

**DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Parts 563b and 575**

[No. 2000-56]

RIN 1550-AB24

**Repurchases of Stock by Recently Converted Savings Associations, Mutual Holding Company Dividend Waivers, Gramm-Leach-Bliley Act Changes****AGENCY:** Office of Thrift Supervision, Treasury.**ACTION:** Interim rule with request for comment.

**SUMMARY:** The Office of Thrift Supervision (OTS) is amending its regulations governing repurchases of stock of insured savings associations and certain related provisions in the mutual holding company regulations to ease regulatory burden. OTS is also amending its rules to implement changes regarding waivers of dividends for mutual holding companies, and to incorporate certain changes resulting from the passage of the Gramm-Leach-Bliley Act of 1999 (GLB Act).

**DATES:** This interim final rule is effective July 12, 2000. Comments must be received by October 10, 2000.

**ADDRESSES:** Send comments to Manager, Dissemination Branch, Information Management and Services Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 2000-56. Hand-deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days. Send facsimile transmissions to FAX Number (202) 906-7755 or (202) 906-6956 (if the comment is over 25 pages). Send e-mails to public.info@ots.treas.gov and include your name and telephone number. Interested persons may inspect comments at the Public Reference Room, 1700 G Street, NW., from 10 a.m. until 4 p.m. on Tuesdays and Thursdays.

**FOR FURTHER INFORMATION CONTACT:**

David A. Permut, Counsel (Banking and Finance), (202) 906-7505, or Gary Jeffers, Counsel (Banking and Finance), (202) 906-6457, Business Transactions Division, Chief Counsel's Office; or Timothy P. Leary, Counsel (Banking and Finance), (202) 906-7170, Regulations and Legislation Division, Chief Counsel's Office; or Mary Jo Johnson, Project Manager (202) 906-5739, Supervision Policy, Office of Thrift

Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:****A. Stock Repurchases**

Current OTS regulations require savings associations to follow OTS rules on stock repurchases for three years following a conversion from mutual to stock form. See 12 CFR 563b.3(g). In the first year following the transaction, the savings association cannot repurchase any stock. In the second and third years, the savings association may repurchase up to five percent of its stock in any twelve month period as long as the repurchases do not cause the institution to become undercapitalized, and certain other conditions have been met. OTS has also permitted repurchases in excess of those limits where an institution has established exceptional circumstances, such as when the stock price has fallen below the initial offering price. Because OTS regulations also prohibit savings association subsidiaries of mutual holding companies (MHCs) from repurchasing their stock for the first three years following the association's stock offering (12 CFR 575.11(c)), savings associations that have reorganized into MHC form must request a waiver from OTS regulations to conduct a stock repurchase.

Numerous stock savings associations and subsidiary holding companies of MHCs have requested waivers for stock repurchases in amounts that do not conform to OTS limitations. OTS has routinely granted the requested waivers. OTS has decided the repurchase of stock after the first year following conversion or issuance in an MHC minority stock offering should be a business decision of the institution. OTS believes that there are sufficient means, such as business plan review and approval, to ensure the safe and sound regulation of converted savings associations. Moreover, the current rule is inconsistent with the treatment accorded by other federal banking agencies.

Therefore, OTS revises its regulations to eliminate restrictions on stock repurchases by converted savings associations after the first year following conversion. Where the institution has established extraordinary circumstances, a converted savings association may repurchase its stock during the first year after conversion, provided the savings association files a notice under amended § 563b.3(g)(3) and OTS does not object to the planned

repurchase.<sup>1</sup> OTS will work with the FDIC to establish consistent practices among the agencies regarding implementation of this provision.

In determining whether to object to a proposed stock repurchase during the first year following conversion, OTS will consider how the extraordinary circumstances, absent a repurchase, may detrimentally affect an institution's financial condition, the business purpose for the repurchase, and the permissibility of the repurchase under other applicable regulations. See amended § 563b.3(g)(3).

OTS also is making corresponding amendments to the mutual holding company (MHC) regulations, and amending the MHC regulations to address MHC purchases of stock of subsidiary savings associations or of subsidiary holding companies.

**B. Dividend Waivers for Mutual Holding Companies**

OTS regulation § 575.11(d) allows MHCs to waive dividends subject to certain restrictions. Under § 575.11(d), MHCs file notice of their intent to waive dividends and include a copy of a board of directors resolution concluding that the dividend waiver is consistent with the board's fiduciary duties. OTS will not object to the notice if it determines that the waiver would not be detrimental to the safe and sound operation of the savings association.

