

(4) Mutual capital certificates

In accordance with regulations issued by the Director, mutual capital certificates may be issued and sold directly to subscribers or through underwriters. Such certificates may be included in calculating capital for the purpose of subsection (t) of this section to the extent permitted by the Director. The issuance of certificates under this paragraph does not constitute a change of control or ownership under this chapter or any other law unless there is in fact a change in control or reorganization. Regulations relating to the issuance and sale of mutual capital certificates shall provide that such certificates—

(A) are subordinate to all savings accounts, savings certificates, and debt obligations;

(B) constitute a claim in liquidation on the general reserves, surplus, and undivided profits of the Federal savings association remaining after the payment in full of all savings accounts, savings certificates, and debt obligations;

(C) are entitled to the payment of dividends; and

(D) may have a fixed or variable dividend rate.

(c) Loans and investments

To the extent specified in regulations of the Director, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments:

(1) Loans or investments without percentage of assets limitation

Without limitation as a percentage of assets, the following are permitted:

(A) Account loans

Loans on the security of its savings accounts and loans specifically related to transaction accounts.

(B) Residential real property loans

Loans on the security of liens upon residential real property.

(C) United States government securities

Investments in obligations of, or fully guaranteed as to principal and interest by, the United States.

For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability of a plan sponsor to each plan participant shall be stated in or determinable from the plan, and, for a defined benefit plan, shall also be based upon an actuarial estimate of future experience under the plan.

(b) *Funding.* Actuarial cost methods permitted under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, shall be used to determine plan funding.

(c) *Plan amendment.* A plan may be amended to provide reasonable annual cost-of-living increases to retired participants: *Provided, That*

(1) Any such increase shall be for a period and amount determined by the sponsor's board of directors, but in no event shall it exceed the annual increase in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless (i) anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and (ii) the increase will not reduce the association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the OTS at least 60 days prior to the proposed termination date.

(e) *Records.* Each savings association or service corporation maintaining a plan not subject to recordkeeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

- (1) Plan description;
- (2) Schedule of participants and beneficiaries;
- (3) Schedule of participants and beneficiaries' rights and obligations;
- (4) Plan's financial statements; and

(5) Except for defined contribution plans, an opinion signed by an enrolled actuary (as defined by the Employee Retirement Income Security Act of 1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

[59 FR 66159, Dec. 23, 1994]

Subpart C—Securities and Borrowings

§ 563.74 Mutual capital certificates.

(a) *General.* No savings association that is in the mutual form shall issue mutual capital certificates pursuant to this section or amend the terms of such certificates unless it has obtained written approval of the Office. No approval shall be granted unless the proposed issuance of the mutual capital certificates and the form and manner of filing of the application are in accordance with the provisions of this section.

(b) *Eligibility Requirements.* The Office will consider and process an application for approval of the issuance of mutual capital certificates pursuant to this section only if the issuance is authorized by applicable law and regulation and is not inconsistent with any provision of the applicant's charter, constitution or bylaws.

(c) *Application form; supporting information.* An application for approval of the issuance of mutual capital certificates pursuant to this section shall be in the form prescribed by the Office. Such application and instructions may be obtained from the OTS. Information and exhibits shall be furnished in support of the application in accordance with such instructions, setting forth all of the terms and provisions relating to the proposed issue and showing that all of the requirements of this section have been or will be met.

(d) *Charter amendment.* No application for approval of the issuance of mutual capital certificates pursuant to this section may be filed unless the amendment to the mutual association's charter, constitution or bylaws or other actions conferring such authority shall have been approved pursuant to the

in the mutual association's charter, constitution or bylaws, or as may otherwise be required by applicable law.

(e) *Filing requirements.* The application for issuance of mutual capital certificates shall be publicly filed with the OTS.

(f) *Supervisory objection.* No application or approval of the issuance of mutual capital certificates pursuant to this section shall be approved if, in the opinion of the Office, the policies, condition, or operation of the applicant afford a basis for supervisory objection to the application.

(g) *Limitation on offering period.* Following the date of the approval of the application by the Office, the association shall have an offering period of not more than one year in which to complete the sale of the mutual capital certificates issued pursuant to this section. The Office may in its discretion extend such offering period if a written request showing good cause for such extension is filed with it not later than 30 days before the expiration of such offering period or any extension thereof.

(h) *Reports.* Within 30 days after completion of the sale of mutual capital certificates issued pursuant to this section, the association shall transmit to the OTS a written report stating the total dollar amount of securities sold, and the amount of net proceeds received by the association, and within 90 days it shall transmit a written report stating the number of purchasers.

(i) *Requirements as to mutual capital certificates—(1) Form of certificate.* Each mutual capital certificate and any governing agreement evidencing a mutual capital certificate issued by an association pursuant to this section:

(i) Shall bear on its face, in bold-face type, 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"; and

(ii) Shall clearly state that the certificate is subject to the requirements § 563.74(i)(2).

