

COMPTROLLER'S LICENSING MANUAL

Mutual to Stock Conversions



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Introduction

This booklet of the *Comptroller's Licensing Manual* supports the Office of the Comptroller of the Currency's (OCC) supervisory activity with respect to the review and decision of applications submitted by a federal savings association (FSA) to convert from a mutual FSA to the stock form FSA under 12 CFR 192. Because a national bank cannot be in the mutual form of ownership, this booklet does not apply to national banks.

A conversion to stock form allows a mutual FSA to raise capital in the equities market. A mutual FSA, one without a holding company or stockholders, seeking to fully convert to a stock FSA must submit an application and obtain prior approval of the OCC. This booklet contains policies and procedures to guide institutions on converting from a mutual FSA to a stock FSA. This booklet also contains a glossary, a reference section, and hyperlinks to filing samples and other booklets in the *Comptroller's Licensing Manual*. The references include applicable laws, regulations, and OCC issuances to help applicants complete the filing process. Users of this booklet may also want to refer to the ["General Policies and Procedures"](#) booklet of the *Comptroller's Licensing Manual* for a discussion of the application process in general.

Key Policies

The federal mutual charter grants certain rights to mutual members allowing the members some control of the affairs of the FSA. All holders of the institution's savings, demand, and other authorized accounts are members of the FSA. The ability to exercise control over the institution by the members is not coextensive with the rights of stockholders of ordinary corporations, although there are similarities. Members of a mutual FSA maintain fundamental rights that broadly include the right to vote, amend corporate governance, nominate and elect directors, request special meetings and communicate with other members, inspect corporate books and records, and share pro rata in the assets of the institution in a liquidation.

A mutual FSA may decide to fully convert to the stock form of organization by issuing 100 percent of its appraised value in a stock offering. Interests of members are protected three ways in the stock conversion process:

- the members, as defined in the FSA's corporate governance documents and applicable law,¹ must vote to approve the conversion;
- account holders receive non-transferable priority subscription rights in the conversion; and
- the converted institution must establish a liquidation account upon completion of the conversion. If a converted institution subsequently undertakes a voluntary liquidation, the liquidation account, subject to adjustment, represents the amount of funds that should be

¹ Refer to 12 CFR 5.21(e) and 192.25.

available for distribution to the former members, before any liquidation distribution to common stockholders.

The types of full stock conversion transactions are described below:

- **Standard conversion:** The converting mutual FSA conducts a stock offering to sell the full value of the association as determined by a valuation appraisal prepared by an independent third party with expertise to appraise the institution. Eligible account holders and supplemental eligible account holders of the mutual FSA receive priority nontransferable, pro-rated subscription rights to purchase the stock of the converting association in a stock offering. The FSA may also sell its shares of the converting institution not purchased by persons with subscription rights, either in a public offering through an underwriter or by the FSA in a direct community offering.²
- **Merger conversion:** A merger conversion occurs when an existing stock depository institution or holding company acquires a converting mutual FSA, with the members of the mutual FSA receiving subscription rights to purchase the stock of the acquiring stock depository institution or holding company. Merger conversions are generally limited to situations involving financially weak FSAs. The OCC may consider a request for an exception to the general policy when a standard conversion is not economically feasible.³
- **Conversion merger:** A conversion merger occurs when a mutual FSA converts to stock and simultaneously acquires an unaffiliated depository institution. Cash proceeds from the stock offering may be used to finance the cash portion of any acquisition consideration. Conversion shares may also be used to fund acquisitions involving a stock exchange when the subscription offering fails to sell the minimum number of shares to close the stock offering.
- **Voluntary supervisory conversion:** A voluntary supervisory conversion is undertaken for supervisory reasons. In a voluntary supervisory conversion, the rights of mutual members of the FSA are extinguished, and the members receive nothing in return. For that reason, the ability of FSAs to undertake a voluntary supervisory conversion has been restricted to specified situations in which the members' equity interests no longer have any significant realizable value. Any significantly undercapitalized insured FSA will qualify for a supervisory conversion unless the OCC determines otherwise. The OCC may permit an undercapitalized FSA to undertake a supervisory conversion if the FSA can demonstrate that a standard conversion is not feasible, and the resulting institution will be viable following the conversion. The OCC may also permit, on a case-by-case basis, an FSA to accomplish a supervisory conversion if severe financial conditions threaten the stability of the FSA and a conversion is likely to improve its financial condition.

