

(d) *Required statement for all securities evidencing outside borrowings.* Each security shall bear on its face, in a prominent place, the following legend:

This security is not a savings account or a deposit and it is not insured by the United States or any agency or fund of the United States.

(e) *Filing requirements for outside borrowings with maturities in excess of one year.* (1) Unless the savings association meets its capital requirement under part 567 of this chapter, it shall, at least ten business days prior to issuance, file with the Regional Director or his or her designee a notice of intent to issue securities evidencing such borrowings. Such notice shall contain a summary of the items of the security, including:

- (i) Principal amount of the securities;
- (ii) Anticipated interest rate range and price range at which the securities are to be sold;
- (iii) Minimum denomination;
- (iv) Stated and average effective maturity;
- (v) Mandatory and optional prepayment provisions;
- (vi) Description, amount, and maintenance of collateral if any;
- (vii) Trustee provisions if any;
- (viii) Events of default and remedies of default;
- (ix) Any provisions which restrict, conditionally or otherwise, the operations of the association.

(2) The OTS shall have 10 business days after receipt of such filing to object to the issuance of such securities. The OTS shall object if the terms or covenants of the proposed issue place unreasonable burdens on, or control over, the operations of the association. If no objection is taken, the savings association shall have 120 calendar days within which to issue such securities.

(f) *Note accounts.* For purposes of this section, note accounts are not borrowings.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 7300, Mar. 1, 1990; 55 FR 13515, Apr. 11, 1990; 57 FR 14345, Apr. 20, 1992; 57 FR 33438, July 29, 1992]

§ 563.81 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital.

(a) *Scope.* A savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock ("covered securities") in supplementary capital under 12 CFR 567.5(b). If a savings association does not include covered securities in supplementary capital, it is not required to comply with this section.

(b) *Application and notice procedures.* (1) A savings association must file an application or notice under 12 CFR part 516, subpart A seeking OTS approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until OTS approves the application or does not object to the notice.

(2) A savings association must also comply with the securities offering rules at 12 CFR part 563g by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: "This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;"

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association, as defined in 12 CFR 583.2;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h);

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) State or refer to a document stating that the savings association must obtain OTS approval before the voluntarily prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntarily redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in § 565.4(b) of this chapter, fails to meet the regulatory capital requirements at 12 CFR part 567, or would fail to meet any of these standards following the payment.

(ii) A savings association must include such additional statements as OTS may prescribe for certificates, purchase agreements, indentures, and other related documents. OTS will prescribe the text of these additional statements in its Application Processing Handbook.

(2) *Maturity requirements.* Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) *Mandatory prepayment.* Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 563g.4) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined at 12 CFR 583.2) and for collective enforcement of the security holders' rights and remedies.

(ii) A savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) *OTS review.* (1) OTS will review notices and applications under 12 CFR part 516, subpart E.

(2) In reviewing notices and applications under this section, OTS will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the savings association's charter and bylaws.

(ii) The savings association is at least adequately capitalized under § 565.4(b) of this chapter and meets the regulatory capital requirements at § 567.2 of this chapter.

(iii) The savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) OTS has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) OTS approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to OTS. OTS may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, OTS, or the Deposit Insurance Fund.

(e) *Amendments.* If a savings association amends the covered securities or related documents following the completion of OTS review, it must obtain OTS approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) *Sale of covered securities.* The savings association must complete the sale of covered securities within one year after OTS approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with OTS. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) *Reports.* A savings association must file the following information with OTS within 30 days after the savings association completes the sale of covered securities includable as supplementary capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all ex-

penses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

[72 FR 1927, Jan. 17, 2007]

EFFECTIVE DATE NOTE: At 72 FR 69438, Dec. 7, 2007, § 563.81 was amended as follows, effective Apr. 1, 2008.

a. In paragraph (a), remove the phrase "in supplementary capital under 12 CFR 567.5(b)" and add the phrase "in supplementary capital (tier 2 capital) under part 567 of this chapter" in its place.

b. In paragraph (d)(2)(ii), remove the phrase "regulatory capital requirements at § 567.2 of this chapter" and add the phrase "regulatory capital requirements at part 567 of this chapter" in its place.

Subpart D [Reserved]

Subpart E—Capital Distributions

SOURCE: 64 FR 2809, Jan. 19, 1999, unless otherwise noted.

§ 563.140 What does this subpart cover?

This subpart applies to all capital distributions by a savings association ("you").

§ 563.141 What is a capital distribution?

A capital distribution is:

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

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

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

(b) Your payment to repurchase, redeem, retire or otherwise acquire any