributions rule to operating subsidiaries raises a variety of questions, the OTS specifically requests comment on this issue.

Proposed § 563.141—What Is a Capital Distribution?

Section 563.141 would define the term "capital distribution" to reflect the PCA statutory definition at 12 U.S.C. 1831o(b)(2)(B). The proposed rule defines a capital distribution, in part, as a distribution of cash or other property to a savings association's owners, made on account of their ownership.[9] As provided in the statute, the proposed definition excludes dividends consisting only of a savings association's shares or rights to purchase shares.[10]

The statute also excludes from the definition of capital distribution any amount paid on deposits of a mutual or cooperative institution that the OTS determines is not a distribution for the purposes of 12 U.S.C. 1831o.[11] In accordance with section 1831o(b)(2)(B)(i)(II), the OTS has determined that payments that a mutual savings association is required to make under the terms of a deposit instrument generally are not considered to be capital distributions.[12] Accordingly, these payments are not subject to the capital distributions rule unless either the OTS or FDIC finds that the payment is, in substance, a distribution of capital. *See* proposed § 563.141(d), discussed below.

Consistent with the statutory definition, the proposed regulatory

[1] 55 FR 17185 (July 2, 1990).

[2] 57 FR 44866 (September 29, 1992).

[3] Section 131 of FDICIA added a new section 38 to the Federal Deposit Insurance Act. The provision is codified at 12 U.S.C. 1831o. The OTS's implementing regulations appear at 12 CFR Part 565 (1997).

[4] Under certain circumstances, an institution may be reclassified to a lower capital category or treated as if it were in a lower capital category. See 12 CFR 565.4(c) (1997).

[5] Core capital, which is defined in Part 567 of the OTS's regulations, is the thrift capital measure comparable to Tier 1 capital for banks. 12 CFR Part 567 (1997).

[6] See 57 FR at 44868, fn.4.

[7] Id.

[8] See 59 FR 62356 (December 5, 1994).

[9] A distribution made by a Subchapter S corporation, as defined in 26 U.S.C. 1361, to its owners, including a distribution intended to cover a shareholder's personal tax liability for the shareholder's proportionate share of the taxable income of the institution, is considered to be a capital distribution under this rule.

[10] 12 U.S.C. 1831o(b)(2)(B)(i)(I).

[11] 12 U.S.C. 1831o(b)(2)(B)(i)(II). The OTS recently revised its regulations governing the payment of interest or earnings on deposits. *See* 62 FR 54759 (October 22, 1997) (final rule) and 62 FR 15626 (April 2, 1997) (proposed rule).

[12] Although payments to accountholders may, under certain circumstances, be capital distributions under the regulation, any treatment of mutual accountholders as "owners" under the capital distributions regulation should not be construed as having any effect on the concept of "ownership" of a mutual association under any other statute or regulation.

definition includes a savings association's payment to repurchase, redeem, retire, or otherwise acquire any of its shares or other ownership interests. In addition, payments to repurchase, redeem, or otherwise acquire debt instruments included in total capital, and any extension of credit to finance an affiliate's acquisition of those shares or interests would be capital distributions under the proposed rule.[13]

Consistent with section 1831o(b)(2)(B)(iii), proposed § 563.141(d) states that a capital distribution includes any transaction the OTS or the FDIC determines to be in substance a distribution of capital. The OTS may make such determinations by order or by regulation. Pursuant to the authority granted under section 1831o(b)(2)(B)(iii), the proposal would add one provision to the definition of capital distribution not specifically addressed in the statutory definition. Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring would be a capital distribution under this provision. The proposed rule would apply to any corporate restructuring, including, for example, cash-out mergers and internal reorganizations. Capital distributions would also include payment to shareholders of an association or shareholders of a holding company by an acquiring association to acquire ownership of the association, other than a distribution of shares. The OTS believes that such payments are in substance a distribution of capital. This provision is based on the existing OTS definition of capital distribution at § 563.134(a)(1)(iv).

In contrast, the OTS does not propose to retain existing § 563.134(a)(1)(iii), which states that a capital distribution includes other distributions charged against the capital accounts of an association. The OTS believes that this provision would be redundant since the distributions it captures would generally be covered under the proposed definition of capital distribution.[14] The OTS specifically solicits comments on whether existing § 563.134(a)(1)(iii) should be added to the final rule.