² "Community offering" means the offer to sell to the members of the general public in the savings association's community the securities not subscribed for in the subscription offering. The community offering may occur concurrently with the subscription offering and any syndicated community offering, or upon conclusion of the subscription offering. Refer to 12 CFR 192.25.

³ While there is no set asset size to be eligible for a merger conversion, smaller institutions can encounter problems in completing a standard conversion because of the cost of the transaction relative to the amount of capital raised. Refer to 67 Fed. Reg. 52015 (August 9, 2002).

Standard Conversions

The mutual FSA is required to issue its common stock in an amount based on a valuation appraisal of the institution.⁴ The institution may offer its own shares directly to the public in the stock offering or may issue shares of a newly formed holding company established at the time of conversion.

Proxy Solicitation and Vote Requirements

After a pre-filing meeting⁵ with the OCC, the board of directors must adopt a plan of conversion (Conversion Plan) by a two-thirds vote.⁶ The Conversion Plan must address the requirements of the OCC conversion regulations, that include among other things, purchase priorities in the offering, purchase limitations, and other matters related to the conversion.⁷

The conversion must be approved by a majority of eligible member votes.⁸ The vote is taken at a members' meeting. The institution's management solicits proxies for the meeting through proxy materials that must satisfy the requirements of Form PS (Proxy Statement).⁹ The vote generally takes place after regulatory approval of the application that included the proposed proxy materials to be issued to the FSA members.

Stock Offering and Offering Circular

The institution offers common stock using an offering circular prepared in accordance with Form OC (Offering Circular), which includes detailed disclosures about matters that are material to the conversion—audited financial statements, terms of the offering, the institution's operations, the institution's management and its compensation, and other matters.

The minimum aggregate price of the stock offered must be no more than 15 percent below the midpoint of the valuation range determined by the appraiser. The maximum must be no more than 15 percent above the midpoint. The OCC may permit a "super-maximum" which

⁴ Refer to 12 CFR 192.150(a)(2).

⁵ The meeting may be in person or electronically and should include the prior submission of a written strategic plan outlining the objectives of the conversion and the intended use of the conversion proceeds. Refer to 12 CFR 192.100.

⁶ Refer to 12 CFR 192.110(a).

⁷ Refer to 12 CFR 192.105.

⁸ Refer to 12 CFR 192.225(b).

⁹ Refer to 12 CFR 192.270.

is 15 percent above the regular maximum. The institution must sell at least the minimum value of shares for the transaction to proceed.¹⁰

The conversion regulations¹¹ provide that members receive priority subscription rights to purchase stock in the offering, in the following order: i) eligible account holders as of a specified date; ii) the institution's proposed employee stock ownership plan (ESOP); iii) supplemental eligible account holders as of a specified date; and iv) other voting members of the institution. These first four priorities are defined as the subscription offering.

The fifth priority to purchase conversion shares includes the offer and sale of shares to the community and to the public, when shares are available within the valuation range that are not subscribed to by those with the higher priority subscription rights.

The conversion regulations contain limitations on the purchase of conversion stock to restrict a party from acquiring control. The Conversion Plan will set individual and group maximum purchase restrictions that limit purchases to 5 percent or less and set limits on the maximum amount of shares that management as a group may purchase.¹²

All registration statements, offering document amendments, notices, or other documents related to a stock conversion under 12 CFR 192 must be filed with the appropriate licensing office.¹³ The FSA must use the forms prescribed under 12 CFR 192 and 16, including the applicable form for a registration statement required under 12 CFR 16.15,¹⁴ and prepare and file its offering circular in compliance with the Form OC and the applicable SEC registration statement form required under 12 CFR 16.15.¹⁵ Amendments to Form OC must comply with 12 CFR 192.155 and 192.165.

