

§ 563.1

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Subpart A—Accounts

§ 563.1 Chartering documents.

(a) *Submission for approval.* Any *de novo* savings association prior to commencing operations shall file its charter and bylaws with the OTS for approval, together with a certification that such charter and bylaws are permissible under all applicable laws, rules and regulations.

(b) *Availability of chartering documents.* Each savings association shall cause a true copy of its charter and bylaws and all amendments thereto to be available to accountholders at all times in each office of the savings association, and shall upon request deliver to any accountholders a copy of such

charter and bylaws or amendments thereto.

[57 FR 14344, Apr. 20, 1992]

§ 563.4 [Reserved]

§ 563.5 Securities: Statement of non-insurance.

Every security issued by a savings association must include in its provisions a clear statement that the security is not insured by the Federal Deposit Insurance Corporation.

Subpart B—Operation and Structure

§ 563.22 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

(a) No savings association may, without application to and approval by the Office:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No savings association may, without notifying the Office, as provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a savings association is not the resulting institution; or

(ii) In the case of a savings association that meets the conditions for expedited treatment under § 516.3(a) of this chapter, convert, directly or indirectly, to a national or state bank.

(2) No savings association that does not meet the conditions for expedited treatment under § 516.3(a) of this chapter may, directly or indirectly, convert to a national or state bank without prior application to and approval of the Office, as provided in paragraph (h)(2)(ii) of this section.

(c) No savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the Office, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term “transfer” means purchases or sales of assets or

liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the Office shall take into account the following:

- (i) The capital level of any resulting savings association;
- (ii) The financial and managerial resources of the constituent institutions;
- (iii) The future prospects of the constituent institutions;
- (iv) The convenience and needs of the communities to be served;
- (v) The conformity of the transaction to applicable law, regulation, and supervisory policies;
- (vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if any) of each savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the result of arms' length bargaining or, in the case of a stock savings association, where controlling stockholders are receiving different consideration from other stockholders. No finder's or similar fee should be paid to any officer, director, or controlling person of a savings association which is a party to the transaction.

(B) *Full disclosure.* The filing should make full disclosure of all written or oral agreements or understandings by which any person or company will receive, directly or indirectly, any money, property, service, release of pledges made, or other thing of value, whether tangible or intangible, in connection with the transaction.

(C) *Compensation to officers.* Compensation, including deferred compensation, to officers, directors and

controlling persons of the disappearing savings association by the resulting institution or an affiliate thereof should not be in excess of a reasonable amount, and should be commensurate with their duties and responsibilities. The filing should fully justify the compensation to be paid to such persons. The transaction will be particularly scrutinized where any of such persons is to receive a material increase in compensation above that paid by the disappearing savings association prior to the commencement of negotiations regarding the proposed transaction. An increase in compensation in excess of the greater of 15% or \$10,000 gives rise to presumptions of unreasonableness and sale of control. In the case of such an increase, evidence sufficient to rebut such presumptions should be submitted.

(D) *Advisory boards.* Advisory board members should be elected for a term not exceeding one year. No advisory board fees should be paid to salaried officers or employees of the resulting savings association. The filing should describe and justify the duties and responsibilities and any compensation paid to any advisory board of the resulting savings association that consists of officers, directors or controlling persons of the disappearing institution, particularly if the disappearing institution experienced significant supervisory problems prior to the transaction. No advisory board fees should exceed the director fees paid by the resulting savings association. Advisory board fees that are in excess of 115 percent of the director fees paid by the disappearing savings association prior to commencement of negotiations regarding the transaction give rise to presumptions of unreasonableness and sale of control unless sufficient evidence to rebut such presumptions is submitted. Rebuttal evidence is not required if:

(1) The advisory board fees do not exceed the fee that advisory board members of the resulting institution receive for each monthly meeting attended or \$150, whichever is greater; or

(2) The advisory board fees do not exceed \$100 per meeting attended for disappearing savings associations with assets greater than \$10,000,000 or \$50 per

meeting attended for disappearing savings associations with assets of \$10,000,000 or less, based on a schedule of 12 meetings per year.

(E) The accounting and tax treatment of the transaction; and

(F) Fees paid and professional services rendered in connection with the transaction.

(2) In conferring approval of a transaction under paragraph (a) of this section, the Office also will consider the competitive impact of the transaction, including whether:

(i) The transaction would result in a monopoly, or would be in furtherance of any monopoly or conspiracy to monopolize or to attempt to monopolize the savings association business in any part of the United States; or

(ii) The effect of the transaction on any section of the country may be substantially to lessen competition, or tend to create a monopoly, or in any other manner would be in restraint of trade, unless the Office finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the communities to be served.

