

**Federal Register** notice and was held on October 28, 1998 (63 FR 4432, August 18, 1998).<sup>7</sup>

FSIS is now reviewing its regulations to determine what changes the Agency should make to increase consumer protection against meat and poultry products adulterated with *E. coli* O157:H7, or other pathogens. Therefore, FSIS is soliciting input from the public about regulatory requirements that may be appropriate to prevent the distribution of products adulterated with *E. coli* O157:H7. Any changes that the Agency would make in the regulations would have to be consistent with the Agency's view expressed in this notice that beef products, other than surface-contaminated intact cuts that are to be distributed for consumption as intact products, that contain *E. coli* O157:H7 are adulterated unless conditions of transportation and other handling ensure that they will not be distributed until they have been processed into ready-to-eat products.

Because FDA has amended its regulations to permit the use of ionizing radiation for refrigerated or frozen uncooked meat, meat byproducts, and certain meat food products to control foodborne pathogens (62 FR 64107, December 3, 1997), FSIS is preparing a proposed rule on procedural and labeling requirements for irradiated products. Interested persons will have the opportunity, in that rulemaking, to submit comments to the Agency on irradiation treatment of *E. coli* O157:H7-contaminated products as an option for effectively eliminating this one specific pathogen.

Done at Washington, DC, on January 13, 1999.

**Thomas J. Billy,**  
Administrator.

[FR Doc. 99-1123 Filed 1-15-99; 8:45 am]

BILLING CODE 3410-DM-P

<sup>7</sup> Copies of the comments received on the risk assessment process (Docket #98-037N), the transcript of the risk assessment public meeting, and a preliminary scoping document are available for viewing in the FSIS docket room. In addition, an electronic version of the preliminary scoping document is available on line through the FSIS web page located at <http://www.fsis.usda.gov> (see the link for the Office of Public Health and Science, *E. coli* risk).

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Parts 563, 563b

[No. 99-1]

RIN 1550-AA72

#### Capital Distributions

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of Thrift Supervision (OTS) is issuing a final rule revising its capital distribution 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 final rule also conforms OTS's capital distribution requirements more closely to those of the other banking agencies.

**EFFECTIVE DATE:** April 1, 1999.

**FOR FURTHER INFORMATION CONTACT:** Edward J. O'Connell, III, Project Manager, (202) 906-5694; 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. Background

On January 7, 1998, the OTS published a proposed rule adding a new subpart E to part 563 to govern capital distributions by savings associations.<sup>1</sup> The proposal was intended to update, simplify, and streamline the existing capital distribution rule 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). Consistent with section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA), the proposed rule was also designed to conform the OTS capital distribution regulation to the rules of the other banking agencies, to the extent possible.

<sup>1</sup> 63 FR 1044 (Jan. 7, 1998).

## II. Summary of Comments and Description of Final Rule

### A. General Discussion of the Comments

The public comment period on the proposed rule closed on March 9, 1998. Four commenters responded: one federal savings bank, one savings and loan holding company, one law firm representing a federal savings bank, and one trade association. Two commenters supported the proposed rule with certain modifications and clarifications. One commenter, the savings and loan holding company, opposed the proposed changes. Another commenter addressed coverage of capital distributions by operating subsidiaries. The issues raised by the commenters are addressed in the section-by-section analysis below.

### B. Section-by-Section Analysis

#### *Proposed § 563.140—What Does this Subpart Cover?*

Section 563.140 of the proposed rule described the scope of the regulation. Proposed subpart E would apply to all capital distributions by savings associations. The OTS specifically requested comment on whether the capital distribution rule should also apply to capital distributions by operating subsidiaries of savings associations. This issue is addressed below under § 563.141.

#### *Proposed § 563.141—What is a Capital Distribution?*

Proposed § 563.141 defined the term "capital distribution" as a distribution of cash or other property to a savings association's owners, made on account of their ownership. The proposed definition, at § 563.141(a), excluded dividends consisting only of a savings association's shares or rights to purchase shares, and excluded payments that a mutual savings association is required to make under the terms of a deposit instrument.

Capital distributions would also include a savings association's payment to repurchase, redeem, retire, or otherwise acquire any of its shares or other ownership interests, any payment 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. Proposed § 563.141(b). Additionally, a capital distribution would include any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate

restructuring. Proposed § 563.141(c). Finally, proposed § 563.141(d) included as a capital distribution, any transaction the OTS or the Federal Deposit Insurance Corporation (FDIC) determines, by order or regulation, to be in substance a distribution of capital.

