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Handbook: Thrift Activities
Subject: Capital

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Section: 110

Thrift Activities Regulatory Handbook Update

Summary: This bulletin provides an update to Thrift Activities Regulatory Handbook Section 110, Capital Stock and Ownership. Please replace the existing handbook section with the enclosed revised section.

For Further Information Contact: Your Office of Thrift Supervision (OTS) Regional Office or the Supervision Policy Division of the OTS, Washington, DC. You may access this bulletin at our web site: www.ots.treas.gov.

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SUMMARY OF CHANGES

OTS is issuing an update to Thrift Activities Handbook Section 110, Capital Stock and Ownership. Change bars in the margins of the handbook section indicate revisions. We provide a summary of substantive changes below.

110 Capital Stock and Ownership

We made the following changes to Handbook Section 110:

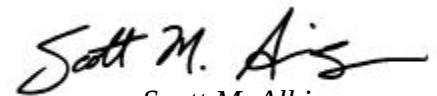
- Added a paragraph on the history of mutual holding companies.
- Updated references to Exchange Act regulations under the Review of Exchange Act and Securities Offering Filings section.
- Updated the information on Exchange Act filings under the Description of Filings section.
- Updated regulations or guidance in the Change in Control and Capital Distributions sections.
- Updated information relating to contributed capital.
- Added a discussion on the prohibition of loans by savings associations on its own stock to comply with The Financial Regulatory Relief and Economic Efficiency Act of 2000 (FRREEA).

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• Updated information relating to Employee Stock Ownership Plans.

• Removed the requirement to provide information on foreign ownership in U.S. savings and loan associations and holding companies because the Federal Reserve System no longer collects this information from OTS.

- Removed the Level I procedure from the Capital Stock and Ownership Program related to reporting foreign ownership to the Federal Reserve System.
- Added a Level II procedure to the program addressing the prohibition of loans by savings associations on its own stock.
- Removed the foreign ownership form (former Appendix A).
- Revised the general procedures in Washington and the Regions for Exchange Act and securities offering filings (new Appendix A).
- Added a new procedure to Appendix A relating to Form H-11 filings.



—Scott M. Albinson

Managing Director, Supervision

INTRODUCTION

This Section of the Handbook presents information concerning the following:

- Mutual organization.
- Mutual holding companies.
- Stock organization.
- Types of capital stock.
- Conversions from mutual to stock organization.
- Securities and Exchange Commission (SEC) reporting requirements for publicly traded companies.
- Insider stock trading.
- Change in control.
- Divestiture of control.
- Contributed capital.
- Savings and loan holding companies.
- Capital distributions.
- Loans by savings associations on its own stock.
- Employee stock ownership plans (ESOPs).

MUTUAL ORGANIZATION

Savings associations organized as mutual institutions issue no capital stock and therefore have no stockholders. Mutual savings associations build capital almost exclusively through retained earnings. Mutual savings associations may receive pledged deposits and issue mutual capital certificates and subordinated debentures, however, mutuals rarely use these capital forms. When a new mutual savings association organizes, certain founding members pledge savings for the time required for the new mutual to build-up capital and operate profitably.

Background

The first savings associations appeared in the United States in the first half of the nineteenth cen-

tury. Savings banks first appeared in Boston and Philadelphia in 1816. The first savings association was in 1831 in Frankford, Pennsylvania, now part of the city of Philadelphia. All thrift type institutions were originally mutual institutions. All federal savings associations were in mutual form from 1933 until 1974, when Congress amended the Home Owners' Loan Act (HOLA) to permit the conversion of federal mutual savings associations to stock form. The Garn-St. Germain Depository Institutions Act of 1982 first authorized the direct chartering of federal stock savings associations.

Mutual savings associations initially were organized by individuals and groups for the common good of working class individuals and families who lacked the financial service facilities necessary for the accumulation of capital through savings plans and access to credit for housing needs. These mutual associations greatly expanded in number and location throughout the nineteenth and early twentieth centuries. They generally were small associations, although some eventually grew to substantial size, mostly in the larger cities. Although a substantial number of mutual associations migrated to stock form savings associations through conversion since the mid-1970s, there remain a substantial core of mutual associations. As of September 2003, there were over 300 mutual savings associations under OTS supervision and several hundred more state chartered savings banks under FDIC supervision. These mutual savings associations, while generally smaller than the stock associations, carry on the basic mission of the founders of the thrift movement. The mutual savings associations remain close to their communities and the immediate needs of their localities for basic banking services for the citizens. In general, mutual savings associations often tend to have higher capital levels, somewhat lower earnings, and high quality assets.

Ownership of Mutual Savings Associations

The concept of ownership in mutual savings associations resulted in extensive discussion and

subsequent litigation. The courts have determined that mutual account holders have only a contingent interest in the surplus of mutual savings associations in the event of liquidation. In the first case to challenge the newly adopted conversion regulations of the Federal Home Loan Bank Board, *York v. Federal Home Loan Bank Board*, the court concluded that conversion to a federal stock organization did not deprive the mutual depositors of property rights.

Members Rights of a Federal Mutual Savings Association

The federal mutual charter grants certain rights to mutual members, which give them some control over the affairs of the savings association. All holders of the savings association's savings, demand, and other authorized accounts are members of the savings association. The ability to exercise control over a mutual savings association by its members, however, is not coextensive with the rights of stockholders of ordinary corporations, although there are similarities. The members of a federal mutual savings association have the right to:

- Vote.
- Amend the charter.
- Amend the bylaws.
- Nominate and elect directors.
- Remove directors for cause.
- Request special meetings.
- Communicate with other members.
- Inspect the corporate books and records.
- Share pro rata in the assets of the savings association following liquidation.

In enacting the Home Owners' Loan Act (HOLA) Congress generally left to the OTS (or its predecessor, the FHLBB) the authority to determine when a mutual savings association's members have voting rights. Except for provisions relating to the conversion of a federal mutual to stock form, there is no statutory requirement that federal mutual savings associations' members have voting rights. Although the charter of a federal mutual savings

association does grant such rights, it does not specify a member vote for all significant corporate transactions.

In practice, members delegate voting rights and the operation of federal mutual savings associations through the granting of proxies typically given to the board of directors (trustees) or a committee appointed by a majority of the board.

MUTUAL HOLDING COMPANIES

In 1987, Congress authorized mutual savings associations and savings banks to reorganize themselves in a holding company structure, in which the holding company is owned by the mutual members. The purpose of this new structure was to afford all FSLIC or FDIC-insured mutual thrifts the opportunity to raise capital in an amount less than that required in a full mutual-to-stock conversion, while retaining the mutual ownership base. A mutual holding company reorganization permits an institution to raise incremental amounts of capital, provided that the mutual holding company retains a majority interest in the subsidiary savings association.

The Mutual Holding Company regulation implements § 10(o) of HOLA. Part 575 authorizes a mutual holding company to engage in capital raising activities. A mutual holding company's subsidiary savings association may issue up to 49.9 percent of its stock to persons other than the mutual holding company.

Alternatively, a mutual holding company (MHC) may create a new subsidiary stock holding company (SHC) that would exist between the MHC and its savings association in a three-tier corporate structure. The SHC, like a stock savings association subsidiary, must issue at least a majority of its shares to the MHC and could issue up to 49.9 percent of its shares to the public. The SHC must own 100 percent of the shares of the savings association subsidiary.

On August 9, 2002, OTS issued a Final Rule based on the Gramm-Leach-Bliley Act. OTS changed the activities limitations for MHC's to mirror those applicable to financial holding companies. These changes enhance the MHC structure

as an alternative to full conversion for mutual savings associations.

STOCK ORGANIZATION

Section 552.2-1 outlines the process for organizing a federal stock savings association. Stock organization means that management decisions are subject to shareholder vote and scrutiny. Stock savings associations must hold annual meetings of shareholders subject to regulatory requirements. These requirements appear in § 552.6 or applicable state law and/or § 14 of the Securities Exchange Act of 1934 (Exchange Act). Savings associations that convert to stock form face shareholder scrutiny and increased public disclosure requirements if they become a public reporting company under that act.

CAPITAL STOCK

Capital stock consists of stock certificates issued to investors (stockholders) as evidence of their ownership interest in the savings association. One or more individuals or any business entity such as a partnership, a trust, or a corporation may own the stock.

Common Stock

Common stock represents all the basic rights of ownership. Common stockholders exercise their basic rights in proportion to the shares owned. These rights include the following:

- The right to vote for the directors.
- The right to share in dividends declared by the board of directors.
- The right to share in the distribution of cash or other assets, after payment of creditors, in the event of liquidation of the savings association.

Savings associations may value capital stock on their books at a stated par value. A savings association will assign a nominal par value if the stock does not have a par value. Savings associations account for amounts paid in excess of the par value as additional paid-in capital.

The market value of shares does not coincide with par values. The market price reflects many factors, including the following:

- Overall economic conditions.
- Financial health of the savings association.
- Liquidity of the stock.
- Competition.
- Dividend policies.
- Growth potential.
- Market saturation in financial institution issues (supply and demand).

