

12 C.F.R. §§ 563.140 through 563.146 provide the requirements governing capital distributions by savings institutions, including provisions for applications and notifications, when applicable. These provisions also describe the circumstances under which a savings institution may declare a capital distribution without filing an application or prior notice. The instructions for filing notices and applications, and the criteria used by OTS to process these filings are provided in 12 C.F.R. §§ 563.144 and 563.146.

The regulation allows OTS to monitor and supervise savings institutions' capital distributions, particularly those by institutions that are not well capitalized, in a uniform manner based on an assessment of risk and statutory requirements. Capital distributions reduce an institution's capital and its ability to absorb losses. Capital distributions include cash dividends, stock repurchases, cash-out mergers, the capitalization of holding companies in a reorganization, and any other distribution that reduces the institution's regulatory capital. Capital distributions may also be defined as any transaction that OTS determines, by order or regulation, to be in substance a distribution of capital.

Special Considerations

Employee Stock Option Plans (ESOP)

Distributions by a savings institution to an ESOP, to enable an ESOP to purchase new shares for the ESOP, are generally considered capital distributions. However, payments to an ESOP to enable the ESOP to make payments on a loan previously contracted by the ESOP to purchase shares of the savings institution's common stock are not considered to be capital distributions. Instead, the payments would be considered to be compensation by the savings institution to its employees.

Subchapter S Distributions

Distributions by an institution in a Subchapter S structure are capital distributions for regulatory purposes. 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. 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 the capital distribution regulations. It is also possible for an institution to be generating taxable income in a period when the institution is reporting a loss or nominal income for financial reporting purposes. This situation can arise, for example, when an institution takes a large provision for loan losses because of credit quality problems but has not yet charged off specific loans. In Subchapter S structures, OTS may restrict or prohibit the payment of dividends, even though they may be needed for tax payments, if OTS determines that such payment would constitute an unsafe and unsound practice.

Institutions Subject to Prompt Correction Action Provisions

If the institution is not prohibited from making a capital distribution under the prompt corrective action regulations, then it may do so in accordance with 12 C.F.R. Part 563, Subpart E - Capital Distributions.

FILING REQUIREMENTS

Delegated Authority

Capital distribution notices and applications are delegated to the Regional Offices unless a proposal raises a significant issue of law or policy. See Delegation Section 040 of the handbook for discussion of the delegation process.

Expedited and Standard Processing Procedures

Savings institutions that are eligible for expedited processing under 12 C.F.R. § 516.5 may be able to make a capital distribution without prior notice to OTS if none of the criteria set forth in 12 C.F.R. § 563.143(a) and (b) are applicable. If one or more of the criteria in 12 C.F.R. § 563.143(b) are applicable, such an institution may provide OTS a notice rather than an application, if none of the criteria in 12 C.F.R. § 563.143(a) are applicable.

Prefiling Meeting Requirements

Prefiling meetings are not required for this filing. However, applicants are encouraged to contact the Regional Office, particularly in the event the transaction involves unique or novel issues, to determine if a prefiling meeting will expedite the application review process.

Information and Form Requirements

Savings institutions must submit one original and two copies of all applications or notices for capital distributions, with the filing fee if applicable, to the appropriate Regional office at least 30 calendar days in advance of a binding declaration of the proposed distribution. An advance schedule of capital distributions may be submitted for prior approval or nonobjection in order to avoid the need for individual approval or nonobjection of multiple capital distributions. Any such schedule should not exceed twelve months.

Notice and application requirements vary according to the capital position of the savings institution, and whether or not it is a subsidiary of a savings and loan holding company. Under certain circumstances, an institution is not required to file an application or notice. An application or notice is required under the following:

Application Required

A savings institution is required to file an application with OTS and receive approval before it may declare a capital distribution if the total of all capital distributions, including the proposed capital distribution, declared by the institution in the calendar year will exceed its calendar year-to-date net income plus the retained net income of the preceding two years. Retained net income is defined as net income for a specified period less total capital distributions declared in that period. If the savings institution plans to declare a capital distribution in excess of its current year's net income, it may attribute capital distributions in excess of the current year's net income to each of the prior two years,

to the extent that there is sufficient retained net income in those years. A savings institution is also required to file an application with OTS prior to making a capital distribution if:

- The institution is not eligible for expedited treatment under 12 C.F.R. § 516.5. An institution is eligible for expedited treatment only if it satisfies all of the following criteria:
 1. Has a composite CAMELS rating of “1” or “2” ;
 2. Has a CRA rating of “Satisfactory” or better;
 3. Has a Compliance rating of “1” or “2”;
 4. Meets or exceeds the minimum capital requirements provided under 12 C.F.R. Part 567; and,
 5. Has not been notified that it is in troubled condition.
- The institution would not be at least adequately capitalized, as defined in 12 C.F.R § 565.4(b)(2), following the distribution; or
- The institution’s proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the institution and OTS (or the FDIC), or violate a condition imposed on the institution in an OTS-approved application or notice.

