

## § 5.55

office for a determination whether the OCC will require an application under this section. In determining whether to require an application, the OCC considers the size and nature of the transaction and the condition of the institutions involved.

(2) *Approval requirement.* A national bank or Federal savings association must file an application and obtain the prior written approval of the OCC before engaging in a substantial asset change.

(3) *Factors—(i) In general.* (A) In determining whether to approve an application under paragraph (d)(1) of this section, the OCC considers the following factors:

(1) The capital level of any resulting national bank or Federal savings association;

(2) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(3) The purpose of the transaction;

(4) The impact of the transaction on safety and soundness of the national bank or Federal savings association; and

(5) The effect of the transaction on the national bank or Federal savings association's shareholders, depositors, other creditors, and customers.

(B) The OCC may deny the application if the transaction would have a negative effect in any of these respects.

(ii) *Additional factors.* The OCC's review of any substantial asset change that involves the purchase or other acquisition or other expansions of the bank's or savings association's operations or that involves a change in the purpose of the bank's or association's charter, as described in § 5.20(1)(2), will include, in addition to the foregoing factors, the factors governing the organization of a bank or savings association under § 5.20.

(e) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply with respect to applications filed pursuant to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all of

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the provisions of §§ 5.8, 5.10, and 5.11 apply.

[80 FR 28462, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017]

EFFECTIVE DATE NOTE: At 85 FR 80466, Dec. 11, 2020, § 5.53 was amended, effective Jan. 11, 2021, by:

a. In paragraph (c)(2)(ii), removing “12 CFR 5.48” wherever it appears and adding in its place “§ 5.48”; and

b. In paragraph (d)(3)(i)(A), removing the phrase “under paragraph (d)(1)” and adding in its place “filed under paragraph (d)(2)”.

### § 5.55 Capital distributions by Federal savings associations.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, 1467a, 1831o, and 5412(b)(2)(B).

(b) *Licensing requirements.* A Federal savings association must file an application or notice before making a capital distribution, as provided in this section.

(c) *Scope.* This section applies to all capital distributions by a Federal savings association and sets forth the procedures and standards relating to a capital distribution.

(d) *Definitions.* The following definitions apply to this section:

(1) *Affiliate* means an affiliate, as defined under regulations of the Board of Governors of the Federal Reserve System regarding transactions with affiliates, 12 CFR part 223 (Regulation W).

(2) *Capital* means total capital, as computed under 12 CFR part 3.

(3) *Capital distribution* means:

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

(A) Any dividend consisting only of the shares of the savings association or rights to purchase the shares; or

(B) If the savings association is a Federal mutual savings association, any payment that the savings association is required to make under the terms of a deposit instrument and any other amount paid on deposits that the OCC determines is not a distribution for the purposes of this section;

(ii) A Federal savings association's payment to repurchase, redeem, retire or otherwise acquire any of its shares or other ownership interests; any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in its total capital under 12 CFR

part 3; and any extension of credit to finance an affiliate's acquisition of the savings association's shares or interests;

(iii) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes the Federal savings association's payment of cash or property to shareholders of another association or to shareholders of its holding company to acquire ownership in that association, other than by a distribution of shares;

(iv) Any other distribution charged against a Federal savings association's capital accounts if the savings association would not be well capitalized, as set forth in 12 CFR 6.4, following the distribution; and

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

(4) *Net income* means a Federal savings association's net income computed in accordance with generally accepted accounting principles (GAAP).

(5) *Retained net income* means a Federal savings association's net income for a specified period less total capital distributions declared in that period.

(6) *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.

(e) *Filing requirements*—(1) *Application required*. A Federal savings association must file an application with the OCC if:

(i) The savings association is not an eligible savings association;

(ii) The total amount of all of the savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years;

(iii) The savings association would not be at least adequately capitalized,

as set forth in 12 CFR 6.4, following the distribution; or

(iv) The savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(2) *Notice required*. Unless it is required to file an application under paragraph (e)(1) of this section, a Federal savings association that is an eligible savings association must file a notice with the OCC if:

(i) The savings association would not remain well capitalized, as set forth under 12 CFR 6.4, or would otherwise not remain an eligible savings association following the distribution;

(ii) The savings association's proposed capital distribution would reduce the amount of or retire any part of its common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under 12 CFR part 3 (other than regular payments required under a debt instrument approved under § 5.56);

(iii) The savings association's proposed capital distribution is payable in property other than cash;

(iv) The savings association is a direct or indirect subsidiary of a mutual savings and loan holding company; or

(v) The savings association is a direct or indirect subsidiary of a company that is not a savings and loan holding company.