A savings association may list its shares on an organized exchange, or trade them over the counter (OTC). A savings association may act as its own registrar and transfer agent. If the savings association has 500 or more stockholders, the savings association must adhere to the SEC regulations when performing transfer agent functions.

Among the records a stock savings association must maintain is a (registrar's) list of stockholders. The list should include the following information:

- Name of holder.
- Address.
- Number of shares owned.
- Date acquired.
- Certificate number(s) held.
- Amount and type of dividend paid each stockholder.

It is important to promptly record transfers of shares to new owners. Savings associations, periodically, should reconcile the stockholder ledger with the general ledger control account and the stock certificate book.

Preferred Stock

Preferred stock carries certain preferences, such as a prior claim on dividends, over common stock. Often preferred stock conveys no voting rights, or only limited voting rights, to the holders. The articles of incorporation (charter) govern special rights

of a preferred stock issue. The chartering authority may also regulate stockholders' rights.

Whether preferred stock is includable in regulatory or generally accepted accounting principles (GAAP) capital depends on its permanence as a funding source. The status of preferred stock as part of capital also depends on whether redemption of the stock is required to occur only upon the liquidation or termination of the savings association. Like common stockholders, preferred stockholders have basic ownership rights and do not have priority over creditors in the event of liquidation.

Although forms of permanent perpetual preferred stock exist, other preferred stock contains defined redemption terms and consequently it is not as permanent or long term a funding source as common stock.

Savings associations not subject to federal securities laws financial reporting requirements may make financial reports using Thrift Financial Report (TFR) instructions and rely on OTS capital regulations. Under 12 CFR Part 567 (Capital), savings associations include noncumulative perpetual preferred stock in core capital (§567.5(a)(1)(ii)). Savings associations include cumulative perpetual preferred stock in supplemental capital (§567.5(b)(1)(i)). Supplemental capital also may include certain redeemable preferred stock and subordinated debt issued under OTS regulations and memoranda. Eligibility for such instruments to qualify as part of regulatory capital depends on the timing of the redemption and other contractual characteristics. See 12 CFR § 563.81, Issuance of subordinated debt securities and mandatorily redeemable preferred stock.

Subchapter S Corporations

Subchapter S Corporations generally receive pass-through tax treatment for federal income tax purposes. The Small Business Job Protection Act of 1996 made changes to the Internal Revenue Code that allows financial institutions, and their parent holding companies, to elect Subchapter S Corporation status under the Code. The savings association must meet the following criteria:

- Shareholders may only be individuals, certain estates, and trusts.
- There may be no more than 75 shareholders and they must all consent to the election of S Corporation status.
- There must be only one class of stock.
- The savings association must use (or convert to) the specific charge-off method in accounting for bad debts for tax purposes.
- The savings association must use a calendar year, unless IRS grants permission to use some other year.

A Subchapter S holding company may wholly (but not partially) own a savings association that is a Subchapter S Corporation. Thus, holding companies and their wholly owned depository institution subsidiaries are both eligible for S Corporation status.

Savings associations may voluntarily or involuntarily lose their S Corporation status. Although there is no penalty or direct tax for a termination, either a voluntary or an involuntary loss may have adverse effects on a savings association's capital. For example, revocations may adversely affect an association, because the association may need to re-establish deferred tax accounts, which may reduce capital.

Ability to Raise Capital

If an S Corporation needs to raise capital, its initial efforts will often focus on selling additional common stock to its existing stockholders to preserve its tax status. If existing stockholders are unable or unwilling to properly capitalize the savings association, the association will normally offer to sell common stock to Subchapter S eligible investors who consent to the tax election. The association should seek to limit the increase in the number of its stockholders to stay within the 75-shareholder limit for S Corporation.

S Corporation stockholders customarily sign shareholder agreements that prevent them from selling stock or otherwise transferring their stock to ineligible stockholders. These agreements typically require a shareholder who wishes to sell stock

to first offer the shares to the other existing stockholders before offering the shares to any other party. As a prerequisite to purchasing an S Corporation's stock, a new investor must agree to sign the shareholder agreement.

If the association cannot successfully increase its capital through these means, it may pursue other potential investors who may cause the association to lose its Subchapter S election. Alternatively, the association may have to issue a second class of stock that will result in an involuntary termination of its election. In either case, the association would not incur any tax penalties because of its return to C Corporation status. Therefore, an association's tax status as an S Corporation does not prevent it from raising additional capital.

STOCK CONVERSION

For mutual savings associations, conversion to stock form is another avenue available to raise capital in the equity market.

To facilitate the conversion process, management may contract for the services of attorneys, accountants, appraisers, and conversion managers who have conversion experience. Savings associations record conversion sales proceeds after deduction of conversion expenses. In smaller offerings, conversion expenses may amount to over ten percent of the equity raised.

Following is a description of various types of conversions. See Part 563b for additional information.

Standard Conversion

A standard conversion offers a funding source for savings associations. In this form, eligible account holders receive nontransferable, pro-rated subscription rights to purchase the stock of the converting savings association before the public offering. Savings associations sell shares of the converting institution not purchased by persons with subscription rights either in a public offering through an underwriter or by the savings association in a direct community offering.

Submission of a conversion plan according to Part 563b, Subpart A, is the first requirement be-

fore effecting a standard conversion. The resulting savings association must comply with the capital standards of Part 567. The accounting used for acquiring assets and liabilities in a standard conversion is generally historical cost of the acquired savings association (pooling-of-interest accounting).

Supervisory Conversion

A supervisory conversion permits savings associations that fail to meet specified capital levels to raise additional capital without government assistance. The resulting savings association must be a viable entity under Part 563b, Subpart B.

Any significantly undercapitalized SAIF-insured savings association will qualify for a supervisory conversion unless OTS determines otherwise. OTS may permit, on a case-by-case basis, an undercapitalized savings association to undertake a supervisory conversion if the savings association can demonstrate that a standard conversion is not feasible.

A savings association may accomplish a supervisory conversion through a public or nonpublic offering (that is, the sale of the savings association's securities issued in the conversion directly to a person or persons) or merger/conversion.

A majority of the board of directors of the converting savings association must adopt a plan of supervisory conversion that is in accordance with Part 563b. The members of the savings association shall have no rights of approval or participation in the conversion or rights to the continuance of any legal or beneficial ownership interest in the converted savings association.

Merger Conversion

A merger conversion occurs when an existing stock institution or holding company acquires a converting mutual savings association. The converting mutual exchanges its stock for stock of the acquiror. OTS limits merger conversions to cases involving financially weak savings associations. OTS will also consider requests for waivers from this general policy for very small institutions, such

as those with assets under \$25 million, for whom a standard conversion is not a viable option.

REVIEW OF EXCHANGE ACT AND SECURITIES OFFERING FILINGS

Under §12(i) of the Exchange Act, OTS has the powers, functions, and duties vested in the SEC to administer and enforce several sections of the Exchange Act for savings associations. The applicable sections are §§ 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and §§ 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act. OTS is the securities regulator for all HOLA federal charters (both SAIF and BIF members that have registered securities with OTS). In addition, OTS is the securities regulator for state chartered savings associations that have registered securities with OTS. The FDIC is the comparable regulator for all BIF-insured, state chartered savings banks. The securities of savings and loan associations are exempt from registration under § 3(a)(5) of the Securities Act of 1933. OTS has promulgated 12 CFR Part 563g to require federal savings associations to register issuances of securities that are not otherwise exempt from registration.

A savings association may become subject to reporting obligations under the Exchange Act in one of three ways:

- Section 12(b) of the Exchange Act requires the registration of any class of a savings association's securities registered on a national securities exchange.
- Exchange Act rules generally require that each savings association with 500 or more shareholders and \$5 million or more in assets register its equity securities under the Exchange Act. Savings associations may satisfy this requirement by filing Form 10 with OTS. Also, savings associations may voluntarily register securities not otherwise requiring registration by filing Form 10 with OTS.
- Section 563b.530(a) generally requires savings associations converting from the mutual to the stock form to register the class of securities issued in the conversion under the Exchange Act.

Savings associations may not deregister such securities for three years.

Each savings association, not otherwise required to report under the Exchange Act, has special responsibilities relating to filing of offering circulars with the Business Transactions Division (BTD). Section 563g.2 provides that no savings association may offer or sell any security unless the offer or sale includes an effective offering circular. Part 563g provides for the declaration of effectiveness of such offering circulars. If BTD declares an offering circular effective pursuant to Part 563g, savings associations must make filings pursuant to § 563g.18 with OTS. Savings associations must make these filings for at least the first year during which the offering circular becomes effective. These filings consist of periodic and current reports on Forms 10-K, 10-Q, 10-KSB, 10-QSB, and 8-K, as § 13 of the Exchange Act may require. The duty to file reports under § 563g.18 is automatically suspended for any fiscal year under the following condition:

- If at the beginning of the fiscal year, (other than the fiscal year the offering circular became effective) the securities of each class to which the offering circular relates are held of record by less than 300 persons.