Waiving dividends saves the MHC from corporate taxation on the dividends and leaves capital at the subsidiary savings association where, in most cases, it can be deployed more efficiently. MHCs have requested clarification on whether the payment of dividends and MHC waiver of dividends will cause OTS to require minority shareholder dilution if the MHC subsequently determines to fully convert to stock form. Minority shareholder dilution would occur if OTS required converting MHCs to reduce the number of shares minority shareholders receive when they exchange their shares for shares in the fully converted company that correspond to the amount of waived dividends. The reduction in shares for minority shareholders reflects that they previously received their dividends while the MHC waived its dividends. OTS has required some dilution in past transactions, but only to the extent of excess or special dividends paid by the subsidiary holding company or savings association to minority shareholders

<sup>1</sup> The proposed repurchase provisions conform to the FDIC's treatment of stock repurchases by converted institutions. See 12 CFR 333.4(d) (1999).

and waived by the MHC. OTS has not required shareholder dilution for ordinary dividends.

OTS has reexamined this issue and has determined to change its practice with respect to waived dividends. OTS will no longer require dilution for any waived dividends in a subsequent conversion to stock form. OTS believes the belief that the minority shareholders would experience dilution caused a number of institutions to fully convert to stock form, rather than remain in MHC form. Instead, to prevent excessive dividends OTS will rely on the business plan filed with the reorganization application and on existing restrictions in OTS capital distribution regulations, as well as the fiduciary duty of the board of directors of the MHC to protect the interests of the depositors. Today, OTS amends the MHC regulation to codify this policy.

### C. Gramm-Leach-Bliley

Finally, the Gramm-Leach-Bliley Act of 1999 (GLB Act) changed the activities limitations for MHCs to mirror those applicable to financial holding companies.<sup>2</sup> OTS is amending its regulations to make the GLB Act changes in this interim final rule. These changes enhance the MHC as a more suitable long-term alternative than full conversion to stock form for mutual savings associations contemplating such a conversion. Before the GLB Act, MHCs were limited to the activities and investments available to multiple savings and loan holding companies and those permissible for bank holding companies under the Bank Holding Company Act and those available under Section 10(o)(5) of the Home Owners' Loan Act. This change will give MHCs parity with financial holding companies, which have the ability to create financial supermarkets—banking, brokerage and insurance—all offered under one holding company that meets certain requirements.<sup>3</sup> OTS is amending § 575.11(a) to reflect this change.

### D. Related Rulemaking

Elsewhere in today's **Federal Register**, OTS is publishing a related proposed regulation governing mutual savings association, mutual holding company reorganizations, and conversions to stock form.

### Notice and Comment, Effective Date, and Request for Comment

Section 553 of the Administrative Procedure Act (APA) permits an agency to issue rules without prior notice and comment if the agency, for good cause, finds that notice and comment are impracticable, unnecessary, or contrary to the public interest and explains its finding when it publishes the rule. 5 U.S.C. 553(b)(B).

OTS has concluded that it may issue an interim final rule revising the stock repurchase provisions. The current rule is inconsistent with the treatment accorded by other federal banking agencies, not required for the safe and sound regulation of converted savings associations, significantly restricts the ability of institution's managers to make appropriate business decisions and, thus, unnecessarily limits the ability of savings associations to repurchase stock following a conversion. As a result, the retention of these restrictions would, in the absence of an interim final rule, continue to negatively impact the operations of thrifts and their holding companies. Accordingly, OTS concludes that public notice and comment on these changes are unnecessary and contrary to the public interest.

Notice and public comment also are not required for the interim rule on dividend waivers and shareholder dilution. As noted above, OTS's current policy on shareholder dilution may have inappropriately: (1) Encouraged some institutions in MHC structures to fully convert to stock form; (2) discouraged MHCs from taking full advantage of corporate tax advantages from dividend waivers; and (3) prevented MHCs from exercising their business judgment in deploying capital at the most appropriate level within the corporate structure. These regulatory disincentives would continue to hamper effective decision-making by MHCs in the absence of an effective interim final rule. As a result, OTS concludes that notice and public comment are inappropriate and contrary to public interest.