(2) *Legal requirements.* Mutual capital certificates issued pursuant to this section shall:

(i) Be subordinate to all claims against the association having the

same priority as savings accounts, savings certificates, debt obligations or any higher priority;

(ii) Not be eligible for use as collateral for any loan made by the issuing association;

(iii) Constitute a claim in liquidation not exceeding the face value plus accrued dividends of the certificates, or the general reserves, surplus and undivided profits of the association remaining after the payment in full of all savings accounts, savings certificates and debt obligations;

(iv) Be entitled to the payment of dividends, which may be fixed, variable, participating, or cumulative, or any combination thereof, only if, when and as declared by the association's board of directors out of funds legally available for that purpose, provided that no dividend may be declared or paid without the approval of the Office if such payment would cause the association to fail to meet its regulatory capital requirements under part 567 of this chapter, and provided further that no dividend may be paid if such payment would constitute a violation of 12 U.S.C. 1828(b);

(v) Not be redeemable, except: (A) Where the dollar weighted average term of each issue of mutual capital certificates to be redeemed is seven years or more and redemption is to be made pursuant to a redemption schedule; (B) in the event of a merger, consolidation or reorganization approved by the Office; or (C) where the funds for redemption are raised by the issuance of mutual capital certificates approved pursuant to this section, or in conjunction with the issuance of capital stock pursuant to part 563b of this chapter; *Provided*, that mandatory redemption shall not be required; that mutual capital certificates shall not be redeemable on the demand or at the option of the holder; and that mutual capital certificates shall not receive, benefit from, be credited with or otherwise be entitled to or due payments in or for redemption if such payments would cause the association to fail to meet its regulatory capital requirements under part 567 of this chapter; *And Provided*

rather, for the purposes of this paragraph (i)(2)(v), the "dollar weighted average term" of an issue of mutual capital certificates shall be the sum of the products calculated for each year that the mutual capital certificates in the issue have been redeemed or are scheduled to be redeemed. Each product shall be calculated by multiplying the number of years of each mutual capital certificate of a given term by a fraction, the numerator of which shall be the total dollar amount of each mutual capital certificate in the issue with the same term and the denominator of which shall be the total dollar amount of mutual capital certificates in the entire issue;

(vi) Not have preemptive rights;

(vii) Not have voting rights, except that an association may provide for voting rights if:

(A) The savings association fails to pay dividends for a minimum of three consecutive dividend periods, and then the holders of the class or classes of mutual capital certificates granted such voting rights, and voting as a single class, with one vote for each outstanding certificate, may elect by a majority vote a maximum of one-third of the association's board of directors, the directors so elected to serve until the next annual meeting of the association succeeding the payment of all current and past dividends;

(B) Any merger, consolidation, or reorganization (except in a supervisory case) is sought to be authorized, where the issuing association is not the survivor, provided that the regulatory capital of the resulting association available for payment of any class of mutual capital certificate on liquidation is less than the regulatory capital available for such class prior to the merger, consolidation, or reorganization;

(C) Action is sought to be authorized which would create any class of mutual capital certificates having a preference or priority over an outstanding class or classes of mutual capital certificates;

(D) Any action is sought to be authorized which would adversely change the specific terms of any class of mutual capital certificates;

(E) Action is sought to be authorized which would increase the number of a

class of mutual capital certificates, or the number of a class of mutual capital certificates ranking prior to or on parity with another class of mutual capital certificates; or

(F) Action is sought which would authorize the issuance of an additional class or classes of mutual capital certificates without the association having met specific financial standards;

(viii) Not constitute an obligation of the association and shall confer no rights which would give rise to any claim of or action for default;

(ix) Not be convertible into any account, security, or interest, except that mutual capital certificates may be surrendered in exchange for preferred stock issued in connection with the conversion of the issuing savings association to the stock form pursuant to part 563b of this chapter, provided that the preferred stock shall have substantially the same voting rights, designations, preferences and relative, participating optional, or other special rights, and qualifications, limitations, and restrictions, as the mutual capital certificates exchanged for the preferred stock.

(x) Provide for charging of losses after the exhaustion of all other items in the regulatory capital account.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 13515, Apr. 11, 1990; 57 FR 14345, Apr. 20, 1992; 59 FR 66159, Dec. 23, 1994; 72 FR 69438, Dec. 7, 2007]

§ 563.76 Offers and sales of securities at an office of a savings association.

(a) A saving association may not offer or sell debt or equity securities issued by the association or an affiliate of the association at an office of the association; except that equity securities issued by the association or an affiliate in connection with the association's conversion from the mutual to stock form of organization in a conversion approved pursuant to part 563b of this chapter may be offered and sold at the association's offices: *Provided, That:*

(1) The Regional Director does not object on supervisory grounds that the offer and sale of the securities at the offices of the association;

(2) No commissions, bonuses, or comparable payments are paid to any employee of the savings association or its

Instructions for Filing for Issuance of Mutual Capital Certificates

Forms

No form is provided for this filing but certain information is required as noted below.