In certain circumstances, an exemption from the filing requirements is available. Savings associations must file offering circulars required under Part 563g with both BTD and the appropriate regional office.

Currently, only a limited number of savings associations have a class of securities registered under the Exchange Act. They are subject to Exchange Act current and periodic reporting requirements and rules governing a wide range of activities. Such activities include proxy solicitations, tender offers, and the acquisition of securities by officers, directors, and significant shareholders.

BTD and the Accounting Policy Division (APD) review Exchange Act and securities offering filings of savings associations for compliance with the Exchange Act and OTS regulations. The applicable OTS regulations are 12 CFR Parts 563b, 563c, 563d, and 563g.

The regional offices are responsible for timely review of filings of savings associations and holding companies for information of supervisory concern. Regional staff should alert BTB or APD to disclosure problems noted during these reviews. For a more detailed discussion of the Washington and Regional Processing of Exchange Act Filings, refer to Appendix B.

Description of Filings

The Annual Report (Form 10-K or Form 10-KSB)

Savings associations must file this report after the close of a fiscal year.

The Quarterly Report (Form 10-Q or Form 10-QSB)

Savings associations must file this report for each fiscal quarter (except the fourth quarter).

Forms 10-KSB and 10-QSB are public filings filed by a small business under SEC Regulation S-B. Under Regulation S-B, a small business filer is generally defined as a company that meets all of the following criteria:

- It has revenues of less than \$25,000,000.
- It is a U.S. or Canadian filer.
- The entity is not an investment company.
- The parent corporation is also a small business filer if the entity is a majority owned subsidiary.

A company is not a small business filer if it has a public float (the aggregate market value of the filers outstanding securities held by the non affiliates) of \$25,000,000 or more.

The Annual and Quarterly Reports provide specific financial information regarding the savings association as well as management's discussion of the savings association's financial condition. The reports also include a description of matters voted on by securities holders, and other relevant matters as required by the applicable form and regulations.

The Annual Report is due 90 days after the savings association's fiscal year end, and the Quarterly Report is due 45 days after the fiscal quarter end. If a savings association qualifies as an accelerated filer, the Annual and Quarterly Reports are due on an accelerated basis. As defined by the SEC, an accelerated filer is a domestic reporting company that has a common equity public float of at least \$75 million that meets the following conditions:

- It has been subject to the Exchange Act's reporting requirements for at least 12 calendar months.
- It previously filed at least one annual report.
- The entity is not eligible to use forms 10-KSB and 10-QSB.

The following chart sets forth the transition filing deadlines for the Annual and Quarterly Reports:

For fiscal years ending on or after	Form 10-K deadline after fiscal year end	Form 10-Q deadline after fiscal quarter end
December 15, 2002	90	45
December 15, 2003	75	45
December 15, 2004	60	40
December 15, 2005	60	35

The Current Report (Form 8-K)

Savings associations must file this report with OTS when one of the following events occurs and within the following time frames:

- Any changes in control of the savings association - 15 days.
- Acquisition or disposition of assets (of a significant amount other than in the ordinary course of business) - 15 days.
- Placing of the savings association in receivership or conservatorship - 15 days.
- Any change in the savings association's certifying accountant - 5 days.
- Occurrence of other events the savings association deems to be materially important to

security holders - no time frame, but within a reasonable time.

- Resignation of directors - 5 days.
- A change in fiscal year - 15 days.

Beneficial Ownership Reports

The Initial Statement of Beneficial Ownership (Form 3)

Persons who fall into any of the categories listed below must file a Form 3 with OTS within ten days after achieving such status.

- Officers (regardless of whether they own any securities).
- Directors (regardless of whether they own any securities).
- Beneficial owners of ten percent or more of any class of the savings association's equity securities.

A Statement of Change in Beneficial Ownership of Equity Securities (Form 4)

Previous filers of Form 3 must file Form 4 when a change occurs in the nature or amount of the person's beneficial ownership of the savings association's equity securities. Filers must file Form 4 within ten days after the end of the month in which a change occurs.

Annual Statement of Changes in Beneficial Ownership (Form 5)

Report annually, within 45 days of the end of the fiscal year, any other small changes in ownership.

Reports of Beneficial Ownership (Schedule 13D and Schedule 13G)

Shareholders must file Schedule 13D within ten days of the acquisition of beneficial ownership of more than five percent of any class of equity securities. Any material change in the facts of the statement requires that the shareholder promptly (generally within two business days of the material change) file an amendment.

Mutual funds and other institutions that invest funds or manage portfolios for beneficial owners must file Schedule 13G. Filers must file Schedule 13G within 45 days after the end of the calendar year.

Shareholders must file 13D and 13G reports with the savings association, OTS, each exchange where the savings association's securities trade, or to the National Association of Securities Dealers, Inc. (NASD) if the National Association of Securities Dealers Automated Quotation System (NASDAQ) quotes the stock.

In reviewing Forms 3, 4, and 5 and Schedules 13D and 13G, BTD attorneys watch for issues related to Part 574, the potential for hostile takeovers, and possible trading on insider information. You should be alert to these possibilities and alert appropriate OTS staff to relevant information.

Other Types of Beneficial Ownership

Persons may own directly any stock held in their own name, or the stock may be held by a bank, broker, or nominee in "street name" for their account. Under the convention of holding shares in street name, a broker executes the trade and holds the stock in the name of the brokerage firm or a nominee. The savings association, through the shareholder (registrar's) ledger, is unaware of the individual initiating the transaction. There are no rules governing the disclosure of ownership held in street name except for the threshold reporting requirements described above.

Persons are the beneficial owners of any stock that they have the right to acquire through the exercise of presently exercisable options, including options granted through a stock option plan. Indirect beneficial ownership includes stock held in the name of another person if, because of an agreement or relationship, a person obtains benefits substantially equivalent to those of ownership. Such benefits include the right to receive income and the right to control transfer of the stock. For example, a person generally is the beneficial owner of stock in the following situations:

- Stock held by certain family members, such as a spouse or minor children.
- Stock owned as trustee, where the person or members of the person's immediate family have a vested interest in the income or principal of the trust.
- Stock held in trust for which the person is a beneficiary.
- Stock owned by a partnership of which the person is a member.
- Stock owned by a corporation that the person controls.

Proxy and Information Statements

Exchange Act Regulations 14A and 14C require the filing of preliminary copies of all proxy statements, other soliciting materials, and Information Statements. Savings associations must file this material with OTS at least ten calendar days prior to the date of first sending or giving such information to shareholders unless the materials relate to the merger or acquisition of the savings association. Savings associations must file definitive copies of the above materials with OTS no later than the date of sending or giving such information to shareholders.

In certain circumstances, savings associations must provide an Information Statement that contains the information specified by Regulation 14C under the Exchange Act. In those instances where a savings association plans corporate action, the Exchange Act requires the filing of an Information Statement. The Information Statement may relate to an annual meeting, a special meeting instead of an annual meeting, or a written consent instead of either an annual or special meeting that includes election of directors. This is a requirement even where there is no solicitation of proxies. The corporate action may occur either at a meeting of the savings association's security holders or by written authorization or consent of such holders.

Annual Report to Shareholders

Savings associations must mail to shareholders copies of the Annual Report to Shareholders. Savings associations mail the Annual Report to

Shareholders with, or subsequent to the mailing of, either proxy solicitation material or an Information Statement.

INSIDER STOCK TRADING

There are substantive limitations on the ability of savings association directors, officers, and ten percent shareholders to trade in the savings association's stock. Generally, any profit realized from any purchase and sale or sale and purchase of the savings association's stock within a six-month period (short swing trade) is subject to recapture. Either the savings association or the savings association's stockholders by filing suit on its behalf (15 USC § 16(b)) may seek recapture. The rule provides a rigorous guard against misuse of confidential information by insiders.

Furthermore, the Exchange Act generally prohibits directors, officers, and ten percent stockholders from making any short sale of their savings association's stock. That is, any sale of stock that the seller does not then own. The Exchange Act also requires that directors, officers, and 10 percent stockholders deliver to buyers within 20 days any stock they sell. Alternatively, the Exchange Act requires the depositing in the mail within 5 days any stock sold by directors, officers, and 10 percent stockholders.

In addition, Rule 10b-5 under the Exchange Act (17 CFR § 240.10b-5) prohibits a person from trading any stock using material inside information. Inside information refers to material information not available to the public in general. The rule also prohibits a person in possession of material nonpublic information from selectively disclosing this information to others (tipping) and generally bars the tippees (persons who may have received such nonpublic information) from trading on such a tip. Information is material for this purpose if a reasonable investor would consider it important in reaching an investment decision or would attach actual significance to the information in making the decision. Thus, savings association officers, directors, and others in possession of material inside information must not trade in the savings association's stock until the information is available to the investing public. Managers must not make any disclosures of material information

to selected persons without concurrently releasing the information to the public.

CHANGE IN CONTROL

Regulators have concerns about the control of a savings association's voting rights because a change in control may influence the direction and operating policies of the savings association. No person may acquire control of a savings association through a purchase, assignment, transfer, pledge, or other disposition of voting rights of such savings association without OTS approval. This includes the individual acting directly or indirectly, or through or in concert with one or more other persons.