(3) Applications and notices filed under this section shall be upon forms prescribed by the Office.

(4) Applications filed under section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)) and paragraph (a) of this section shall be processed in accordance with the time frames set forth in § 516.2 of this chapter, provided that the period for review may be extended only if the Office determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

(e)(1) Unless the OTS finds that it must act immediately in order to prevent the probable default of one of the savings associations involved, the applicant must publish a public notice of the application in accordance with the procedures specified in subpart B of part 516 of this chapter. In addition to initial publication, the applicant must publish on a weekly basis during the

period allowed for furnishing reports under paragraph (e)(2) of this section.

(2) Unless the Office determines that action must be taken immediately in order to prevent the probable default of one of the savings associations involved, the Office shall request reports from the Attorney General, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation on the competitive factors involved in the transaction. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the Office advised the Attorney General and the other three banking agencies that an emergency exists requiring expeditious action. The Office shall immediately notify the Attorney General of any approval of a transaction pursuant to this section.

(3) If the Office has found that it must act immediately to prevent the probable default of one of the savings associations involved and the reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the Office and any applicable state regulatory authorities. If the Office has advised the Attorney General and the other three banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the Office. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the Office.

(4) Commenters may submit comments on the application in accordance with the procedures set forth in subpart C of part 516 of this chapter, except that comments may be submitted at any time during the period described in paragraph (e)(2) of this section. The OTS may arrange informal or formal meetings in accordance with the procedures set forth in subpart D of part 516 of this chapter.

(5) Notice of a proposed account transfer and the option of retaining the

account in the transferring savings association shall be furnished to an affected account holder:

(i) By a savings association transferring account liabilities to an institution the accounts of which are not insured by the Savings Association Insurance Fund, the Bank Insurance Fund, or the National Credit Union Share Insurance Fund; and

(ii) By any mutual savings association transferring account liabilities to a stock form depository institution. The required notice shall allow affected account holders at least 30 days to consider whether to retain their accounts in the transferring savings association.

(f) *Automatic approvals by the Office.* Applications filed pursuant to paragraph (a) of this section shall be deemed to be approved automatically by the Office 30 calendar days after the Office sends written notice to the applicant that the application is complete, unless:

(1) The acquiring savings association does not meet the criteria for expedited treatment under § 516.3(a)(1) of this chapter;

(2) The OTS recommends the imposition of non-standard conditions prior to approving the application;

(3) The OTS suspends the applicable processing time frames under § 516.190 of this chapter;

(4) The OTS raises objections to the transaction;

(5) The resulting savings association would be one of the 3 largest depository institutions competing in the relevant geographic area where before the transaction there were 5 or fewer depository institutions, the resulting savings association would have 25 percent or more of the total deposits held by depository institutions in the relevant geographic area, and the share of total deposits would have increased by 5 percent or more;

(6) The resulting savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 6 to 11 depository institutions the resulting savings association would have 30 percent or more of the total deposits held by depositing institutions in the relevant geographic

area, and the share of total deposits would have increased by 10 percent or more;

(7) The resulting savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 12 or more depository institutions, the resulting savings association would have 35 percent or more of the total deposits held by the depository institutions in the relevant geographic area, and the share of total deposits would have increased by 15 percent or more;

(8) The Herfindahl-Hirschman Index (HHI) in the relevant geographic area was more than 1800 before the transaction, and the increase in the HHI used by the transaction would be 50 or more;

(9) In a transaction involving potential competition, the OTS determines that the acquiring savings association is one of three or fewer potential entrants into the relevant geographic area;

(10) The acquiring savings association has assets of \$1 billion or more and proposes to acquire assets of \$1 billion or more;

(11) The savings association that will be the resulting savings association in the transaction has a composite Community Reinvestment Act rating of less than satisfactory, or is otherwise seriously deficient with respect to the Office's nondiscrimination regulations and the deficiencies have not been resolved to the satisfaction of the OTS;

(12) The transaction involves any supervisory or assistance agreement with the Office, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation;

(13) The transaction is part of a conversion under part 563b of this chapter;

(14) The transaction raises a significant issue of law or policy; or

(15) The transaction is opposed by any constituent institution or contested by a competing acquirer.

(g) *Definitions.* (1) The terms used in this section shall have the same meaning as set forth in § 552.13(b) of this chapter.

(2) *Insured depository institution.* *Insured depository institution* has the same

meaning as defined in section 3(c)(2) of the Federal Deposit Insurance Act.