Proposed § 563.142—What Other Definitions Apply to This Subpart?

Proposed § 563.142 sets forth other definitions that apply to capital distributions. Significant definitions are highlighted below.

To implement the proposed definition of capital distribution at § 563.141(b) and (c), which includes certain payments to affiliates, the proposed rule would add a definition of affiliate. Under the proposed rule, an affiliate would be any company that controls, is controlled by, or is under common control with, another company. The terms "control" and "company" would have the meaning given to those terms in 12 U.S.C. 1841(a)(2) and (b) respectively.

The proposed rule would also add a definition of retained net income. This definition would be introduced in connection with a new provision requiring an application whenever a proposed capital distribution exceeds a specified amount. As discussed below, an application is required whenever the total amount of a capital distribution exceeds a prescribed limit based on net income for the year to date plus retained net income for the preceding two years.[15]

Proposed § 563.142 would retain the current regulation's definitions of capital, net income, and shares with minor modifications.[16] Moreover, the proposed rule would eliminate definitions related to capital tier thresholds.[17] These thresholds have become obsolete as the thrift industry raised its capital to required levels and the phase-in of capital requirements was completed on December 30, 1992.

Proposed § 563.143—Must I File With the OTS?

The current rule requires all savings associations to file either a notice or an application with the OTS before making a capital distribution. Today's proposal would allow savings associations to make certain capital distributions without filing a notice or application under certain circumstances. For savings associations that would remain at least adequately capitalized following the capital distribution and that meet other specified requirements, the OTS is proposing to eliminate any requirement for notice or application for cash dividends below specified amounts.

Section 563.143(a) would describe when a savings association must file an application. Under this proposed provision, a savings association must file an application if the association is not eligible for expedited treatment under OTS's Application Processing Regulation at 12 CFR 516.3(a), or if the capital distribution exceeds specified amounts.

Under § 516.3(a), a savings association is eligible for expedited treatment if it: (1) has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (UFIRS), as revised by the Federal Financial Institutions Examination Council;[18] (2) has a CRA rating of satisfactory or better; (3) has a Compliance rating of 1 or 2; (4) is meeting all of its capital requirements under part 567; and (5) has not been notified by supervisory personnel that it is a problem association or a savings association in troubled condition. Under existing § 563.134(b)(5), the OTS may notify an association that it is "in need of more than normal supervision," and subject it to more rigorous capital distribution requirements. For example, such an association may be required to file an application for prior approval of a distribution, rather than a notice of the distribution. The phrase "in need of more than normal supervision," however, is not defined in existing § 563.134 nor used elsewhere in OTS regulations. The proposed rule would retain similar OTS discretion on this point by requiring an application from any institution that does not meet the requirements for expedited treatment (including the problem association or troubled condition restrictions).[19]

A savings association must also file an application with the OTS if the amount of the capital distribution exceeds a specified amount. Under proposed § 563.143(a)(2), an application would be required if the total amount of all capital distributions, including the proposed capital distribution, for the applicable calendar year would exceed an amount equal to the savings association's net income for that year to date plus the savings association's retained net income for the preceding two years. Thus, without prior application to the OTS, only undistributed net income for the prior two years may be distributed in addition to the current year's undistributed net income. This proposed restriction is similar to

[13] Under this provision, payments from a savings association to an employee stock option plan (ESOP) trust to make payments on a loan previously contracted by the ESOP to purchase shares of the savings association's stock are not considered to be capital distributions. Rather, such payments would be treated as compensation by the savings association to its employees.

[14] See proposed § 563.141(a)–(c).

[15] See proposed § 563.143(a)(2).

[16] See existing 12 CFR 563.134(a)(2), (5) and (6) (1997).

[17] See existing 12 CFR 563.134(a)(3), (4), (7), (8), (9) and (10) (1997).

[18] 61 FR 67021, 67024–67029 (December 19, 1996). The OTS issued a final rule making conforming changes to its regulations that cross-reference the UFIRS. 62 FR 3779, 3780 (January 27, 1997).