The content of financial statements and related financial data in a 12 CFR 192 filing must be prepared in accordance with U.S. generally accepted accounting principles (GAAP),¹⁶ and in compliance with the application forms for a stock conversion, specifically Form AC (Application for Conversion), Form PS, Form OC, and Form OF (Order Form).

The OCC will review the Form OC and may comment on its disclosures and financial statements. The OCC, however, will not approve the adequacy and accuracy of the Form OC and its disclosures. If the transaction proposes a stock issuance by a newly formed holding company, the SEC is responsible for declaring the registration statement and prospectus

¹⁰ Refer to 12 CFR 192.330.

¹¹ Refer to 12 CFR 192.320.

¹² Refer to 12 CFR 192.385.

¹³ Refer to 12 CFR 16.17(b).

¹⁴ Refer to 12 CFR 192.5(b).

¹⁵ Refer to 12 CFR 192.300(a).

¹⁶ Refer to 12 USC 1463(b)(2)(A); 12 CFR 192.5(d).

effective.¹⁷ If the transaction does not propose to form a holding company but involves a public stock issuance directly by the savings association, the OCC will declare the offering circular effective. In circumstances without a holding company, after an FSA satisfactorily addresses comments from the OCC, the FSA must request that the OCC declare the Form OC effective for a time period not to exceed the maximum timeframe for completion of the sale of all the conversion shares.¹⁸

The FSA must distribute the offering circular within 10 calendar days of the date when the OCC or SEC declared it effective.¹⁹ All stock sales must be completed within 45 calendar days after the last day of the subscription period, unless extended by the OCC.²⁰ To receive an extension, an FSA must submit a written request and receive the OCC's approval. Each extension of the time period to sell stock cannot exceed more than 90 days. Granted extensions require submission of a post-effective amendment to the offering circular to all parties who subscribed for or ordered stock, and each recipient has the option to increase, decrease, or rescind their subscription within the extension period. The post-effective amendment offering period must remain open no less than 10 calendar days and no more than 20 calendar days, unless the OCC approves a longer rescission period.²¹

The FSA must set a date by which the conversion must be completed, which must not be more than 24 months from the date members voted to approve the Conversion Plan. The conversion is complete on the date when the FSA accepts the offers for stock purchases.²²

Stock Benefit Plans

In connection with conversions to stock, FSAs may establish stock benefit plans in conformance with the OCC regulations.²³ There are three types of plans involved: ESOPs, Stock Option Plans (SOP), and Management Recognition Plans (MRP). 12 CFR 192.500 addresses the maximum size of these plans and when and under what circumstances the plans may be established.

¹⁷ Refer to 85 Fed. Reg. 42634 (July 14, 2020).

¹⁸ Refer to 12 CFR 192.300(e).

¹⁹ Refer to 12 CFR 192.305(c).

²⁰ Refer to 12 CFR 192.405.

²¹ Refer to 12 CFR 192.310(d).

²² Refer to 12 CFR 192.420.

²³ Refer to 12 CFR 192.500.

Continuity of Customer Interests

- Each savings account holder must be provided a withdrawable savings account in the same amount and under the same terms and conditions as accounts before the conversion. Refer to 12 CFR 192.445(a).
- The FSA's conversion will not affect borrowers' loans, including the amount, rate, maturity, security, and other contractual terms. Refer to 12 CFR 192.135(b)(9).
- The FSA's business of accepting deposits and making loans will continue without interruption. Refer to 12 CFR 192.135(b)(10).
- Current management and staff will continue to conduct current services for depositors and borrowers under current policies and in existing offices. Refer to 12 CFR 192.135(b)(11).

Post-Conversion Restrictions

The converting FSA must establish a liquidation account at the time of conversion that represents the potential interest of eligible and supplemental eligible account holders in the FSA's net worth at the time of conversion.²⁴ In the event the converted institution later voluntarily liquidated, the remaining balance of the liquidation account would be distributed to the beneficiary members.