Applications Processing Handbook Reference

The Applications Processing Handbook does not discuss applications for issuance of mutual capital certificates. Refer to 12 C.F.R. Section 563.74 for further guidance.

Approval/Denial Authority

The Regional Director, or his/her designee, is authorized to approve or deny the issuance of mutual capital certificates or amend the terms of such certificates pursuant to 12 C.F.R. Section 563.74 unless they raise a significant issue of policy or law. Applications with significant issues of policy or law require Washington review and approval.

General Filing Requirements

Institutions filing an application to issue or amend the terms of mutual capital certificates must submit the original and two conformed copies of the application and all supporting materials with the Regional Director, or his/her designee, within whose jurisdiction the applicant's home office is located.

Specific Filing Requirements

Informational Requirements

The following information should be provided when filing an application for issuance of mutual capital certificates:

- A legal opinion stating that the issuance is authorized by applicable laws and regulations and is consistent with the institution's charter, constitution or bylaws;
- Materials evidencing that the public will be given the required information regarding the mutual capital certificate, including a copy of the mutual capital certificate that:
 - Bears on its face, in bold-face type, 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."; and
 - Clearly states that the certificate is subject to the requirements of 12 C.F.R. Section 563.74(1)(2);
- Materials evidencing that the mutual capital certificates:
 - Are subordinate to all claims against the institution having the same priority as savings accounts, savings certificates, debt obligations or any higher priority;
 - Are not eligible for use as collateral for any loan made by the issuing institution;

Instructions for Filing for Issuance of Mutual Capital Certificates

- Shall constitute a claim in liquidation not exceeding the face value, plus accrued dividends, of the certificates on the general reserves, surplus and undivided profits of the institution remaining after the payment in full of all savings accounts, savings certificates and debt obligations or any higher priority;
- Are entitled to the payment of dividends as described by 12 C.F.R. 563.74(i)(2)(iv);
- Are not redeemable except under certain circumstances enumerated by 12 C.F.R. Section 563.74(i)(2)(v);
- Do not have pre-emptive rights and do not have voting rights except those enumerated by 12 C.F.R. 563.74(i)(2)(vii);
- Do not constitute an obligation of the institution;
- Are not convertible into any account, securities or interest except that mutual capital certificates may be exchanged for preferred stock; and
- Provide for charging of losses after the exhaustion of all other items in the regulatory capital account.

Therefore, the LIP represents the undisbursed portion of the loan and is off-balance-sheet. For capital purposes, the thrift needs to convert the LIP to an on-balance-sheet credit equivalent amount as described below. If a thrift does not set up a loans-in-process account, the thrift should still treat the unfunded (undisbursed) loan commitment in the same manner as an off-balance-sheet item for capital purposes. LIP or other unfunded construction loan balances will either:

- Convert at 0 percent (that is, there is no capital requirement).
- Convert at 50 percent to an on-balance-sheet credit equivalent (that is, a risk-weighted asset).

If the original maturity of the construction loan is one year or less, LIP (or the unfunded construction commitment) should generally convert at 0 percent. When the original maturity of the loan exceeds one year, the LIP (or unfunded commitment) should generally convert at 50 percent, in which case the thrift then risk weights the credit equivalent amount based on the type of loan: for example, 50 percent for qualifying residential construction loans or qualifying mortgage loans, 100 percent for most other types of loans.

Notes:

- Thrifts should not split LIP (or the unfunded commitment) on a single loan into a component that matures within one year and a component that matures after one year.
- Thrifts may apply a 0 percent conversion factor to a loan with more than a one-year term if they actively evaluate the credit relationship and structure the terms of the loan to comply with §567.6(a)(2)(iv). Specifically the thrift must have a contractual right to separately underwrite each disbursement and the thrift does so, or the thrift has a contractual right to reevaluate the lending relationship at least annually and the thrift does so.

(See also Appendix A, the subsection titled Credit Conversion Factors for Off-Balance-Sheet Items.)

Nonwithdrawable (Pledged) Deposit Accounts of Mutual Institutions

Directors or officers of mutual savings associations, or other interested individuals or organizations, may pledge personal deposits held by the institution. These deposits can count as Tier 1 capital. The individuals must formally subordinate the deposits to the institution's creditors, including the FDIC. The deposits must satisfy the same criteria as noncumulative perpetual preferred stock. The pledge must affirm that the deposits have no maturity, allow no option for withdrawal of the funds, and allow the suspension of interest payment obligations. Sections 561.31, 567.5(a)(1)(iv), and 567.9(b)(3) describe how mutual institutions may use these accounts for regulatory capital purposes. Note that this form of regulatory capital is relatively uncommon.

Preferred Stock

General limitation on preferred stock: OTS has a general policy that the majority of a thrift's equity should be common voting shares. Preferred stock should not comprise the majority of a thrift's capital base.