Similarly, OTS does not believe that public notice and comment are required for the technical change regarding MHC activities. The interim rule merely updates OTS regulations to correctly cite new statutory authority expanding the activities authorized for MHCs. Notice and comment procedures for this change are impractical and contrary to the public interest because such procedures could delay implementation of this new expanded authority for MHCs.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA), 12 U.S.C. 4802, requires that new OTS regulations and amendments to existing regulations take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published. This delayed effective date provision, however, does not apply unless the rule imposes additional reporting, disclosures, or other new requirements on insured depository institution. As a related matter, section 553(d) of the APA states that publication of a rule shall be made not less than 30 days before its effective date. 5 U.S.C. 553(d). This APA provision does not apply if the rule grants or recognizes an exemption or relieves a restriction. OTS believes neither CDRIA nor the APA precludes the publication of this rule with an immediate effective date. As noted above, this rule makes only burden reducing, clarifying and technical conforming amendments to OTS rules and relieves current restrictions on repurchases.<sup>4</sup>

OTS invites comments on this interim final rule during the 60-day period that runs concurrently with its request for comment on companion proposed regulation published elsewhere in today's **Federal Register**.

### Regulatory Flexibility Act Analysis

An initial regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) is required when an agency must publish a general notice of proposed rulemaking. 5 U.S.C. 603. As noted previously, OTS has determined that it is not necessary to publish a notice of proposed rulemaking for this interim final rule. Accordingly, the RFA does not require an initial regulatory flexibility analysis. Nonetheless, OTS has considered the likely impact of the rule on small entities and believes that the rule will not have a significant impact on a substantial number of small entities. This interim rule eliminates restrictions, imposes no new requirements, and makes only burden reducing, clarifying, and technical conforming amendments to OTS current regulations.

<sup>4</sup> In addition, both CDRIA and the APA permit an agency to select an earlier effective date for "good cause" published with the regulation. As noted above, the OTS has determined that there is good cause for publishing rule without notice and public comment. For these same reasons, OTS finds good cause to dispense with the delayed effective date requirements under CDRIA and the APA.

<sup>2</sup> 12 U.S.C. 1467a(o)(5)(E).

<sup>3</sup> Those requirements include requiring the depository institution controlled by the parent to be well capitalized, well managed and hold at least a satisfactory rating under the Community Reinvestment Act.

**Paperwork Reduction Act**

OTS invites comments on all of the following issues:

(1) Whether the information collections contained in this proposal are necessary for the proper performance of OTS' functions, including whether the information has practical utility.

(2) The accuracy of OTS' estimate of the burden of the information collections.

(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 of respondents, including through the use of automated collection techniques or other forms of information technology.

(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 these collections of information unless they display a currently valid OMB control number.

OTS has submitted the collections of information requirements contained in this proposal to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Send comments on the collections of information to the Office of Management and Budget, Paperwork Reduction Act Project (conversion information collection requirement: 1550-0014 or the mutual holding company information collection requirement: 1550-0072) Washington, DC 20503, with copies to the Regulations and Legislation Division (1550-0014 or 1550-0072), Chief Counsel's Office, Office of Thrift Supervisions, 1700 G Street, NW., Washington, DC 20552.

The collections of information requirements in this rule are in parts 563b and 575. OTS requires this information for the proper supervision of savings associations that convert from mutual to stock form under OTS regulations and mutual holding company activities. The likely respondents/recordkeepers are Federal savings associations or mutual holding companies.

*OMB Control Number:* 1550-0014.  
*Estimated average annual burden hours per respondent/recordkeeper:* 510 hours.

*Estimated number of respondents/recordkeepers:* 16 per year.

*Estimated total annual reporting and recordkeeping burden:* 8,160 hours.

*Start up costs to respondents/recordkeepers:* N/A.

*OMB Control Number:* 1550-0072.

*Estimated average annual burden hours per respondent/recordkeeper:* 263 hours.

*Estimated number of respondents/recordkeepers:* 16 per year

*Estimated total annual reporting and recordkeeping burdenhours:* 4,874 hours.

*Start up costs to respondents/recordkeepers:* N/A.

**Executive Order 12866**

OTS has determined that this interim final rule is not a significant regulatory action under Executive Order 12866.

**Unfunded Mandates Reform Act Analysis**

The Unfunded Mandates Reform Act of 1995 (UMA), Pub. L. 104-4, applies only when an agency is required to issue a general notice of proposed rulemaking or a final rule for which a general notice of proposed rulemaking was published. 2 U.S.C. 1532. As noted previously, OTS has determined, for good cause, that this interim final rule should take immediate effect and, therefore, that a notice of proposed rulemaking is not required. Accordingly, OTS has concluded that the UMA does not require an unfunded mandates analysis of this interim final rule.