An institution’s capital distribution application should include the following:

- Amount of proposed dividend,
- Proposed payment date, and
- Pro forma capital ratios, giving effect to the capital distribution.

Prior Notice Required

If a savings institution is not required to file an application with OTS in order to declare a capital distribution, then it may be required to notify OTS at least 30 calendar days before making a capital distribution. Such a notice is required if:

- The institution would not be well capitalized, as defined in 12 C.F.R. § 565.4(b)(1), following the distribution;
- The institution’s proposed capital distribution would reduce the amount of, or retire any part of, the institution’s common or preferred stock or retire any part of its debt instruments such as notes or debentures included in capital under 12 C.F.R. Part 567 (other than regular payments required under a debt instrument approved under 12 C.F.R. § 563.81); or
- The institution is a subsidiary of a savings and loan holding company.

Confidentiality

The applicant must submit in writing, concurrently with the submission of the application, any requests to keep specific portions of the application confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the application by reference to the confidential section; (ii) separately bound; and (iii) labeled “confidential.” The applicant should follow these same procedures when filing supplemental information to the application. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

REVIEW GUIDELINES

Processing Procedures and Timeframes

All Filings

Within five business days of receipt of the filing and the filing fee if applicable, the Regional Office must notify the applicant of the application or notice’s receipt. The appropriate fee must accompany each filing in order for it to be considered filed. If it is determined that the submission will require concurrent processing with OTS-Washington, the filing will not be considered filed until it is received by both the Washington and Regional Offices.

For purposes of calculating processing timeframes, OTS does not include the day of the act or event, in determining the date the time period commences. In determining the conclusion of a time period, when the last day of the time period is a Saturday, Sunday, or a Federal holiday, the last day will become the next day that is not a Saturday, Sunday, or Federal holiday.

Applications

Within 30 calendar days of receipt of a properly submitted application, OTS shall take the following actions.

- Deem the application complete;
- Request, in writing, any additional information necessary to deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient.

Failure by OTS to act within 30 calendar days of receipt of the application for processing shall result in the filed application being deemed complete, commencing the period for review.

OTS must timely review all requests for a waiver of an application requirement that certain information be supplied. Unless OTS requests, in writing, additional information about the waiver request, or denies the waiver request, the waiver request shall be deemed granted.

If additional information is requested, a response must be submitted within 30 calendar days of the letter requesting such information. The applicant may, in writing, request a brief extension of the 30-calendar day period for responding to a request for additional information, prior to the expiration of the 30-calendar day time period. OTS, at its option, may grant the applicant a limited extension of time in writing. Failure to respond to a written request for additional information within 30 calendar days of such request may be deemed to constitute withdrawal of the application or may be treated as grounds for denial or disapproval of the application.

After the timely filing of additional information in response to any initial or subsequent request by OTS for additional information, OTS has 15 calendar days to review the additional information for completeness or appropriateness and take one of the following actions:

- Request, in writing, any additional information necessary to deem the application complete;
- Deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient.

The 15-day review period commences when the OTS receives a response that purports to respond to all questions in the information request. OTS may extend the 15-day review period for an additional 15 calendar days, if OTS requires the additional time to review the response. OTS will notify the applicant that it has extended the period before the end of the initial 15-day period.

Failure by OTS to act within 15 calendar days of receipt of the additional information shall result in the filed application being deemed complete, commencing the period for review.

Once the application has been deemed complete, there is a 60-calendar day review period during which time OTS will take into consideration all factors present in the application and render a decision thereon. If, upon expiration of the 60-day review period, assuming no extension has been granted, OTS has failed to act, the application is deemed approved automatically, and the applicant may thereafter consummate the transaction. If multiple applications are submitted in connection with one transaction, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review periods.

During the review period, OTS may request additional information if the information is necessary to resolve or clarify the issues presented in the application. OTS may also notify the applicant that the application is incomplete and require that the applicant submit additional information to complete the application. The review period can be extended an additional 30 calendar days if OTS determines that additional time will be required to analyze the proposed transaction. In such cases, OTS must notify an applicant prior to the expiration of the period for review. In situations in which an application presents a significant issue of law or policy, OTS may extend the applicable period for review of such application beyond the time period for review. In these cases, written notice must be provided to an applicant no later than the expiration of the time period.