[19] See proposed §§ 563.143(a)(1).

limitations imposed upon banks and should promote interagency regulatory conformity consistent with section 303 of CDRIA. It is based on the requirement currently imposed upon national banks under 12 U.S.C. 60 and OCC regulations at 12 CFR 5.64.[20] FRB regulations at 12 CFR 208.19(b) impose a similar requirement on state member banks.

Proposed § 563.143(b) describes when a savings association must file a notice of a capital distribution. This proposed section would apply whenever an application is not otherwise required under § 563.143(a). A savings association would be required to file a notice if it meets any one of four criteria.

First, a notice would be required if the savings association would not be at least adequately capitalized following the distribution. This requirement ensures that a savings association will not violate the PCA provision prohibiting a savings association from declaring any dividend or making any other capital distribution if, following the distribution, the institution would be undercapitalized.[21]

The second criterion is similar to restrictions imposed on upon banks and should promote interagency regulatory conformity consistent with section 303 of CDRIA. Section 563.143(b)(2) is based on section 18(i) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1828(i)). Under this statute, no insured state nonmember bank may, without the FDIC's prior consent, reduce the amount, or retire any part of its common or preferred capital stock, or retire any part of its capital notes and debentures.[22] Section 563.143(b)(2) would place a comparable restraint on savings associations by requiring a notice where a capital distribution would reduce the amount of, or retire any part of the savings association's common or preferred stock, or retire any part of debt instruments such as notes or debentures included in capital under part 567. Under the proposed rule, the reduction of the amount of stock would include the repurchase of outstanding stock as treasury stock. The OTS specifically requests comment on whether a savings association should be required to file a notice for such stock repurchases.

Proposed § 563.143 would include a limited exception to the FDIA-based requirement. If a notice or application is not otherwise required under § 563.143(a) and (b), a savings association would not be required to file if the savings association is making a regular payment under a debt instrument approved by the OTS under 12 CFR 563.81.

Under the third criterion, a savings association would be required to file a notice if the proposed distribution violates a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OTS (or the FDIC), or a condition imposed on the savings association in an OTS-approved application or notice.

Finally, under § 563.143(b)(4), a savings association that is a subsidiary of a savings and loan holding company would be required to file a notice, unless an application is otherwise required. This provision implements 12 U.S.C. 1467a(f), which requires such savings associations to notify OTS at least 30 days before the proposed declaration of any dividend.

If neither the savings association nor the proposed capital distribution meet any of the criteria listed in § 563.143(a) or (b), the savings association is not required to file a notice or an application before making a distribution. *See* proposed § 563.143(c).

Proposed § 563.144—How Do I File With the OTS?

Proposed § 563.144 contains the requirements governing the filing of capital distribution notices or applications with the OTS. Under this proposed section, an application or notice must be in narrative form, include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution, and demonstrate compliance with § 563.146, which addresses the criteria for OTS disapproval of notices and denial of applications. In addition, an application must demonstrate compliance with OTS approval standards at § 516.3(b)(2). *See* proposed § 563.144(a).

Current § 563.134(c) permits savings associations to seek approval or provide notice by submitting schedules of proposed capital distributions. Proposed § 563.144(b) would permit a savings association to file schedules of capital distributions it proposes to make over a period not to exceed 12 months.

All notices and applications must be filed at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by the savings association's board of directors. *See* proposed § 563.144(c). All notices and applications would be processed under 12 CFR §§ 516.1 through 516.3.

Proposed § 563.145—May I Combine My Notice or Application With Other Notices or Applications?

Consistent with the current regulation, the proposed rule would allow a savings association to combine a capital distribution notice or application with any related notice or application filed with the OTS under any regulation. To combine notices, the association must state that the related notice or application is intended to serve as a notice or application under the capital distributions regulation. Additionally, the savings association must submit the combined notice or application in a timely manner.

Proposed § 563.146—Will the OTS Permit My Capital Distribution?

Section 563.146 would state that the OTS may disapprove a notice or deny an application submitted under § 563.143 under three circumstances. First, § 563.146(a) would state that the OTS may disapprove a notice or deny an application if, following the distribution, the savings association would be undercapitalized. This provision reflects the PCA prohibition at 12 U.S.C. 1831o(d)(1)(B). If the savings association would be undercapitalized, the OTS would determine whether the capital distribution falls within the limited statutory exception permitting the OTS, in consultation with the FDIC, to approve an undercapitalized institution's repurchase, redemption, retirement or acquisition of shares or ownership interests. To be exempted, the distribution must be made in connection with the issuance of additional shares in at least an equivalent amount, and must reduce the institution's financial obligations or otherwise improve its financial condition. 12 U.S.C. 1831o(d)(1)(B).