Companies that seek to acquire direct or indirect control of a savings association must also seek OTS approval pursuant to § 10(e) of the HOLA before the acquisition of control. Companies may act in concert with individuals or other companies to acquire control of a savings association. OTS rules on acquisition of control of savings associations are in 12 CFR Part 574. See Applications Handbook Section 310, Change of Control and Section 320, Rebuttals of Control for a more detailed discussion of changes of control, rebuttals of control, and acting in concert.

Section 563.181 contains special notification requirements that apply whenever a change occurs in the outstanding voting rights that will result in control (or a change in control) of any mutual savings association. The president or other chief executive officer must report such facts to the OTS. They should file the report within 15 days of their knowledge of such change.

Section 563.183 requires the savings association to file a report whenever there is a change in control of any savings association or holding company and there is also a change or replacement of the chief executive officer within a specified time.

The president or other chief executive officer must file a report when a change in control of a savings association or holding company occurs concurrently with, or within 60 days after or 12 months before, a change or replacement of the chief executive officer. (A change in control also mandates

filing Form 8-K for a savings association or holding company subject to public reporting requirements of the Exchange Act.)

The president or other chief executive officer must report to OTS whether a change in ownership or other change in the outstanding voting rights under §§ 563.181 or 563.183 will result in control or a change in control of the savings association or holding company. Section 574.4 outlines the conditions under which an acquirer possesses control. The regulation also includes conclusive control determinations.

Section 563.181(c) states the conditions that will require a report from a mutual savings association president or CEO when there is a solicitation of voting rights of the savings association. If a solicitation is of a continuing nature, it is necessary to file a report only when the solicitation begins. The report should indicate the continuing nature of the solicitation. No further reporting is necessary unless or until there is a change in the solicitor.

The president or CEO of the savings association or the holding company should file the report required under 12 CFR §§ 563.181 and 563.183. Under 12 CFR § 516.1(c), they should send an original and two copies to the regional office.

Savings associations must provide a business plan with each of the following applications:

- Approval of change in control of a stock savings association.
- Change in control of a mutual savings association.
- Change in or replacement of the chief executive officer.

Willful violations of §§ 563.181 and 563.183 may be subject to harsh enforcement action, including civil money penalties. If you discover such activity, you should remind savings associations and savings and loan holding companies of these reporting requirements. Savings associations and savings and loan holding companies are to resolve any doubt regarding the necessity of filing by submission of a report.

REGULATORY CONSIDERATIONS**Divestiture of Control**

Section 567.13 requires that any acquiror subject to a capital maintenance obligation must give prior written notice to OTS if the acquiror proposes a divestiture of the savings association.

After receiving the notice, OTS has 90 days to conduct an examination of the savings association. OTS determines the extent of any capital deficiency and communicates the results to the acquiror. If the examination indicates that no deficiency exists, the acquiror may divest control of the savings association upon receiving written notice of the examination results.

If a capital deficiency does exist, any acquiror subject to a capital maintenance agreement may only divest a savings association if they provide OTS with a capital infusion agreement. Such an agreement must provide that the acquiror will infuse the savings association with the amount necessary to remedy the deficiency. Further, the acquiror must arrange for payment, satisfactory to OTS, or otherwise satisfy the deficiency. If the acquiror provides OTS with a satisfactory agreement before the completion of an examination made to determine the extent of any capital deficiency, it may proceed to divest control. Also, the acquiror must arrange for payment, satisfactory to OTS, to ensure payment of any deficiency. Alternatively, the acquiror may immediately satisfy the deficiency.

Contributed Capital

Savings associations may accept without limit the following capital contributions:

- Cash.
- Cash equivalents.
- Other high quality, marketable assets provided they are otherwise permissible for the savings association.

Savings associations may accept other forms of contributed capital if the association receives prior OTS Regional Director approval. In considering whether to approve a contribution of capital, the

Regional Director will consider the following criteria:

- The assets are separable and capable of being sold apart from the savings association or from the bulk of the savings association's assets.
- The savings association has established an independent market value of the assets and demonstrated that such assets are likely to hold their market value in the future or that the association has established a process for periodic, independent revaluation of the assets.
- The savings association has demonstrated that a market exists for the assets.
- The transaction is in compliance with the requirements of 12 CFR § 563.41.
- The financial condition and adequacy of capital of the savings association.

Generally, the Regional Director will not approve noncash capital contributions that do not meet the above criteria or that constitute more than 25 percent of capital prior to the proposed conversion, unless good cause is demonstrated.

Noncash capital contributions in connection with permission to organize applications or applications under 12 CFR Part 559 will be evaluated pursuant to the criteria established for those application reviews.

Savings and Loan Holding Companies

OTS regulation, 12 CFR § 584.1, requires savings and loan holding companies to file Form H-(b)11 with the appropriate regional office.

Holding companies with securities registered with the SEC under the Exchange Act must attach certain SEC filings to the H-(b)11. For example, the H-(b)11 must include the following information:

- Proxy material filed with the SEC.
- The annual report on Form 10-K.
- Current reports filed on Form 8-K.
- Any prospectus filed in connection with the public offering of securities.

- SEC reports not excluded by request of the OTS regional office.

Capital Distributions

A savings association is permitted to make a distribution of cash or other property subject to 12 CFR § 563.140. Whether a savings association must file a notice or application with OTS depends on whether the capital distribution falls within certain criteria. Section 12 CFR 563, Subpart E - Capital Distributions provides guidance on capital distributions by a savings association. Federal Deposit Insurance Corporation Improvement Act (FDICIA) § 38 prohibits an insured institution from taking certain actions if, as a result, the institution would fall within any of the three undercapitalized capital categories. The prohibited actions include the following:

- Declare any dividends.
- Make any other capital distribution.
- Pay a management fee to a controlling person.

See 12 CFR § 565.4(b) and Thrift Activities Handbook Section 120, Capital Adequacy, for guidance regarding the capital categories.

A savings association permitted to make a capital distribution under the prompt corrective action regulations may do so in accordance with 12 CFR Part 563. The capital distribution regulation incorporates FDICIA's capital distribution requirements and imposes other limitations comparable to those applicable to national banks.

Subchapter S Distributions

Distributions by a Subchapter S Corporation are dividends for regulatory purposes, including prompt corrective action. This includes distributions intended to cover a shareholder's personal tax liability for the shareholder's proportionate share of the taxable income of the institution.

OTS may restrict such distributions to shareholders in amount or prohibit them in some instances. There may be some cases where the amount of dividends that shareholders would need to receive to pay their personal income taxes would exceed

the amount of dividends allowable under 12 CFR Part 563, Subpart E - Capital Distributions. It is also possible for an association to be generating taxable income in a period when the association is reporting a loss or nominal income for financial reporting purposes. This situation can arise, for example, when an association takes a large provision for loan losses because of credit quality problems but has not yet charged off specific loans.

Loans by Savings Association on Its Own Stock

Pursuant to The Financial Regulatory Relief and Economic Efficiency Act of 2000 (FRREEA), OTS now prohibits savings associations from making loans or discounts on the security of the shares of their own capital stock. Since repayment of the loan may require the association to take title to the collateral and remarket it, OTS considers such action an unsafe and unsound practice, particularly for an association that cannot easily remarket its stock. Prior to FRREEA, OTS did not prohibit savings associations from making loans on its own stock.

The statute allows a savings association to make a loan or discount on the security of the shares of its own capital stock if it acquires the stock to prevent loss upon a debt previously contracted for in good faith. Savings associations may also take their own stock as additional collateral in "work-out" situations. This provides lenders with greater security against default and enhances the safe and sound operations of a lender. Savings associations may own or acquire shares to reduce capital.

EMPLOYEE STOCK OWNERSHIP PLANS

It is customary for a significant holder of a savings association's shares to be an Employee Stock Ownership Plan (ESOP). An ESOP is an employee benefit plan. The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC) of 1986 describe an ESOP as a stock bonus plan, or combination stock bonus and money purchase pension plan. ESOPs invest primarily in an employer's stock, generally by using tax deductible contributions made to the ESOP under the terms of the plan. Other pension plans

normally limit the amount of the plan's assets allowable for investment in the employer's securities.

Federal legislation encourages the use of ESOPs to help achieve two major objectives:

- Broadening stock ownership of corporations by employees.
- Providing corporations with an additional source of capital funds.

A plan and trust are the vehicles used to establish an ESOP. The trustee is typically a financial institution. There are over 100 savings associations with trust powers. A savings association with trust powers can be the trustee for its own ESOP and the ESOPs of other employers.

After the establishment of the plan and the trust, the employer periodically contributes to the ESOP. The ESOP uses the contributions to purchase stock of the employer and to pay administrative and other expenses.

A common form of this type of benefit plan is the leveraged ESOP, whereby the sponsoring company forms a tax-qualified ESOP trust. The ESOP then borrows funds from a lending institution to acquire shares of the employer's stock. The stock may consist of outstanding shares, Treasury shares, or newly issued shares.