Two commenters addressed this proposed definition. Both responded to OTS's request for comment on whether the final rule, like OTS's existing regulation, should state that a capital distribution includes other distributions charged against the capital accounts of an association. See current § 563.134(a)(1)(iii). Both commenters agreed with the OTS's initial conclusion that all distributions described by this section would be covered under other provisions of the proposed definition of capital distribution.<sup>2</sup> The OTS, however, has decided to retain this provision based on its review of a related issue regarding distributions by operating subsidiaries.

In the preamble to the proposed rule, the OTS specifically requested comment on whether the capital distribution rule should apply to capital distributions made by operating subsidiaries of savings associations. One commenter argued that the application of the rule to operating subsidiaries would make it more difficult for institutions to raise capital at favorable pricing for the operating subsidiary. The commenter also noted that, in certain instances, distributions by an operating subsidiary would have no impact on the capital accounts of savings associations.

The final rule does not apply to capital distributions by wholly-owned operating subsidiaries. Rather, the OTS believes that its capital distribution rule should apply only when a distribution by an operating subsidiary (or any other subordinate organization) is made to minority shareholders and consequently affects the capital accounts of an association. Generally, for reporting purposes, the accounts of a majority-owned subsidiary are consolidated with those of the parent savings association. For regulatory capital purposes, where the consolidated subsidiary is not wholly owned, the balance sheet account "minority interests in the equity accounts of subsidiaries that are fully consolidated" may be included in Tier 1 capital and total capital if certain conditions are met.<sup>3</sup> Distributions by such consolidated subsidiaries to shareholders other than the savings association reduce the cited balance sheet account and, therefore, reduce regulatory capital. Accordingly, final

§ 563.141(d) states that a capital distribution includes any distribution charged against the capital accounts of an association. For example, any distribution by a subsidiary, as defined under the capital rules at 12 CFR 567.1, falls under this subsection if the distribution reduces the savings association's regulatory capital. To ensure that this application of the regulation does not impose undue regulatory burdens that are not justified by safety and soundness considerations, these distributions are not considered capital distributions under the final rule if the savings association will be well capitalized following the distribution.<sup>4</sup>

#### *Proposed § 563.142—What Other Definitions Apply to this Subpart?*

Proposed § 563.142 included other definitions of terms used in Subpart E, including "affiliate," "capital," "net income," "retained net income," and "shares." No commenter addressed this section.

The final rule amends the definition of affiliate. The proposed rule defined affiliate as any company that controls, is controlled by, or is under common control with another company. The term "affiliate" is used twice in the final definition of capital distribution. See § 563.141 (b) and (c), which provide that a capital distribution includes any direct payment of cash or property to owners or affiliates made in connection with a corporate restructuring and includes any extension of credit to finance an affiliate's acquisition of the savings association's shares or ownership interests. The OTS does not believe that direct payments of cash or property or extensions of credit to a subsidiary that is controlled by the thrift should be considered to be a capital distribution. The definition of "affiliate" at 12 CFR 563.41(b) generally excludes a thrift's subsidiaries. The OTS believes that this definition is better suited to the capital distribution rule and has amended the final rule accordingly.<sup>5</sup> This change will also promote the use of consistent and uniform definitions in OTS regulations.

#### *Proposed § 563.143—Must I File With the OTS?*

The current OTS capital distribution regulation requires all savings

associations to file a notice or an application for approval before making any capital distribution.<sup>6</sup> The OTS proposed to amend existing procedures to exempt certain savings associations from filing with the OTS.

Proposed § 563.143(a) described when a savings association must file an application and obtain prior OTS approval of a proposed capital distribution. Under this proposed section, a savings association would be required to file an application if the association is not eligible for expedited treatment under OTS's application processing rules at 12 CFR 516.3(a), or 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 (the "retained net income standard").

Proposed § 563.143(b) described when a savings association must file a notice of a proposed capital distribution. Under the proposed rule, a savings association would be required to file a notice whenever an application would not be required under § 563.143(a) and: (1) The savings association will not be at least adequately capitalized following the capital distribution; (2) The 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; (3) The proposed distribution would violate 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; or (4) The savings association is a subsidiary of a savings and loan holding company.

