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[Page 202-206]

TITLE 12--BANKS AND BANKING

CHAPTER V--OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY

PART 563\_SAVINGS ASSOCIATIONS\_OPERATIONS--Table of Contents

Subpart B\_Operation and Structure

Sec. 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 Sec. 516.5 of this chapter, convert, directly or indirectly, to a national or state bank.

(2) A savings association that does not meet the conditions for expedited treatment under Sec. 516.5 of this chapter may not, directly or indirectly, convert to a national or state bank without prior application to and approval of OTS, 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

[[Page 203]]

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.

[[Page 204]]

(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 must be processed in accordance with the time frames set forth in Sec. Sec. 516.220 through 516.290 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) The following procedures apply to applications described in paragraph (a) of this section, unless OTS finds that it must act immediately to prevent the probable default of one of the depository institutions involved:

(i) The applicant must publish a public notice of the application in accordance with the procedures in subpart B of part 516 of this chapter.

In addition to the initial publication, the applicant must also publish on a weekly basis during the public comment period.

(ii) Commenters may submit comments on an application in accordance with the procedures in subpart C of part 516 of this chapter. The public

comment period is 30 calendar days after the date of publication of the initial public notice. However, if OTS has advised the Attorney General

that an emergency exists requiring expeditious action, the public comment period is 10 calendar days after the date of publication of the initial public notice.

(iii) OTS may arrange a meeting in accordance with the procedures in subpart D of part 516 of this chapter.

(iv) OTS will request the Attorney General, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation to provide reports on the competitive impacts involved in the transaction.

(v) OTS will immediately notify the Attorney General of the approval of the transaction. The applicant may not consummate the transaction before the date established under 12 U.S.C. 1828(c)(6).

(2) For applications described in Sec. 563.22, certain savings associations described below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring savings association. The following savings associations must provide the notices:

(i) 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) Any mutual savings association transferring account liabilities to a stock form depository institution.

(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

[[Page 205]]

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 Sec. 516.5 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 Sec. 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 acquiror.

(g) Definitions. (1) The terms used in this section shall have the same meaning as set forth in Sec. 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

[[Page 206]]

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 Sec. 516.25(a) of this chapter may be submitted to OTS under Sec. 516.40 of this chapter for any transaction under paragraph (c) of this section, provided all constituent savings associations meet the conditions for expedited treatment under Sec. 516.5 of this chapter. Notices submitted under this paragraph must be deemed approved automatically by OTS 30 days after receipt, unless OTS advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without OTS'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 Sec. 516.25(b) of this chapter and paragraph (d) of this section must be submitted to OTS under Sec. 516.40 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 Sec. 516.5 of this chapter, except as provided in paragraph (h)(2)(iii) of this section. Applications under this paragraph must be processed in accordance with the procedures in part 516, subparts A and E of this chapter.

(iii) Standard treatment for transactions under section 5(d)(3) of the Federal Deposit Insurance Act. An application in conformity with Sec. 516.25(b) of this chapter and paragraph (d) of this section must be submitted to OTS under Sec. 516.40 by each savings association which will survive any transaction under both section 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 Sec. 516.5 of this chapter. Applications under this paragraph must be processed in accordance with

the procedures in part 516, subparts A and E of this chapter, provided that the period for review may be extended only if OTS 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.

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