

§ 5.60

the OCC before changing the composition of all, or substantially all, of its assets through sales or other dispositions, or, having sold or disposed of all, or substantially all, of its assets, through subsequent purchases or other acquisitions or other expansions of its operations. This section does not apply to a change in composition of all, or substantially all, of a bank's assets that the bank undertakes in response to direction from the OCC (*e.g.*, in an enforcement action pursuant to 12 U.S.C. 1818) or as part of a voluntary liquidation pursuant to 12 U.S.C. 181 and 182 and 12 CFR 5.48, if the liquidating bank has stipulated in its notice of liquidation to the OCC that its liquidation will be completed, the bank dissolved and its charter returned to the OCC within one year of the date it filed this notice, unless the OCC extends the time period. This section does not apply to changes in asset composition that occur as a result of a bank's ordinary and ongoing business of originating and securitizing loans.

(c) *Approval requirement.* (1) A national bank must file an application and obtain the prior written approval of the OCC before changing the composition of all, or substantially all, of its assets (i) through sales or other dispositions, or, (ii) having sold or disposed of all or substantially all of its assets, through subsequent purchases or other acquisitions or other expansions of its operations.

(2) In determining whether to approve an application under paragraph (c)(1) of this section, the OCC will consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers. The OCC may deny the application if the transaction would have a negative effect in any of these respects. The OCC's review of any change in asset composition through purchase or other acquisition or other expansions of its operations under paragraph (c)(1)(ii) of this section will include, in addition to the foregoing factors, the factors governing the organization of a bank under § 5.20.

(d) *Exceptions to Rules of General Applicability.* Sections 5.8, 5.10, and 5.11 do not apply with respect to applications filed pursuant to this section. However,

12 CFR Ch. I (1–1–06 Edition)

if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all of the provisions of §§ 5.8, 5.10, and 5.11 apply.

[69 FR 50297, Aug. 16, 2004]

Subpart E—Payment of Dividends

§ 5.60 Authority, scope, and exceptions to rules of general applicability.

(a) *Authority.* 12 U.S.C. 56, 60, and 93a.

(b) *Scope.* Except as otherwise provided, the restrictions in this subpart apply to the declaration and payment of all dividends by a national bank, including dividends paid in property. However, the provisions contained in § 5.64 do not apply to dividends paid in stock of the bank.

(c) *Exceptions to the rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this subpart.

§ 5.61 Definitions.

For the purposes of subpart E, the following definitions apply:

(a) *Capital stock, capital surplus, and permanent capital* have the same meaning as set forth in § 5.46.

(b) *Retained net income* means the net income of a specified period less the total amount of all dividends declared in that period.

§ 5.62 Date of declaration of dividend.

A national bank shall use the date a dividend is declared for the purposes of determining compliance with this subpart.

§ 5.63 Capital limitation under 12 U.S.C. 56.

(a) *General limitation.* Except as provided by 12 U.S.C. 59 and § 5.46, a national bank may not withdraw, or permit to be withdrawn, either in the form of a dividend or otherwise, any portion of its permanent capital. Further, a national bank may not declare a dividend in excess of undivided profits.

(b) *Preferred stock.* The provisions of 12 U.S.C. 56 do not apply to dividends on preferred stock. However, if the undivided profits of the national bank are not sufficient to cover a proposed dividend on preferred stock, the proposed

Comptroller of the Currency, Treasury

§ 5.67

dividend constitutes a reduction in capital subject to 12 U.S.C. 59 and § 5.46.

§ 5.64 Earnings limitation under 12 U.S.C. 60.

(a) *Transfers to capital surplus.* Subject to the restrictions in 12 U.S.C. 56 and this subpart, the directors of a national bank may declare and pay dividends as frequently and of such amount of undivided profits as they judge prudent. However, a national bank may not declare a dividend unless capital surplus equals or exceeds the capital stock of the bank, except:

(1) In the case of an annual dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding four quarters to capital surplus; or

(2) In the case of a quarterly or semi-annual dividend, or any other special dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding two quarters to capital surplus.

(b) *Earnings limitation.* For purposes of 12 U.S.C. 60, a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any calendar year exceeds the total of the national bank's retained net income of that year to date, combined with its retained net income of the preceding two years, unless the dividend is approved by the OCC. A national bank shall submit a request for OCC approval of a dividend under 12 U.S.C. 60 to the appropriate supervisory office.

(c) *Surplus surplus.* Any amount in capital surplus in excess of capital stock required by 12 U.S.C. 60(a) (referred to as "surplus surplus") may be transferred to undivided profits and available as dividends, provided:

(1) The bank can demonstrate that the surplus came from earnings of prior periods, excluding the effect of any stock dividend; and

(2) The board of directors of the bank approves the transfer of the surplus surplus from capital surplus to undivided profits.

[61 FR 60363, Nov. 27, 1996, as amended at 64 FR 60098, Nov. 4, 1999]

§ 5.65 Restrictions on undercapitalized institutions.

Notwithstanding any other provision in this subpart, a national bank may not declare or pay any dividend if, after making the dividend, the national bank would be "undercapitalized" as defined in 12 CFR part 6.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. Even though the property distributed has been previously charged down or written off entirely, the dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on the books of the national bank as a recovery, and the dividend should then be declared in the amount of the full book value (equivalent to the actual current value) of the property being distributed.

§ 5.67 Fractional shares.

To avoid complicated recordkeeping in connection with fractional shares, a national bank issuing additional stock by stock dividend, upon consolidation or merger, or otherwise, may adopt arrangements such as the following to preclude the issuance of fractional shares. The bank may:

(a) Issue scripts or warrants for trading;

(b) Make reasonable arrangements to provide those to whom fractional shares would otherwise be issued an opportunity to realize at a fair price upon the fraction not being issued through its sale, or the purchase of the additional fraction required for a full share, if there is an established and active market in the national bank's stock;

(c) Remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and