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

Two commenters addressed the proposed retained net income standard. One commenter claimed that this standard is too stringent because it would require applications from savings associations that have a large amount of capital, but low retained earnings in the years preceding the capital distribution. Another commenter suggested a

<sup>4</sup> Of course, OTS may, nonetheless, determine that such a distribution is, in substance, a distribution of capital under final § 563.141(e).

<sup>5</sup> The proposed definition of "affiliate" was based on the Federal Deposit Insurance Act definition. See 12 U.S.C. 1813(w). However, since the PCA capital distribution restrictions do not use this term, the OTS is not required to apply this definition in its rule.

<sup>6</sup> 12 CFR 563.134 (b) and (c).

<sup>2</sup> 63 FR 1044, at 1046.

<sup>3</sup> 12 CFR 567.5(a)(1)(iii).

different standard which would require an application whenever a capital distribution exceeded the association's net income for the year plus an amount equal to the greater of the retained net income for the preceding two years or the amount of available capital above the well capitalized level. The commenter asserted that this change would provide additional flexibility because it would permit associations with strong capital positions to provide dividend distributions or other types of capital distributions through all phases of the economic and business cycle.

The final rule continues to require an application whenever a proposed capital distribution exceeds the retained net income standard. This standard is based on similar requirements currently imposed on national banks and state member banks. Under 12 U.S.C. 60 and 12 CFR 5.64 (1998), 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. The Federal Reserve System regulation at 12 CFR 208.19(b)(1998) imposes a similar requirement on state member banks. Adoption of the net income standard will bring the OTS capital distribution regulation into greater uniformity with these other banking agencies and is, thus, consistent with section 303 of the CDRIA.

One commenter feared that the OTS would use the retained net income standard as a benchmark for approving capital distributions. The final rule does not prohibit capital distributions in excess of this uniform retained net income standard, but rather merely subjects these distributions to greater regulatory scrutiny through the application process. Under the final rule, the OTS may disapprove or deny a capital distribution if it raises safety and soundness concerns. The OTS will make this determination on a case-by-case basis. It has not proposed, and will not use, the retained net income standard as a proxy for a safety and soundness review.

One commenter recommended that an application and prior OTS approval should be required whenever an institution would not be at least adequately capitalized following the distribution and whenever a proposed distribution would violate a statute or regulation, an agreement with the OTS or the FDIC, or a condition in an OTS-

approved application. OTS agrees that a notice procedure is not appropriate under these circumstances. Where a savings association would not be adequately capitalized following a distribution or where a distribution would violate an applicable statute, regulation, agreement or condition, OTS must have a sufficient opportunity to review the specific facts and circumstances and to affirmatively determine whether a proposed distribution should, nonetheless, be permitted.<sup>7</sup> To ensure that OTS is permitted to fully and adequately make these determinations, the final rule has been revised to require an application under these circumstances.

One commenter, a savings and loan holding company, asserted that the proposed regulation inappropriately exempts many adequately capitalized institutions from any advance notice or application. The commenter argued that the proposed rule does not provide a sufficient cushion against losses, could pose an unjustifiable risk to the insurance fund, and would not permit the OTS to consider trends within the institution and the long-term consequences of disbursement of capital.

The OTS has modified the final § 563.143(b) to require a notice when an institution would not be well capitalized following the distribution. Such advance notice will provide the OTS with the opportunity to consider whether a proposed distribution by an adequately capitalized institution raises safety and soundness concerns. Such safety and soundness concerns may arise, for example, where the amount of capital held by an adequately capitalized institution following a distribution would be insufficient to offset other factors, such as high risk activities conducted by the institution.

The proposed and final rule require a notice or application whenever the savings association is a subsidiary of a savings and loan holding company. This provision implements 12 U.S.C. 1467a(f), which requires such savings

<sup>7</sup>For example, the PCA statute provides that OTS may permit certain repurchases, redemptions, retirements or other acquisitions of shares or other ownership interests notwithstanding the general prohibition on distributions by inadequately capitalized institutions. To do so, however, OTS must have an opportunity to consult with FDIC and must review the circumstances to determine whether it should permit the capital distribution under the statutory exemption authority. *I.e.*, the OTS must determine that the proposed transaction will be made in connection with the issuance of additional shares or obligations of the institution in at least an equivalent amount, and that the proposed distribution will reduce the institution's financial obligations or otherwise improve the institution's financial position. 12 U.S.C. 1831o(d)(1)(B).

associations to notify OTS at least 30 days before the proposed declaration of any dividend. Two commenters objected to this provision, but recognized its statutory basis.