(3) *No prior notice required*. A Federal savings association does not need to file a notice or an application with the OCC before making a capital distribution if the Federal savings association is not required to file an application under paragraph (e)(1) or a notice under paragraph (e)(2) of this section.

(4) *Informational copy of notice required*. If the Federal savings association is a subsidiary of a savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a dividend solely under 12 U.S.C. 1467a(f) and not also under 12 U.S.C. 1467a(o)(11), and neither an application under paragraph (e)(1) nor a notice

under paragraph (e)(2) of this section is required, then the savings association must provide an informational copy to the OCC of the notice filed with the Board, at the same time the notice is filed with the Board.

(f) *Filing format*—(1) *Contents*. The notice or application must:

- (i) Be in narrative form;
- (ii) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution; and
- (iii) Demonstrate compliance with paragraph (h) of this section.

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

(3) *Combined filings*. A Federal savings association may combine the notice or application required under paragraph (e) of this section with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If submitting a combined filing, the Federal savings association must state that the related notice or application is intended to serve as a notice or application under this section.

(g) *Filing procedures*—(1) *Application*. When a Federal savings association is required to file an application under paragraph (e)(1) of this section, it must file the application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. The Federal savings association shall not effect the proposed declaration of dividend or approval of the proposed capital distribution unless it has received prior written approval of the OCC.

(2) *Prior notice with expedited review*. A Federal savings association that is an eligible savings association and that is required to file a notice under paragraph (e)(2) must file the notice at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. The notice is deemed approved by the OCC upon the expiration of 30 days after the filing date of the notice unless, before the ex-

piration of that time period, the OCC notifies the Federal savings association that:

- (i) Additional information is required to supplement the notice;
- (ii) The notice is not eligible for expedited review, or the expedited reviewed process is extended, under 5.13(a)(2); or
- (iii) The notice is disapproved.

(h) *OCC review of capital distributions*. The OCC reviews applications and notices submitted pursuant to paragraphs (g)(1) and (g)(2) of this section. The OCC may disapprove the notice or deny the application in whole or in part, if it makes any of the following determinations:

(1) The Federal savings association will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in 12 CFR 6.4, as applicable, following the capital distribution. If so, the OCC will determine if the capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

(2) The proposed capital distribution raises safety or soundness concerns.

(3) The proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between the Federal savings association and the OCC or the OTS, or a condition imposed on the Federal savings association in an application or notice approved by the OCC or the OTS. If so, the OCC will determine whether it may permit the capital distribution notwithstanding the prohibition or condition.

(i) *Exceptions to rules of general applicability*. Sections 5.8, 5.10, and 5.11 do not apply to capital distributions made by Federal savings associations.

[80 FR 28463, May 18, 2015]

EFFECTIVE DATE NOTE: At 85 FR 80466, Dec. 11, 2020, §5.55 was amended, effective Jan. 11, 2021, by:

- a. In paragraph (b), removing the phrase “or notice”;
- b. Removing paragraph (d)(2) and redesignating paragraph (d)(3) as paragraph (d)(2);
- c. Adding a new paragraph (d)(3);
- d. In paragraph (d)(4), removing the phrase “generally accepted accounting principles (GAAP)” and adding in its place the word “GAAP”;
- e. Revising paragraphs (e), (f), (g), and paragraph (h) introductory text;

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f. Redesignating paragraphs (h)(1) through (h)(3) as paragraphs (h)(1)(i) through (h)(1)(iii);

g. Removing the last sentence of redesignated paragraph (h)(1)(iii); and

h. Adding new paragraph (h)(1) introductory text and paragraph (h)(2).

For the convenience of the user, the added and revised text is set forth as follows:

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\* \* \* \* \*

(d) \* \* \*

(3) *Control* has the same meaning as in section 10(a)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(2)).

\* \* \* \* \*

(e) *Filing requirements*—(1) *Application required*. A Federal savings association must file an application with the OCC before making a capital distribution if:

(i) The Federal savings association would not be at least well capitalized or would not otherwise remain an eligible savings association following the distribution;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. If the capital distribution is from retained earnings, the aggregate limitation in this paragraph may be calculated in accordance with § 5.64(c)(2), substituting "capital distributions" for "dividends" in that section;

(iii) The Federal savings association's proposed capital distribution would reduce the amount of or retire any part of its common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under 12 CFR part 3 (other than regular payments required under a debt instrument approved under § 5.56);

(iv) The Federal savings association's proposed capital distribution is payable in property other than cash;

(v) The Federal savings association is directly or indirectly controlled by a mutual savings and loan holding company or by a company that is not a savings and loan holding company; or

(vi) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the Federal savings association and the OCC or the OTS, or violate a condition imposed on the Federal savings association in an application or notice approved by the OCC or the OTS.