Under 12 C.F.R. § 516.290, if OTS has not acted on a pending application within two calendar years after the filing date, OTS may deem the application withdrawn unless it determines that the applicant is actively pursuing a final determination on the application. Applications that are subject to this withdrawal provision are those that have failed to timely take action such as filing required additional information, or OTS has suspended processing of an application based on circumstances that are, in whole or in part, within the applicant's control and have failed to take reasonable steps to resolve these circumstances.

Notices

The applicant may engage in the proposed activities upon the expiration of 30 calendar days after the filing date of its notice, unless OTS takes one of the following actions before expiration of that time period:

- Request, in writing, any additional information necessary to supplement the notification;
- Notifies the applicant that the notice is subject to standard treatment as it raises a supervisory concern, raises a significant issue of law or policy, or required significant additional information; or
- Disapproves of the notice.

Failure by OTS to act within 30 calendar days of receipt of the notice for processing shall result in the filed notice's being accepted. If supplemental information is requested, the applicant will have 30 days to provide such information. The 30-day time frame will begin anew upon receipt of such information.

Regulatory Criteria

OTS may deny a savings institution's application or notice for a capital distribution, in whole or in part, if it is determined that:

- The institution will be undercapitalized, significantly undercapitalized, or critically undercapitalized as defined in 12 C.F.R. § 565.4(b), following the capital distribution. If so, OTS will determine if the capital distribution is permitted under 12 C.F.R. § 565.6(a)(2)(i), which provides OTS with mandatory and discretionary supervisory authority regarding the payment of capital distributions and management fees;
- The institution's proposed capital distribution raises safety or soundness concerns; or
- The institution's proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between the institution and OTS (or the FDIC), or a condition imposed on the institution in an OTS-approved application or notice. If so, OTS will determine whether it may permit the capital distribution notwithstanding the prohibition or condition.

Decision Guidelines

In evaluating a capital distribution, the review should conclude that the institution will maintain sufficient capital to operate in a safe and sound manner. Consideration should be given to the pro forma level of capital given the institution's risk profile, and its historical and future operations. The analysis should include an assessment of the following:

- Does the institution have a history of stable earnings?
- Do earnings result from core operations, or do they represent nonrecurring transactions, i.e., loan sales, sales of deposits, etc.?
- Is the institution engaged in any high-risk activity that may warrant the maintenance of additional capital?
- Are any asset quality problems apparent that may require the establishment of additional loan loss reserves?
- What prompt corrective action category will the institution be classified subsequent to the distribution?
- Is the institution under any specific agreement regarding the payment of dividends?

Conditions

Capital distributions are not subject to standard approval conditions. However, OTS may condition its approval of the institution to declare a dividend to include nonstandard conditions. If such nonstandard conditions are utilized, the Regional Office's digest must include appropriate justification for imposing such conditions.

NOTE: Any nonstandard conditions incorporated into the approval letter must be summarized in the National Applications Tracking System record for the application.

RECORDKEEPING REQUIREMENTS

OTS is required to consolidate all correspondence related to the processing of the notice or application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

MONITORING AND CONTROL

In the event that conditions of approval are imposed, the Regional Office should monitor compliance with all conditions. Specifically, the institution's Thrift Financial Reports and audit statements should

be reviewed periodically to confirm that all capital distributions are consistent with the regulations and representations of the savings institution. All future examinations should similarly review the institution's capital history related to capital distributions.

The appropriate staff responsible for the supervision and examination of the institution should be notified of the action taken on an application, and provided with copies of the approval order or letter. In addition, the Continuing Examination File should also be updated to include a copy of the decision with respect to the capital distribution filing to assist the examiners in reviewing this aspect of the institution's operations during the next examination of the institution following approval. The examiner review is to ensure compliance with all conditions of approval, and to note any changes in operations as a result of the transaction.

A review of the application file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the application in the Regional Office, including a review of the documentation maintained in the application file.

INFORMATION SOURCES

Statutes

12 U.S.C. § 1831(o)	Prompt corrective action
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Regulations

12 C.F.R. §§ 563.140 - 563.146	Capital distribution regulations
12 C.F.R. § 565.6(a)(2)(i)	Prompt corrective action
12 C.F.R. §§ 563b.510 and 563b.520	Restrictions on repurchase of stock and payment of dividends by savings institutions that convert from mutual to stock institutions
12 C.F.R. § 565.4(b)	Definitions of capital categories

Forms

OTS Form 1583	Notice for Capital Distribution
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