The debt of the ESOP is usually collateralized by the pledge of the stock to the lender. Also, there is either a guarantee or a commitment from the employer to make future contributions to the ESOP sufficient to cover the debt service requirements. There is a prohibition on the use of guarantees during a stock conversion. In leveraged ESOPs, the employer provides contributions to repay the debt and pay administrative expenses associated with the plan.

A suspense account under the control of the trustee of the plan usually holds the stock shares. Employees receive credit to their individual account when the trustee releases shares from the suspense account. The trustee releases shares from the suspense account as the ESOP repays the loan.

An ESOP must be tax qualified in order for the corporation's contribution to the plan to be tax free. This means the plan must meet certain requirements specified by the Internal Revenue Code and is, therefore, subject to IRS examination. These requirements pertain to participation, vesting, distribution, and other rules designed to protect the interests of the employees.

Recognition of a deferred tax liability may occur if a savings association contributes more than the maximum percentage allowed for deduction in the current year. This allows for an inter-period tax allocation in a future year. Further, ESOPs allow for an above the line deduction for federal income tax purposes. This consists of a pre-tax deduction for employer contributions to the ESOP. The deduction includes both the principal and interest on the loan. Alternatively, if the ESOP is not leveraged, a deduction is allowable for the contribution up to a certain maximum. The net effect of this transaction is a reduction in operating income for the tax year.

An ESOP also may be a non-tax-qualified plan; the corporation simply receives no tax benefits as a result. Attraction or retention of key, highly compensated individuals often involves the use of non-tax-qualified ESOPs.

An ESOP is subject to the provisions ERISA and is consequently subject to the rules and regulations promulgated by the Department of Labor.

ESOPs provide the following benefits:

- Employees can acquire stock ownership in their employer without having to invest their own funds.
- The employer can use the ESOP to generate additional capital with tax-deductible dollars.
- Shareholders of a closely held corporation may benefit from creation of a larger market for their stock.

Federal savings associations have the implied authority to establish ESOPs, as they have the authority to compensate their employees. State-chartered savings associations also appear to possess the implied authority to establish ESOPs. This

question, however, is a matter of state law. This also holds true for holding companies.

A savings association must establish and operate an ESOP in a safe and sound manner. Savings associations establishing employee pension plans must satisfy certain requirements specified in § 563.47. Such requirements concern funding, amendments for cost of living increases, and termination. In addition, there are recordkeeping requirements for plans not subject to the recordkeeping and reporting requirements of ERISA and the Internal Revenue Code. The rule is applicable to ESOPs formed by service corporations as well.

A savings association, another financial institution with trust powers, or a service corporation may administer or act as a trustee for an ESOP. Some savings associations have service corporations that are separate trust companies; when this is the case, ESOPs are typically trusted by those service corporations.

Regulatory Restrictions and Issues

Conversions

Creation and structuring of ESOPs frequently occurs during conversions. There are a number of reasons to establish an ESOP, for example, to reward employees or to serve as an anti-takeover device. Discussion of three issues of particular interest relating to ESOPs follows:

- An ESOP may purchase no more than ten percent of the stock offered in a conversion.
- Limitations exist in a conversion as to the amount of stock that an individual may purchase and as to the amount of stock that management as a group may purchase. An individual's stock purchase limitations do not include stock held in an ESOP. There is no aggregation of the individual and ESOP stock holdings. Stock held in an ESOP that is a management recognition or retention plan (MRP) is non-tax-qualified. You should include stock held in a non-tax-qualified ESOP when determining the overall limitation for management purchases of conversion stock.
- OTS continues to prohibit a savings association, during a conversion, from extending its own credit to finance the funding of any employee stock benefit plan. OTS also prohibits a converting savings association from guaranteeing the debt incurred by the ESOP when it borrows from another lending institution. The major objective of the conversion process is to raise new capital. To permit a savings association to extend financing or to guarantee debt of the ESOP would be inconsistent with that objective. OTS requires a savings association to service the debt of the ESOP and reserves the right to disapprove a plan that is unrealistic subject to the provisions of ERISA.

Transactions with Affiliates

Savings associations are subject to 12 CFR § 563.41, which incorporates the Federal Reserve Board's Regulation W (12 CFR Part 223). These rules restrict and prohibit certain transactions with affiliates. In many cases, ESOPs are affiliates because the trustees are also directors, partners, or trustees of the savings association or its holding company. In some cases, an ESOP is an affiliate because of other control. For example, the ESOP may own, control, or have the power to vote 25 percent of a class of voting securities of the holding company or savings association. If the ESOP is an affiliate, the savings association may not make a loan, guarantee, or other extension of credit to the ESOP. This is because the collateral requirements of § 563.41(c) would be difficult, if not impossible, to meet. The securities issued by an affiliate of the association are not acceptable as collateral for a loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of the affiliate.

Despite this limitation, the funding of most ESOPs does not raise concerns. Typically, most ESOPs receive funding by a loan or guarantee from the holding company, as opposed to the savings association itself. A loan by the holding company is not a covered transaction under the affiliate regulations. Refer to Handbook Section 380 for further details on Transactions with Affiliates.

Compliance with ERISA

ERISA imposes complex requirements upon savings associations acting as trustee or in other fiduciary capacities for ESOPs, and severe penalties can result from statutory violations. In addition, the savings association, as the employer or plan sponsor of its own employees' retirement plan, is a party in interest pursuant to ERISA. This is the case whether or not the savings association is the trustee. Almost without exception, all transactions involving the purchase or sale of an asset of the plan to or from the savings association, any affiliate, officer, or employee are subject to the provisions of ERISA. There are only certain narrowly defined exemptions. The plan sponsor or its administrative committee may be subject to reporting, disclosure, and plan design requirements. There are also a number of other responsibilities under ERISA if the savings association is acting as trustee or in a fiduciary or similar capacity.

Risk to Savings Association as Employer or When Acting as Trustee

Most of the responsibility for administration lies with the trustee, and there consequently is little risk to the savings association when it uses an outside trustee. However, the plan and trust establishing the ESOP stipulate the respective rights, duties, and obligations of the employer and trustee. For example, the trustee has a fiduciary responsibility to protect the assets of the ESOP. When a board member acts as trustee, a conflict may occur. A board member may be privy to an event that will drastically affect the employers' stock price. The trustees' fiduciary responsibility to the ESOP requires an action to protect and preserve the assets of the trust; however, this same person (board member) is prohibited from trading the stock based on insider information. The employer may be subject to liability under ERISA if it violates any of its duties or obligations.

Acquisition of Control

No company may acquire control of a savings association or holding company without the prior written approval of OTS. An exception under 12 CFR § 563(c)(1)(vii) allows an ESOP to acquire

up to twenty-five percent of a savings association's stock.

Valuation of Savings Association Stock

Shares of a publicly held savings association where fair market value is recognizable in an actively traded market generally do not raise problems. Difficulties may arise with closely held savings associations; the stock is not marketable and the ESOP creates but a limited market. IRS Ruling 59-60 outlines major principles of stock valuation; one of the principles requires the use of an independent appraiser.

Repurchase Liability

At separation or retirement, employees generally want cash for their shares of stock. The law requires an employer to redeem the shares if there is no readily available market for them. The issue of cash availability can become a critical one for a small, privately held savings association. The ESOP repurchase liability is the savings association's continuing obligation to repurchase its stock from former ESOP participants and their beneficiaries. The savings association should perform a careful analysis of the magnitude of the obligation and include it in the financial planning process if necessary to ensure that enough cash is available.

Accounting

The present accounting for ESOPs comes from a project undertaken by the Accounting Standards Executive Committee (AcSEC), which resulted in Statement of Position 93-6 (SOP 93-6, Employers' Accounting for Employee Stock Ownership Plans). This SOP provides guidance on employers' accounting for ESOPs. The SOP applies to all employers with ESOPs (both leveraged and nonleveraged). It does not address reporting by ESOPs. There is a discussion of financial reporting by ESOPs in the AICPA Audit and Accounting Guide: Audits of Employee Benefit Plans.

The necessity for SOP 93-6 is due to the great expansion in the number of ESOPs, their increased complexity, plus revised laws by Congress concerning ESOPs. In addition, the Internal Revenue Service (IRS) and the U.S. Department of Labor

(DOL) issued many regulations covering the operation of plans. These actions caused changes in the way ESOPs operate and the reasons for their establishment.

SOP 93-6 brought significant changes in the way employers report transactions with leveraged ESOPs. Although SOP 93-6 did not change how employers with nonleveraged ESOPs account for ESOP transactions, it contains guidance for nonleveraged ESOPs.

The following paragraphs summarize significant accounting rules applicable to employer's accounting for ESOPs.