Second, under proposed § 563.146(b) the OTS may disapprove a notice or deny an application where the OTS determines that the proposed capital distribution raises safety or soundness concerns. The OTS will consider the amount of the capital distribution in determining whether the distribution raises safety and soundness concerns. Under today's proposal, a savings association would not be required to file a notice or application for a cash distribution if, in addition to satisfying other regulatory requirements, the total

[20] Under 12 U.S.C. 60 and 12 CFR 5.64(1997), a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any calendar year exceeds the total of the national bank's retained net income of that year to date, combined with its retained net income of the preceding two years, unless the dividend is approved by the OCC.

[21] 12 U.S.C. 1831o(d)(1)(A).

[22] A similar, but not identical, provision applies to national banks. *See* 12 U.S.C. 56 and 59.

amount of all distributions (including the proposed distributions) for the applicable calendar year does not exceed net income for that year to date plus the retained net income for the preceding two years. The OTS may permit a capital distribution in excess of this standard upon application, but may deny an application for such a distribution if it raises safety and soundness concerns.

Finally, § 563.146(c) would retain the existing provision that a savings association may not make a distribution that violates a prohibition contained in any statute, regulation, or agreement between the savings association and the OTS or the FDIC or condition imposed on the savings association in an OTS-approved application or notice.[23] If there is such a violation, the OTS would determine whether it may and should permit the capital distribution notwithstanding the prohibition.

Miscellaneous

The current regulation at 12 CFR 563.134(e)(2) and (3) addresses the effect of the capital distributions rule on more stringent and less stringent provisions or conditions imposed in written agreements between a savings association and the OTS, or imposed on a savings association in an OTS-approved application or notice. The OTS believes that these provisions would have a limited application, and has not included them in the proposed rule. The OTS specifically requests comments on whether these provisions should be retained in the final rule.

The proposed rule includes appropriate revisions modifying cross citations to existing § 563.134.

IV. Executive Order 12866

The Director of the OTS has determined that this proposed regulation does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

V. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this proposed regulation will not have a significant economic impact on a substantial number of small entities. The proposal merely conforms the capital distributions regulation to standards already in place for all institutions as a result of PCA and makes other revisions designed to lower paperwork and other burdens on savings associations.

[23] See current 12 CFR 563.134(b)(6) (1997).

VI. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (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 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. OTS has determined that the proposed rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. As discussed in the preamble, the proposal merely conforms the capital distributions regulation to standards already in place for all institutions as a result of PCA and makes other revisions designed to lower paperwork and other burdens on savings associations. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

VII. Paperwork Reduction Act

OTS invites comment on:

(1) Whether the proposed information collection contained in this proposal is necessary for the proper performance of OTS's functions, including whether the information has practical utility;

(2) The accuracy of OTS's estimate of the burden of the proposed information collection;

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

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

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

Respondents/recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number.

The collection of information requirements contained in this proposal have been submitted to the Office of Management and Budget for review 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 (1550–0059), Washington, D.C. 20503, with copies to the Regulations and Legislation Division (1550–0059), Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552.

The collection of information requirements in this proposed rule are found in 12 CFR 563.143–563.146. OTS requires this information for the proper supervision of capital distributions by Federal savings associations. The likely respondents/recordkeepers are Federal savings associations.

Estimated average annual burden hours per respondent/recordkeeper: 4.

Estimated number of respondents: 688.

Estimated total annual reporting and recordkeeping burden: 2752.

Start up costs to respondents: none.

List of Subjects

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Security bonds.

12 CFR Part 563b

Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision hereby proposes to amend chapter V, title 12 of the Code of Federal Regulations as set forth below.

PART 563—OPERATIONS

1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 3806; 42 U.S.C. 4106.

§ 563.134 [Removed]

2. Section 563.134 is removed.

3. Subpart E is revised to read as follows:

Subpart E—Capital Distributions

Sec.