(2) *No application required*. A Federal savings association may make a capital distribution without filing an application with the OCC if it does not meet the filing requirements in paragraph (e)(1) of this section.

(3) *Informational copy of Federal Reserve System notice required*. If the Federal savings association is a subsidiary of a savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a dividend solely under 12 U.S.C. 1467a(f) and not also under 12 U.S.C. 1467a(o)(11), and no application under paragraph (e)(1) of this section is required, then the savings association must provide an informational copy to the OCC of the notice filed with the Board, at the same time the notice is filed with the Board.

(f) *Application format*—(1) *Contents*. The application must:

(i) Be in narrative form;

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

(iii) Demonstrate compliance with paragraph (h) of this section.

(2) *Schedules*. The application may include a schedule proposing capital distributions over a specified period.

(3) *Combined filings*. A Federal savings association may combine the application required under paragraph (e)(1) of this section with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If submitting a combined filing, the Federal savings association must state that the related notice or application is intended to serve as an application under this section.

(g) *Filing procedures*—(1) *Application*. When a Federal savings association is required to file an application under paragraph (e)(1) of this section, it must file the application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. Except as provided in paragraph (g)(2) of this section, the OCC is deemed to have approved an application from an eligible savings association upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(i) Additional information is required to supplement the application;

(ii) The application has been removed from expedited review, or the expedited review process is extended, under 5.13(a)(2); or

(iii) The application is denied.

(2) *Applications not subject to expedited review*. An application is not subject to expedited review if:

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(i) The Federal savings association is not an eligible savings association;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years;

(iii) The Federal savings association would not be at least adequately capitalized, as set forth in 12 CFR 6.4, following the distribution; or

(iv) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(3) *OCC filing office*—(i) *Appropriate licensing office.* Except as provided in paragraph (g)(3)(ii) of this section, a Federal savings association that is required to file an application under paragraph (e)(1) of this section or an informational copy of a notice under paragraph (e)(3) of this section must submit the application or notice to the appropriate OCC licensing office.

(ii) *Appropriate supervisory office.* A Federal savings association that is required to file an application under paragraph (e)(1) of this section for capital distributions involving solely a cash dividend from retained earnings or involving a cash dividend from retained earnings and a concurrent cash distribution from permanent capital must submit the application to the appropriate OCC supervisory office.

(h) *OCC review of capital distributions.* After review of an application submitted pursuant to paragraph (e)(1) of this section:

(1) The OCC may deny the application in whole or in part, if it makes any of the following determinations:

\* \* \* \* \*

(2) The OCC may approve the application in whole or in part. Notwithstanding paragraph (h)(1)(iii) of this section, the OCC may waive any waivable prohibition or condition to permit a distribution.

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**§5.56 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital.**

(a) *Scope and definitions.* (1) A Federal savings association must comply with this section in order to include subordi-

nated debt securities or mandatorily redeemable preferred stock ("covered securities") in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital. A savings association that does not include covered securities in tier 2 capital is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of §163.80 of this chapter.

(2) For purposes of this section, mandatorily redeemable preferred stock means mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Federal Home Loan Bank Board and approved in writing by the Federal Savings and Loan Insurance Corporation for inclusion as regulatory capital before or after issuance.

(b) *Application and notice procedures*—(1) *Application or notice to include covered securities in tier 2 capital*—(i) *Application.* Unless a Federal savings association is an eligible savings association filing a notice under paragraph (b)(1)(ii) of this section, it must file an application seeking the OCC's approval of the inclusion of covered securities in tier 2 capital. The savings association may file its application before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application.

(ii) *Notice with expedited review.* An eligible savings association must file a notice seeking the OCC's approval of the inclusion of covered securities in tier 2 capital. The savings association may file its notice before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the notice. The OCC is deemed to have approved the notice upon the expiration of 30 days after the filing date of the notice unless, before the expiration of that time period, the OCC notifies the Federal savings association that

(A) Additional information is required to supplement the notice;

(B) The notice is not eligible for expedited review, or the expedited reviewed process is extended, under §5.13(a)(2); or

(C) The OCC denies the notice.