Leveraged ESOPs

- Employers should report the issuance of new shares or the sale of treasury shares to the ESOP when the issuance or sale occurs. Also, employers should report a corresponding charge to unearned ESOP shares, a contra-equity account.
- For ESOP shares committed for release in a period to compensate employees directly, employers should recognize compensation cost equal to the fair value of the shares committed for release.
- For ESOP shares committed for release in a period to settle or fund liabilities for other employee benefits, employers should report satisfaction of the liabilities when the employer commits to release the shares to settle the liabilities. Other employee benefits include an employer's match of employees' 401(k) contributions or an employer's obligation under a formula profit-sharing plan. The use of an ESOP has no bearing on the recognition of compensation cost and liabilities associated with providing such benefits to employees.
- For ESOP shares committed for release to replace dividends on allocated shares used for debt service, employers should report satisfaction of the liability to pay dividends when the ESOP commits for the release of shares for that purpose.
- Employers should credit unearned ESOP shares as they commit shares for release based on the

cost of the shares to the ESOP. Employers should charge or credit to additional paid-in capital the difference between the fair value of the shares committed for release and the cost of those shares to the ESOP.

- Employers should report dividends on unallocated shares as a reduction of debt or accrued interest payable or as compensation cost. The use of the dividend for either debt service or payment to participants determines the form of accounting entry. Employers should charge dividends on allocated shares to retained earnings. They should make satisfaction of dividends payable by one of the following:
 - Contributing cash to the participant accounts.
 - Contributing additional shares to participant accounts.
 - Releasing shares from the ESOP's suspense account to participant accounts.
- Employers should report redemptions of ESOP shares as purchases of treasury stock. Employers should also report redemption of shares of leveraged and nonleveraged ESOPs as purchases of treasury stock. Employers must give a put option to participants holding ESOP shares that are not readily tradable. When participants exercise a put option, employers must repurchase the shares at fair value. The put option requirement applies to both leveraged and nonleveraged ESOPs.
- Employers that sponsor an ESOP with a *direct loan* (a loan made by a lender other than the employer to the ESOP) should report the obligations of the ESOP to the outside lender as liabilities. Employers should accrue interest cost on the debt. They should report cash payments made to the ESOP to service debt as reductions of debt and accrued interest payable when the ESOP makes payments to the outside lender. Apply this rule regardless of whether the source of cash is employer contributions or dividends.
- Employers that sponsor an ESOP with an *indirect loan* (loan made by the employer to the ESOP with a related outside loan to the employer) should report the outside loan as a

liability. Employers should not report a loan receivable from the ESOP as an asset and should not recognize interest income on such receivable. Employers should accrue interest cost on the outside loan and should report loan payments as reductions of the principal and accrued interest payable. Employers do not recognize in the financial statements contributions to the ESOP or the concurrent payments from the ESOP to the employer for debt service.

- Employers that sponsor an ESOP with an *employer loan* (no related outside loan) should not report the ESOP's note payable and the employer's note receivable in the employer's balance sheet. Accordingly, employers should not recognize interest cost or interest income on an employer loan.
- For earnings per share computations, consider ESOP shares committed for release as outstanding. ESOP shares are not outstanding if there is no commitment for release.

Nonleveraged ESOPs

- Employers with nonleveraged ESOPs should report compensation cost equal to the contribution called for in the period under the plan. Measure compensation cost as the fair value of shares contributed to or committed for contribution to the ESOP as appropriate under the terms of the plan.
- Employers with nonleveraged ESOPs should charge dividends on shares held by the ESOPs to retained earnings. An exception is that employers should account for suspense account shares of a pension reversion ESOP in the manner described in SOP 93-6 for leveraged ESOPs.
- Account for the redemption of shares of a nonleveraged ESOP in the same manner as that required for a leveraged ESOP. Employers must give a put option to participants holding ESOP shares that are not readily tradable, which on exercise requires employers to repurchase the shares at fair value. The put option requirement applies to both leveraged and nonleveraged ESOPs. Employers should report the satisfaction of such option exercises as purchases of treasury stock. (See the prior

discussion of redemptions in the leveraged ESOPs section.)

- Treat all shares held by a nonleveraged ESOP as outstanding in computing the employer's earnings per share, except suspense shares of a pension reversion ESOP. Treat shares of a pension reversion ESOP as outstanding until making commitment for release for allocation to participant accounts. Different rules also apply if a nonleveraged ESOP holds convertible preferred stock.

Consult SOP 93-6 for a comprehensive discussion of rules applicable to employers' accounting for ESOPs.

REFERENCES

United States Code (12 USC)

Federal Reserve System

§371c(23A)	Banking Affiliates
§371c-1(23B)	Restrictions on Transactions with Affiliates
Part 223	Transactions between Bank Member Banks and Their Affiliates (Regulation W)

Home Owners' Loan Act

§1464(i)	Conversions
§1464(o)	Conversion of State Savings Banks
§1464(p)	Conversions
§1467a(10)	Regulation of Holding Companies
§1468(11)	Transactions with Affiliates

Federal Deposit Insurance Act

§1817(j)	Change in Control of Depository Institutions
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United States Code (15 USC)

Securities Exchange Act of 1934

§12	Registration Requirements
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§13 Periodical and Other Reports
 §14 Proxies
 §16 Insiders

United States Code (29 USC)

§1001 Employee Retirement Income
 Security Act of 1974

Code of Federal Regulations (12 CFR)*FDIC Rules*

Part 303 Subpart E Change in Bank Control

Office of Thrift Supervision Rules

Part 543 Federal Mutual Associations
 Part 552 Federal Stock Associations
 §561.4 Affiliate
 §561.5 Affiliated Person
 §563.41 Loans and Other Transactions
 with Affiliates and Subsidiaries
 §563.43 Loans to Executive Officers, Di-
 rectors and Principal Shareholders
 §563.47 Pension Plans
 §563.81 Issuance of Subordinated Debt
 Securities and Mandatorily Re-
 deemable Preferred Stock
 Part 563
 Subpart E Capital Distributions
 §563.181 Reports of Change in Control of
 Mutual Savings Associations
 §563.183 Reports of Change in CEO or
 Director
 Part 563b Conversions from Mutual to Stock
 Form
 Part 563c Accounting Requirements
 Part 563d Securities of Savings Associations
 Part 563g Securities Offerings
 §565.4 Capital Measures and Capital
 Category Definitions
 §567.5 Components of Capital
 §567.13 Obligations of Acquirors of Sav-
 ings Associations to Maintain
 Capital
 Part 569 Proxies

Part 574 Acquisition of Control of Savings
 Associations
 §584.1 Registration, Examination, and
 Reports

Code of Federal Regulations (17 CFR)*Securities and Exchange Commission Rules*

§240.10b-5 Insider Trading
 §240.12b Registration under the Exchange
 Act
 §240.13 Shareholder and Periodic Report-
 ing
 §240.14a Proxies
 §240.14c Distribution of Information
 §240.14e Tender Offer Rules
 §240.16a-1 Reports by Insiders
 §240.17f-2 Fingerprinting of Transfer Agent
 Personnel
 §240.17Ad-2 Turnaround of Items by Transfer
 Agents
 §240.17Ad-4 Exempt Transfer Agents
 §240.17Ad-11 Reports of Record Differences

OTS Applications Processing Handbook

Section 440 Stock Conversions

OTS Trust & Asset Management Handbook

Section 620 Employee Benefit Accounts

**Financial Accounting Standards Board,
Statement of Financial Accounting Standards**

No. 47 Disclosure of Long-term
 Obligations
 No. 89 Financial Reporting and Changing
 Prices

Internal Revenue Service

Revenue Ruling 59-60 Stock Valuation

**American Institute of Certified Public
Accountants (AICPA) Statement of Position**

No. 93-6 Employers' Accounting for Em-
ployee Stock Ownership Plans

Capital Stock and Ownership Program

Examination Objectives

Identify and determine the nature of ownership and control of the savings association.

Determine whether any individual has exerted a detrimental influence through ownership or control.

Determine if adequate physical safeguards for stock certificates and ownership records are in place.

Determine compliance with applicable laws, rulings, regulations, and any expressed agreements with OTS, FDIC, or state regulators.

Determine the adequacy of the savings association's policies, procedures, and controls related to capital stock.

Review securities filings for information of a supervisory interest and report results of the review to Business Transactions Division (BTD).

Determine if a savings association prudently administers an Employee Stock Ownership Plan (ESOP).

Initiate corrective action when deficiencies exist that could affect safety and soundness, or when you note significant violations of laws or regulations other than securities violations.

Examination Procedures

Level I

Wkp. Ref.

1. Determine through discussions with management and other appropriate verification methods, if management has taken corrective action relative to:

- Prior examination report comments and prior examination exceptions.
- Internal and external audit exceptions.
- Any enforcement/supervisory actions and directives.

-
2. Summarize information from securities offering filings, directors' minutes, audit reports, and other sources pertaining to any new issuance of capital stock (including the payment

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Capital Stock and Ownership Program

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of stock dividends), notes, subordinated debentures, and other capital instruments. File the information within the continuing examination file (CEF), if applicable.