563.140 What does this subpart cover?
563.141 What is a capital distribution?
563.142 What other definitions apply to this subpart?
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Subpart E—Capital Distributions

§ 563.140 What does this subpart cover?

This subpart applies to all capital distributions made by a savings association ("you").

§ 563.141 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a mutual savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the OTS determines is not a distribution for the purposes of this section.

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under § 567.5 of this chapter, and any extension of credit to finance an affiliate's acquisition of your shares or interests.

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes a payment to shareholders of an association or shareholders of a holding company by an acquiring association to acquire ownership of the association, other than a distribution of shares.

(d) Any transaction that the OTS or the Corporation determines, by order or regulation, to be in substance a distribution of capital.

§ 563.142 What other definitions apply to this subpart?

The following definitions apply to this subpart:

Affiliate means any company that controls, is controlled by, or is under common control with another company. The terms "control" and "company" have the meaning given to those terms in 12 U.S.C. 1841(a)(2) and (b) respectively.

Capital means total capital as defined under § 567.5(c) of this chapter.

Net income means your net income computed in accordance with generally accepted accounting principles.

Retained net income means your net income for a specified period less total capital distributions declared in that period.

Shares means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term "share" also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution.

§ 563.143 Must I file with the OTS?

Whether and what you must file with the OTS depends on whether you and your proposed capital distribution fall within certain criteria.

(a) *Application required.*

If:	Then you:
(1) You are not eligible for expedited treatment under § 516.3(a) of this chapter.	Must file an application with the OTS.
(2) The total amount of all of your capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds your net income for that year to date plus your retained net income for the preceding two years.	Must file an application with the OTS.

(b) *Notice required.*

If you are not required to file an application under paragraph (a) of this section, but:	Then you:
(1) You will not be at least adequately capitalized, as set forth in § 565.4(b)(2) of this chapter.	Must file a notice with the OTS.
(2) Your proposed capital distribution would reduce the amount of or retire any part of your common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under part 567 of this chapter (other than regular payments required under a debt instrument approved under § 563.181).	Must file a notice with the OTS.
(3) Your proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between you and the OTS (or the Corporation, or violate a condition imposed on you in an OTS-approved application or notice.	Must file a notice with the OTS.
(4) You are a subsidiary of a savings and loan holding company.	Must file a notice with the OTS.

(c) *No prior notice required.*

If neither you nor your proposed capital distribution meet any of the criteria listed in paragraphs (a) and (b) of this section.	Then you do not need to file a notice or an application with the OTS before making a capital distribution.

§ 563.144 How do I file with the OTS?

(a) *Contents.* Your notice or application must:

(1) Be in narrative form.

(2) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution.

(3) Demonstrate compliance with § 563.146. If you have filed an application, your application must also demonstrate compliance with the standards of § 516.3(b)(2) of this chapter.

(b) *Schedules.* Your notice or application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months.

(c) *Timing.* You must file your notice or application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by your board of directors.

§ 563.145 May I combine my notice or application with other notices or applications?

Yes. You may combine the notice or application required under § 563.143 with any related notice or application filed with the OTS under any provision of this chapter, if:

(a) You state that the related notice or application is intended to serve as a notice or application under this subpart; and

(b) You submit the notice or application in a timely manner.

§ 563.146 Will the OTS permit my capital distribution?

The OTS may disapprove your notice or deny your application filed under § 563.143, if the OTS makes any of the following determinations.

(a) You will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in § 565.4(b) of this chapter, following the capital distribution. If so, the OTS will determine if your capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

(b) Your proposed capital distribution raises safety or soundness concerns.

(c) Your proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between you and the OTS (or the Corporation), or a condition imposed on you in an OTS-approved application or notice. If so, the OTS will determine whether it may permit your capital distribution notwithstanding the prohibition or condition.

PART 563b—CONVERSIONS FROM MUTUAL TO STOCK FORM

4. The authority citation for part 563b continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901; 15 U.S.C. 78c, 78l, 78m, 78n, 78w.

§ 563b.3 [Amended]

5. Section 563b.3(g)(2) is amended by removing the phrase "§ 563.134", and by adding in lieu thereof the phrase "§§ 563.140–563.146".

Dated: December 12, 1997.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

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