(3) With regard to paragraph (f) of this section, the term *relevant geographic area* is used as a substitute for *relevant geographic market*, which means the area within which the competitive effects of a merger or other combination may be evaluated. The relevant geographic area shall be delineated as a county or similar political subdivision, an area smaller than a county, or an aggregation of counties within which the merging or combining insured depository institutions compete. In addition, the Office may consider commuting patterns, newspaper and other advertising activities, or other factors as the Office deems relevant.

(h) *Special requirements and procedures for transactions under paragraphs (b) and (c) of this section—(1) Certain transactions with no surviving savings association.* The Office must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the OTS at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the Office may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the savings association submitting the notification maintains a liquidation account established pursuant to part 563b of this chapter, the notification must state that the resulting institution will assume such liquidation account.

The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the Office's receipt of the notification, a new notification must be submitted to the Office.

(2) *Other transfer transactions—(i) Expedited treatment.* A notice in conformity with § 516.3(a)(2) of this chapter may be submitted to the Office for any transaction under paragraph (c) of this section, provided all constituent savings associations meet the conditions for expedited treatment under § 516.3(a) of this chapter. Notices submitted under this paragraph shall be deemed approved automatically by the Office 30 calendar days after receipt, unless the Office advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without the Office's approval of an application under paragraphs (h)(2)(ii) or (h)(2)(iii) of this section.

(ii) *Standard treatment.* An application in conformity with § 516.3(b)(2) of this chapter and paragraph (d) of this section must be submitted to and approved by the Office by each savings association participating in a transaction under paragraph (b)(2) or (c) of this section, where any constituent savings association does not meet the conditions for expedited treatment under § 516.3(a) of this chapter, except as provided in paragraph (h)(2)(iii) of this section. Applications under this paragraph shall be processed in accordance with the time frames set forth in § 516.2 of this chapter.

(iii) *Standard treatment for transactions under section 5(d)(3) of the Federal Deposit Insurance Act.* An application in conformity with § 516.3(b)(2) of this chapter and paragraph (d) of this section must be submitted to and approved by the Office by each savings association which will survive any transaction under both § 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)) and paragraph (c) of this section, where any constituent savings association does not meet the conditions for expedited treatment under § 516.3(a) of this chapter. Applications under this paragraph shall be processed in accordance with the time frames set forth in § 516.2 of this chapter, provided that the period for review may be extended only if the Office determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case

the review period may be extended for up to 30 days.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 13514, Apr. 11, 1990; 57 FR 14344, Apr. 20, 1992; 59 FR 44624, Aug. 30, 1994; 59 FR 66159, Dec. 23, 1994; 62 FR 64146, Dec. 4, 1997]

§ 563.27 Advertising.

No savings association shall use advertising (which includes print or broadcast media, displays or signs, stationery, and all other promotional materials), or make any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments, or financial condition.

[54 FR 49552, Nov. 30, 1989, as amended at 58 FR 4313, Jan. 14, 1993]

§ 563.33 Directors, officers, and employees.

(a) *Directors*—(1) *Requirements*. The composition of the board of directors of a savings association must be in accordance with the following requirements:

(i) A majority of the directors must not be salaried officers or employees of the savings association or of any subsidiary or (except in the case of a savings association having 80% or more of any class of voting shares owned by a holding company) any holding company affiliate thereof.

(ii) Not more than two of the directors may be members of the same immediate family.

(iii) Not more than one director may be an attorney with a particular law firm.

(2) *Prospective application*. In the case of an association whose board of directors does not conform with any requirement set forth in paragraph (a)(1) of this section as of October 5, 1983, this paragraph (a) shall not prohibit the uninterrupted service, including reelection and re-appointment, of any person serving on the board of directors at that date.

(b) [Reserved]

[54 FR 49552, Nov. 30, 1989, as amended at 58 FR 4313, Jan. 14, 1993]

§ 563.36 Tying restriction exception.

(a) *Safe harbor for combined-balance discounts*. A savings and loan holding

company or any savings association or any affiliate of either may vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the company varying the consideration (eligible products), if:

(1) That company (if it is a savings association) or a savings association affiliate of that company (if it is not a savings association) offers deposits, and all such deposits are eligible products; and

(2) Balances in deposits count at least as much as non-deposit products toward the minimum balance.

(b) *Limitations on exception*. This exception shall terminate upon a finding by the OTS that the arrangement is resulting in anti-competitive practices. The eligibility of a savings and loan holding company or savings association or affiliate of either to operate under this exception shall terminate upon a finding by the OTS that its exercise of this authority is resulting in anti-competitive practices.

[61 FR 60184, Nov. 27, 1996]

§ 563.39 Employment contracts.

(a) *General*. A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.