-
3. Either you or the regional office should make a brief review of the Forms 10-K, 10-Q, 10-KSB, 10-QSB and any other Exchange Act reports. (See Appendix B.) Compare the Exchange Act reports to TFRs, other reports, information, and documents relating to the savings association that are available. Immediately report any material discrepancies between the disclosures contained in the Exchange Act reports and information known to the regional office. The regional office should inform BTB and the Accounting Policy Division (APD) by e-mail.
 4. Carefully review all transactions involving Treasury stock. Determine whether the board of directors' actions adequately supports Treasury stock transactions. Consider whether transactions have a detrimental effect.
 5. Update the CEF, if applicable, with the Schedule of Stockholders (PERK 014). Alternatively, summarize the following information for each director and director's interests, officer, attorney, partner, and all other stockholders who own or control five percent or more of the savings association's stock:
 - Number of shares.
 - Percent to total outstanding.
 - Stock certificate number (optional).
 - Issuing price (optional).
 - Date of issue (optional).
 - Confirm the timely reporting of changes in ownership on Forms 3, 4, 5 or Schedules 13D or 13G by companies subject to the Exchange Act.
-

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Capital Stock and Ownership Program

6. Determine stock concentration by noting the total number of shareholders along with the number of shares outstanding.
-
7. If the savings association elected S Corporation status since the last examination, perform the following procedures:
- Review the association's eligibility for the election.
 - Review shareholder agreements regarding stock transfers which management will use to maintain compliance with the eligibility requirements.
 - Verify that management has a method for monitoring ongoing compliance with S Corporation eligibility requirements.
 - Confirm that management periodically test and review the method for monitoring compliance.
-
8. Review whether the institution has realistic expectations about its ability to increase its capital while maintaining its S Corporation status.
-
9. Determine whether the association's management and shareholders understand that limitations may exist on the ability of an S Corporation to pay dividends.
-
10. Determine whether management understands the overall effect of any potential dividend distribution limitations on an S Corporation.
-
11. Review proxy records from the last election of the directors. Identify anyone who has controlled the election of the board through proxies.
-

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12. On the basis of information obtained in procedure No. 5 and review of shareholder and related information, consider:

- Whether there was a change in control in the association. If yes, determine if BTD received the information for savings associations subject to the Exchange Act, and if not reported, provide details to BTD for a determination of needed disclosures.
- Whether ownership, or change in control, of the savings association has significantly affected the savings association's operating policies or mode of operations to the detriment of the savings association.

13. ERISA and IRS rules and regulations are complex. Accordingly, you should request the ESOP administrator in the savings association to provide evidence that specialist legal counsel assists in helping to maintain the plan in compliance with all applicable rules and regulations. You should request the ESOP administrator to provide evidence that the savings association is able to meet its repurchase liability. The ESOP administrator also should support the stock valuation of closely held savings associations.

14. From a review of plan documents or other appropriate sources, determine the duties and responsibilities of the savings association regarding its ESOP. Ascertain whether the savings association is satisfactorily performing its duties and responsibilities. If the need for expert advice is apparent, you should recommend that the savings association obtain the advice of an ESOP legal specialist. (*Note:* Section 620 of the Trust & Asset Management Handbook contains additional examination procedures if the savings association or its service corporation is acting as trustee, or serving in a fiduciary or similar capacity.)

15. If the savings association established an ESOP in conjunction with a conversion, determine if the ESOP purchased ten percent or more of the stock offered in the conversion.

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Capital Stock and Ownership Program

16. Determine if the savings association aggregates stock held in the ESOP with an individual's purchase limitations. (They should not be aggregated.)
-
17. Determine if during a conversion the savings association extended its own credit to finance the funding of the ESOP. Also determine if during a conversion the savings association guaranteed the debt incurred by the ESOP when borrowing from another savings association.
-
18. Determine if the ESOP is an affiliate or an affiliated person. If so, verify that transactions such as loans and other financing arrangements with the savings association are consistent with OTS and FRB restrictions and prohibitions. (12 CFR §§ 561.5 and 563.43 and Federal Reserve Act §§ 23A and 23B.)
-
19. Determine if an ESOP trust acquired control of the savings association or an S&L holding company outside of the conversion process. If so, verify OTS approval of the acquisition of control, as required by § 574.3.
-
20. Summarize pertinent information relating to stock option plans and ESOPs and file in the CEF, if applicable.
-
21. Review Level II procedures and perform those necessary to test, support, and present conclusions derived from performance of Level I procedures.
-

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Capital Stock and Ownership Program

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Level II

22. Determine whether the association's management and shareholders understand that prohibitions exist on the ability of an association to make loans or discounts on the security of the shares of its own stock. Verify that the association is in compliance with these restrictions.

-
23. Ensure that capital distributions are of the type and in the amount permitted by Part 563, Subpart E – Capital Distributions.

-
24. For savings associations subject to the Exchange Act, determine whether the savings association makes timely required filings. If not, contact the regional office or BTB.

-
25. If the savings association acts as its own transfer agent or registrar, examine the records pertaining to stock certificates to ensure controls are adequate to prevent over issuance of stock.

-
26. Ensure that your review meets the Objectives of this Handbook Section. State your findings and conclusions, and recommendations for any necessary corrective measures, on appropriate work papers and report pages.
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Examiner's Summary, Recommendations, and Comments

Exam Date: _____
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Reviewed By: _____
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WASHINGTON AND REGIONAL PROCESSING OF EXCHANGE ACT FILINGS**Background**

Savings associations must provide full, fair, accurate and complete information regarding their business and financial condition to the investing public to avoid potential liability under the anti-fraud rules of the federal securities laws. It is essential to the supervisory efforts of the regional offices that regulators be aware of critical information disclosed in filings.

The Business Transactions Division (BTD) of the Office of Chief Counsel and the Accounting Policy Division (APD) of the Office of Supervision review Exchange Act and securities offering filings of savings associations for compliance with generally accepted accounting principles (GAAP), generally accepted auditing standards (GAAS), and with the Exchange Act and OTS regulations. Also, BTD, upon request, assists the SEC by reviewing filings of savings and loan holding companies referred by the SEC.

For purposes of this Appendix, we refer to BTD and APD as securities review staff when they perform dual functions. We refer to BTD and APD individually when they perform tasks independent of each other.

Coordination between regional and Washington staff is essential to ensure that savings associations fulfill their obligations to make full, fair, accurate, and complete representations to the public about their financial condition and operations. Reliable public disclosure and market integrity for saving association's securities are key to the savings association industry's capital-raising process.

General Procedures

The responsibility for reviewing disclosure documents filed by savings associations for compliance with the Exchange Act and the OTS securities offerings regulations rests with securities review staff. Securities review staff are responsible for issuing comment letters relating to a particular filing. Further, securities review staff are responsible for resolving legal, disclosure, and accounting questions that may arise under the Exchange Act and 12 CFR Parts 563b, 563d, and 563g. A specific attorney is assigned to each reporting savings association and reviews and examines all of that savings association's Exchange Act reports and any offering circulars it may file.

APD performs accounting reviews for the nontransactional Exchange Act filings and other filings and applications that contain financial statements. APD is primarily responsible for accounting reviews of the following forms: 8-K, 10, 10-SB, 10-K, 10-KSB, 10-Q, 10-QSB, 12b-25, applications for conversions, applications for conversions with mergers, and applications for mutual holding company conversions. The BTD staff is primarily responsible for accounting reviews for secondary offering circulars (of equity, debt and other securities) and mergers.

The regional office should contact securities review staff when questions arise with respect to a particular savings association's disclosure obligations. Also, the regional office should contact securities review staff by telephone or e-mail whenever information comes to their attention that potentially affects such reporting obligations.

Securities review staff closely review examination reports and other supervisory communications in connection with their review of securities filings to ensure appropriate disclosures in the filings. Staff works together to secure resolution of novel and precedential accounting issues.

APD generally issues accounting comments in conjunction with, but separate from, comments issued by BTD on the Exchange Act filings for which it has primary responsibility. Otherwise, BTD provides to the savings

association or other filing party all comments relating to the accuracy, adequacy, and timeliness of Exchange Act filings made with OTS. Securities review staff and the regional office receives copies of all comments and responses regardless of which office issues the comments.

Securities review staff maintains a shared electronic file of all comments on filings that is accessible by each regional accountant or a designee. The shared file ensures that each office is aware of each other's findings and can determine if there is a need for a supervisory response. Securities review staff and the regional office must be aware of problems that require disclosure in filings. The regional regulator must be aware of securities review staff comments, and responses to those comments.

Securities review staff will resolve all issues regarding a savings association's compliance with issued comments. Also, BTB will resolve any necessary enforcement or other actions regarding compliance with filing requirements. In some instances, securities review staff may seek the assistance of a regional office in obtaining a savings association's compliance with comments. Securities review staff rely on regional regulators to observe and to report events that may affect Exchange Act disclosures, particularly events raising significant supervisory concerns. Regional regulators, therefore, must have a general knowledge of the content of a savings association's securities filings.

Time Requirements

For a report to be timely, OTS must receive a properly filed report by the required date. The mailing or postmarking of a report on the last day on which a report is to be filed does not constitute a timely filing.