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

Proposed § 563.144 prescribed the procedures for filing of capital distribution notices or applications with the OTS. Proposed § 563.144(c) would permit a savings association to file schedules of proposed capital distributions over a specified period not to exceed 12 months. One commenter urged the OTS to clarify that if the agency objects to one or more capital distributions in the proposed schedule, the savings association would not be required to refile a notice or application for the other capital distributions on the schedule. Section 563.146 has been revised to specifically state that the OTS may disapprove a notice or deny an application "in whole or in part." Accordingly, under the final rule, the savings association would not be required to refile its application or notice for the approved distributions on the schedule.

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

Proposed § 563.145 would allow a savings association to combine a capital distribution notice or application with any related notice or application filed with the OTS.

One commenter objected to combined filings, particularly combined filings by a less than well capitalized association. When a savings association combines a capital distribution notice or application with another filing, it must include all relevant information necessary to support each request. The OTS will review each request under the applicable review standards for that request. Since combined filings will not affect the OTS's review of requests, but may reduce the regulatory burden of filing separate applications, the final rule continues to permit these filings.

Another commenter argued that the reference to "related" notices or applications was vague and urged the OTS to permit combined filings without restrictions. As noted above, OTS policy is to minimize burden, including paperwork burdens associated with applications and notices, whenever possible. The final rule has been clarified to state that a savings association may combine filings when the proposed capital distribution is a part of, or proposed in connection with,

any other transaction requiring a notice or application under OTS regulations.

*Proposed § 563.146—Will the OTS Permit my Capital Distribution?*

Proposed § 563.146 set forth the standards under which the OTS would disapprove a notice or deny an application for a capital distribution. Under proposed § 563.146, the OTS could deny a capital distribution if the savings association would be undercapitalized following the distribution and the distribution did not fall within the statutory exemption at 12 U.S.C. 1831o(d)(1)(B). This statutory exception permits 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 exempt, however, the distribution must be made in connection with the issuance of additional shares in at least an equivalent amount, and must either reduce the institution's financial obligations or otherwise improve its financial condition.

One commenter urged the OTS to authorize the use of the statutory exception if the distribution would improve the savings association's capital position, even though the savings association would not become adequately capitalized as a result of the distribution. Provided all other statutory conditions for exemption are met, the statutory prerequisite that a capital distribution must "otherwise improve the institution's financial condition" does not, on its face, require that the association be adequately capitalized following the transaction. In exercising its discretion under the statute, the OTS may consider this factor. The OTS, however, will make the decision to grant or deny an exemption on a case-by-case basis.

The OTS has made a minor change to § 563.146 to clarify that the OTS will review all notices and applications under the review procedures in 12 CFR 516, subpart A. In light of this clarifying change, the OTS has also revised the application and notice content requirements at § 563.144(a) to delete the unnecessary cross-reference to application review standards at § 516.3(b).

*Conditions Imposed in Written Agreements*

Existing § 563.134(e)(2) and (3) address the impact of the capital distribution 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. Specifically, existing § 563.134(e)(2) states that the capital distribution rule supersedes less stringent agreements and conditions of approved applications. Under existing § 563.134(e)(3), a savings association is subject to agreements and approval conditions that are more stringent than the capital distribution rule.<sup>8</sup>

One commenter argued that these provisions would be helpful in determining when a proposed distribution would violate a prohibition contained in an agreement between the savings association and the OTS (or the FDIC), or a condition in an OTS-approved application. See final § 563.143(a)(4), which requires an application under these circumstances. The OTS, however, believes that § 563.134(e)(2) and (3) do not provide significant useful guidance in interpreting the regulation. Moreover, because these paragraphs have only a limited applicability, they have not been included in the final rule.

**III. Executive Order 12866**

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

**IV. Regulatory Flexibility Act**

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

**V. Unfunded Mandates Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 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

<sup>8</sup>The savings association may file a written notice with the OTS requesting relief from the application of the more stringent condition or agreement. See 12 CFR 563.134(e)(3).

an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OTS has determined that the final 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 final rule merely conforms the capital distribution regulation to standards already in place for all depository 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.