Moreover, OTS finds that this interim rule will not result in expenditure by state, local, and tribal governments, or by the private sector, of more than \$100 million in any one year. Rather, the rule eliminates restrictions, imposes no new requirements, and makes only burden reducing, clarifying, and technical conforming amendments to OTS regulations. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

**List of Subjects***12 CFR Part 563b*

Reporting and recordkeeping requirements, Savings associations, Securities.

*12 CFR Part 575*

Administrative practice and procedure, Capital, Holding companies, Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision amends title 12, Chapter V, Code of Federal Regulations as set forth below:

**PART 563b—CONVERSIONS FROM MUTUAL TO STOCK FORM**

1. 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.

2. Section 563b.3 is amended by revising paragraphs (g)(1) and (g)(3) to read as follows:

**§ 563b.3 General principles for conversions.**

\* \* \* \* \*

(g) \* \* \*

(1) No converted savings association may, for a period of one year from the date of the completion of the conversion, repurchase any of its capital stock from any person, except that this restriction shall not apply to:

(i) A repurchase, on a *pro rata* basis, pursuant to an offer approved by OTS and made to all shareholders of such association;

(ii) A repurchase of qualifying shares of a director; or

(iii) A repurchase approved by OTS under paragraph (g)(3) of this section.

\* \* \* \* \*

(3) A savings association that is subject to paragraph (g)(1) of this section may not repurchase its capital stock within one year following its conversion to stock form, except that open market stock repurchases of up to five percent of its outstanding capital stock may occur during the first year after the conversion where extraordinary circumstances exist. The savings association must establish compelling and valid business purposes for the repurchases, to the satisfaction of the OTS. The savings association must file a notice with the Regional Director, with a copy to the Office of Examination and Supervision, at least ten days before commencement of the proposed repurchase. The notice must describe the proposed repurchase program and the effects of the proposed repurchases on the savings association's regulatory capital. OTS will not object to the proposed repurchase program if:

(i) The repurchase does not adversely affect the savings association's financial condition;

(ii) The savings association submits sufficient information to evaluate the repurchase program;

(iii) The savings association demonstrates extraordinary circumstances and a compelling and valid business purpose for the repurchase program consistent with the savings association's business plan; or

(iv) The repurchase program would not be contrary to other applicable regulations.

\* \* \* \* \*

**PART 575—MUTUAL HOLDING COMPANIES**

3. The authority citation for part 575 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828, 2901.

4. Section 575.11 is amended by:

a. Removing, in paragraph (a) the phrase “12 U.S.C. 1467a(c)(2)(A) or (c)(2)(C)–(c)(2)(G)”, and by adding in lieu thereof the phrase “;12 U.S.C. 1467a(c)(2) or (c)(9)(A)(ii)”;

b. Redesignating, in paragraph (c), the introductory text as paragraph (c)(1) introductory text, and paragraphs (c)(1), (c)(2) and (c)(3), as (c)(1)(ii), (c)(1)(iii) and (c)(1)(iv), respectively;

c. Removing, in newly designated paragraph (c)(1) introductory text the word “shall”, and by adding in lieu thereof the word “may”; by removing the phrase “three years”, and by adding in lieu thereof the phrase “one year”;

d. Adding, in newly designated paragraph (c)(1), a new paragraph (c)(1)(i);

e. Removing, in newly designated paragraph (c)(1)(iv) the phrase “but not” and by adding in lieu thereof the word “or”;

f. Adding a new paragraph (c)(2); and  
g. Adding a new paragraph (d)(3).

The additions and revisions read as follows:

**§ 575.11 Operating restrictions.**

\* \* \* \* \*

(c)(1) \* \* \*

(i) Is in compliance with § 563b3(g)(1) of this chapter;

\* \* \* \* \*

(2) No mutual holding company may purchase shares of its subsidiary savings association or subsidiary holding company within one year after a stock issuance, except if the purchase complies with § 563b.3(g)(1) of this chapter. For purposes of this subsection, the reference in § 563b.3(g)(3) of this chapter to five percent refers to minority shareholders.

\* \* \* \* \*

(d) \* \* \*

(3) The OTS will not consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form.

\* \* \* \* \*

Dated: June 20, 2000.

By the Office of Thrift Supervision.

**Ellen Seidman,**

*Director.*

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**BILLING CODE 6720–01–P**