A savings association may receive an extension of time to file a report if the savings association follows the procedures described in the regulations and satisfies all of the requirements of an extension. Exchange Act Rule (17 CFR § 240.12b-25) contains general provisions to follow if a savings association fails to file within a prescribed time frame all or portion of an Exchange Act periodic report. If a savings association fails to submit a complete Exchange Act periodic report within the prescribed time period, it must file a Form 12b-25. The savings association must file Form 12b-25 no later than one business day after the due date of such report. The association must disclose its inability to file the report on a timely basis and the reasons why in reasonable detail, and otherwise comply with all other requirements of Rule 12b-25. Among other things, the savings association must represent in the Form 12b-25 that it cannot eliminate the reasons for the delay without unreasonable effort or expense. The savings association also must represent that it will make the filing within the period of the extension. Rule 12b-25 provides for a 15-day extension for a Form 10-K or 10-KSB and a 5-day extension for a Form 10-Q or 10-QSB. Such extensions are available only upon an appropriate filing with BTB. Only one 15- or 5-day extension period, as appropriate for the type of filing, is available. No additional extensions of time are available under the regulations.

If appropriate, a savings association may represent that its failure to file a timely prescribed report is due to its inability to file the report without unreasonable effort or expense. Generally, late reports satisfy prescribed due dates only if the savings association meets all conditions of the rules.

When a savings association is unable to file a report on time, it should promptly consider its general public disclosure obligations. The savings association should determine whether it is appropriate to issue a press release to advise its stockholders and the public markets of material information pertaining to the savings association. In this regard, savings associations may wish to contact BTB or submit a written statement of the reasons for the delinquency. The statement should include a description of the steps the savings association is taking to come into compliance with the reporting requirements.

Regional Procedures

Securities oversight of savings associations is critically important. Regional regulators must alert the individual responsible for the particular savings association to all supervisory or other regulatory information that affects or may potentially affect securities law disclosure obligations. This reporting may be through e-mail. The use of e-mail provides more time for both the regional and securities review staff evaluation. Also e-mail facilitates the maintenance of the comments in a shared electronic file that is available to the regions and securities review staff.

Critical to an effective OTS oversight role is the certainty that regional personnel are thoroughly familiar with the current financial and operational condition of savings associations. Knowledgeable regional personnel should promptly review filings for supervisory concerns, and communicate any concerns to securities review staff. A critical component in securities review staff's Exchange Act oversight role is ensuring correction, as soon as possible, of any information in a public filing that is inaccurate, misleading, or incomplete. For this reason, regional regulators should promptly review Exchange Act filings, offering circulars, and applications for conversion.

The regional office should provide to securities review staff copies of all nonroutine correspondence to and from the savings association. Further, the regional office should provide copies of documents and internal memoranda that may contain information relevant to a savings association's disclosure obligations. Securities review staff examine this information to ensure that savings associations promptly comply with all disclosure obligations.

Achievement of successful supervision of savings association securities responsibilities requires uniformity and consistency of action. Regional personnel and BTB should coordinate a supervisory approach prior to initiating discussions with savings associations regarding requests for additional information or requiring corrective action under the Exchange Act. Should it become necessary, BTB will inform the Enforcement Division of Exchange Act or securities offering problems needing enforcement attention.

The regional office should determine if the savings association provides timely periodic Exchange Act filings. The regional office should maintain a schedule for each regional Exchange Act and 563g registered savings association indicating the due dates of all Exchange Act filings. This Handbook Section lists all common required filings and their respective time requirements. Regional offices should use this information to set up the schedules. Securities review staff maintain similar schedules and may assist the regional offices in setting up these schedules.

Savings associations must file required reports within prescribed time frames. Before the regional office contacts a savings association to inquire about a missing filing, they should first check with the assigned individual to determine if BTB has the filing. In certain instances a savings association may explain a late filing by filing Form 12b-25. Generally, this filing will allow a short extension of time to file certain reports. In addition, a savings association may inadvertently file reports with either BTB or the region, but not both. In such a case, BTB will direct the savings association to immediately file reports as required by the regulations, including Parts 563d and 563g.

Failure to file required reports on a timely basis may indicate deeper problems at a savings association. When regional regulators become aware of serious problems with a registrant savings association, they should immediately alert securities review staff by e-mail. Regional personnel should provide relevant supervisory information to securities review staff when practicable, rather than wait until completion of the next examination report.

Regional staff should quickly and promptly review all filings related to savings associations and holding companies to discover any information of supervisory interest. If regulators read the filings promptly, they may find serious problems disclosed in filings months before they would otherwise find them. A quick and timely review of filings may result in more timely initiation of a supervisory response that may require a restatement of earnings and financial position. In addition, the timely review of filings may lead to enforcement action, such as cease and desist, removal and prohibition, or receivership. Regional staff should not rely on securities review staff for this supervisory review. Further, regional staff should not duplicate the work of securities review staff in reviewing filings for compliance with the Exchange Act and Parts 563b, 563d, and 563g of the OTS regulations.

After a review of any filing, regional personnel should prepare a brief memorandum to securities review staff describing the review. The memorandum should disclose the existence of possible supervisory concerns and corrective actions that the regional office recommends. If the regional office notes problems, the filing will receive higher review priority. In the absence of such disclosure of potential concerns, the filing will likely receive a lower review priority. If necessary, securities review staff will prepare and issue a comment letter to the savings association concerning the disclosure problems. The regional office should promptly provide this memorandum via e-mail to securities review staff who will include the information in the shared electronic file.

When a savings association files an offering circular pursuant to Part 563g, BTB generally issues an initial comment letter on the filing within 14 to 30 calendar days of the filing date. This comment letter will generally include comments from the individual assigned to the savings association. Accordingly, regional staff should review offering circulars and provide any relevant information via e-mail to BTB within ten calendar days of filing. Satisfying this time frame will allow BTB to consider such information within the initial review period.

Regional regulators should be aware of significant events that have occurred requiring the filing of a current report on Form 8-K. The regional regulators should determine if the filing is timely. Consult with BTB if there is a question regarding the necessity of making a filing.

Filers must properly file and receive BTB clearance of proxy soliciting materials (or information statements, when applicable) before distribution to stockholders. Regional regulators should note these required steps. In addition, while not necessary, regional regulators may review proxy materials. If they do review proxy material, they should notify security review staff immediately by e-mail if they believe any proxy materials contain a material misstatement or omit any material information.

Regional regulators should be alert to changes in the majority of a savings association's board of directors resulting from actions other than a meeting of the stockholders. Regional regulators should promptly consult with BTB if questions arise regarding a change in the majority of a board of directors. Also, regional regulators should immediately notify BTB if problems arise.

Regional regulators should identify any savings associations with assets of more than \$5 million that have 300 or more shareholders and a class of stock not registered under the Exchange Act. Also, regional regulators should identify formerly registered savings associations. Interpretive questions sometimes arise as to the meaning of "held of record" or "class" and regional regulators should refer these questions to BTB. If it appears that a savings association should have registered its stock under the Exchange Act, the regional office should advise securities review staff. The trigger for this inquiry is 300 shareholders because:

- Although 500 shareholders triggers registration under the Exchange Act, the number of shareholders may have increased to 500 or more since the last verification.
- Three hundred shareholders triggers deregistration.

Regional regulators should notify a savings association's officers, directors and significant shareholders of their responsibilities to file reports (with BTB in Washington and with the regional office) relating to their ownership of the savings association's securities. Savings association officers, directors and five percent or greater shareholders have ownership and transaction reporting requirements under the Exchange Act. The Exchange Act requires this information on Forms 3, 4, or 5 and Schedule 13D or 13G. The rules in this area can be extremely complex and there is a large body of judicial precedent dealing with this area. Refer questions regarding interpretation to BTB. Regional regulators should encourage those with obligations to file such reports to consult with their own counsel regarding their filing responsibilities.

Regional personnel should refer all comments or discovery of material information regarding savings and loan holding companies that are subject to Exchange Act filing requirements to BTB. Securities review staff will assess the materiality of the information for purposes of securities law obligations and will work with the regional personnel in deciding an appropriate response under the circumstances. Securities review staff will assess the information to determine whether a referral to the SEC is appropriate.

Regional office personnel are responsible for contacting holding companies that are not filing Form H-(b)11 as required. The inclusion of SEC filings in Form H-(b)11 does not mean that OTS necessarily has a role in performing disclosure review of those documents. Regional regulators should provide any comments to BTB for all securities filings that the holding companies provide and send BTB related correspondence and examination reports upon request.

Regional office personnel should also advise APD of any significant accounting disclosure problems and accounting issues noted during their review of Forms H-b(11) for holding companies that have thrift subsidiaries that file Securities Exchange Act filings with the SEC and/or the OTS.

You should report information concerning accounting or reporting problems that may affect the Thrift Financial Report (TFR) to the Financial Reporting Division (FRD), Dallas, TX. The staff of the FRD in Washington, DC can answer questions and provide advice concerning the correct completion of TFRs. Institutions should correct TFRs that are less than five months old in accordance with FRD's guidance.