**VI. Paperwork Reduction Act**

The information collection requirements contained in this final rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB Control No. 1550-0059. 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 & Legislation Division (1550-0059), Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552.

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

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

**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 amends chapter V, title 12 of the Code of Federal Regulations as set forth below.

**PART 563—OPERATIONS**

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

**Authority:** 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 1831o, 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?
  - 563.143 Must I file with the OTS?
  - 563.144 How do I file with the OTS?
  - 563.145 May I combine my notice or application with other notices or applications?
  - 563.146 Will the OTS permit my capital distribution?

**Subpart E—Capital Distributions**

**§ 563.140 What does this subpart cover?**

This subpart applies to all capital distributions 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

(a) *Application required.*

- (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 your 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;
  - (d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in § 565.4(b)(1) of this chapter, following the distribution; and
  - (e) 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 an affiliate, as defined under § 563.41(b) of this part.
  - 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.

| 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. |
| (3) You would not be at least adequately capitalized, as set forth in § 565.4(b)(2) of this chapter, following the distribution.   | Must file an application with the OTS. |
| (4) 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 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 would not be well capitalized, as set forth under § 565.4(b)(1), following the distribution.   | 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 § 563.81). | Must file a notice with the OTS. |
| (3) 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.

(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?**

You may combine the notice or application required under § 563.143 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 you submit a combined filing, you must:

- (a) State that the related notice or application is intended to serve as a notice or application under this subpart; and
- (b) Submit the notice or application in a timely manner.

**§ 563.146 Will the OTS permit my capital distribution?**

The OTS will review your notice or application under the review procedures in 12 CFR part 516, subpart A. The OTS may disapprove your notice or deny your application filed under § 563.143, in whole or in part, 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: January 8, 1999.

By the Office of Thrift Supervision.

**Ellen Seidman,**

*Director.*

[FR Doc. 99-1040 Filed 1-15-99; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 98-SW-24-AD; Amendment 39-10989; AD 98-12-30]

RIN 2120-AA64

**Airworthiness Directives; McDonnell Douglas Helicopter Systems Model MD-900 Helicopters**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 98-12-30 which was sent previously to all known U.S. owners and operators of McDonnell Douglas Helicopter Systems (MDHS) Model MD-900 helicopters by individual letters. This AD requires inspecting the main rotor upper hub assembly (hub assembly) for cracks, and if a crack is found, replacing the hub assembly. The AD also requires verifying attachment nut torque values

and a repetitive inspection at intervals not to exceed 150 hours time-in-service. This amendment is prompted by the discovery of cracks in 6 main rotor upper hub assemblies. This condition, if not corrected, could result in failure of the hub assembly, loss of drive to the main rotor, and subsequent loss of control of the helicopter.

**DATES:** Effective February 3, 1999, to all persons except those persons to whom it was made immediately effective by priority letter AD 98-12-30, issued on June 4, 1998, which contained the requirements of this amendment.

Comments for inclusion in the Rules Docket must be received on or before March 22, 1999.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 98-SW-24-AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

**FOR FURTHER INFORMATION CONTACT:** Greg DiLibero, Aerospace Engineer, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Blvd., Lakewood, California 90712, telephone (562) 627-5231, fax (562) 627-5210.

**SUPPLEMENTARY INFORMATION:** On June 4, 1998, the FAA issued priority letter AD 98-12-30, applicable to MDHS Model MD-900 helicopters, which requires inspecting the hub assembly, part number 900R2101006-101 or -103, for cracks, and if a crack is found, replacing the hub assembly. The AD also requires verifying attachment nut torque values and a repetitive inspection at intervals not to exceed 150 hours time-in-service. That action was prompted by the discovery of cracks in 6 hub assemblies. This condition, if not corrected, could result in failure of the hub assembly, loss of drive to the main rotor, and subsequent loss of control of the helicopter.

Since the unsafe condition described is likely to exist or develop on other MDHS Model MD-900 helicopters of the same type design, the FAA issued priority letter AD 98-12-30 to prevent failure of the hub assembly, loss of drive to the main rotor, and subsequent loss of control of the helicopter. The AD requires inspecting the hub assembly, part number 900R2101006-101 or -103, for cracks, and if a crack is found, replacing the hub assembly. The AD