Directors and officers who purchased conversion shares may not sell their shares for one year after the conversion, except that in the event of death, the successor in interest may sell the shares.²⁵ Directors, officers, and their associates may only purchase stock from a broker or dealer for three years following conversion, except in limited circumstances.²⁶

The FSA (or its holding company) must promptly register its shares after conversion under the Securities Exchange Act of 1934 and remain registered for three years.²⁷ It must also use its best efforts to list its shares on a national or regional securities exchange.²⁸

OCC regulations authorize certain stock repurchases of conversion stock within the first 12 months after conversion when the stock is to fund management benefit plans ratified by shareholders, provided prior notification has been made to the OCC.²⁹ All other stock repurchases in the first year are prohibited unless extraordinary and compelling

²⁴ Refer to 12 CFR 192.445(b).

²⁵ Refer to 12 CFR 192.505(a).

²⁶ Refer to 12 CFR 192.505(c).

²⁷ Refer to 12 CFR 192.530(a).

²⁸ Refer to 12 CFR 192.530(c).

²⁹ Refer to 12 CFR 192.510(a)(3).

circumstances exist, and the institution receives OCC prior approval.³⁰ Regulatory scrutiny is applied to consideration of requests, and OCC approval for extraordinary and compelling circumstances has been unusual and rare after the date the regulation changed to reduce the repurchase limitation from a three-year period to one year.³¹

OCC regulations provide that no person or company may acquire more than 10 percent of the converted institution for three years following conversion without OCC prior approval.³² The rule was enacted to provide a reasonable timeframe for recently converted institutions to deploy new capital prudently, consistent with the disclosures in the offering document, and to allow the institution to acclimate operating as a public company without the distraction of considering takeover proposals. The approval standards differ from the standards applicable to notices filed under the Change in Bank Control Act. The OCC closely reviews requests to be acquired within the three-year period after a stock conversion and few requests have received regulatory approval.³³

Merger Conversions

A merger conversion must generally meet the same requirements as for a standard conversion and the same filings are required. In addition, an exit notice under 12 CFR 5.33(k) may be required.

A merger conversion occurs when an existing stock institution or holding company acquires a converting mutual institution. There is no consideration paid by the acquirer because the target mutual has no stockholders. The transaction raises capital from the offering of acquirer stock in accordance with OCC stock conversion regulations based on the appraised value of the involved mutual institution. A liquidation account is created at the acquiring stock depository institution.

Due to the unique features of a merger conversion, the transaction raises issues that are not present in standard conversions, and these transactions are limited to specific circumstances to protect mutual member rights and to ensure fair and equitable treatment of constituent parties.³⁴ Examples of the issues raised by these transactions include:

³⁰ Refer to 12 CFR 192.510(a).

³¹ 67 Fed. Reg. 52010 (August 9, 2002).

³² Refer to 12 CFR 192.525.

³³ 65 Fed. Reg. 43096 (July 12, 2000), 67 Fed. Reg. 17232 (April 9, 2002), 67 Fed. Reg. 52013 (August 9, 2002).

³⁴ 59 Fed. Reg. 22729 (May 3, 1994), 59 Fed. Reg. 61254 (November 30, 1994), 67 Fed. Reg. 17234 (April 9, 2002), 67 Fed. Reg. 52015 (August 9, 2002).

- **Sale of control:** OCC merger regulations require consideration of the impact of the transaction on the FSA’s members, depositors, other creditors, and customers.³⁵ Merger conversion transactions should not propose plans when management of the target mutual institution will receive anything more than they could receive if they had undertaken a standard conversion. The OCC reviews these arrangements to ensure the transaction is in the best interests of the institution and not influenced by insider benefits that could cause concern for sale of control.
- **Windfall to the acquirer:** While both standard and merger conversions require shares to be sold at an aggregate price that is equal to the estimated pro forma market value of the converting mutual institution, the calculation of the pro forma market value for purposes of a merger conversion had historically often involved a steep discount from book value. While there may have been a valid reason to lower a valuation, too often the discount for a healthy institution was cause for concern that the transaction resulted in a windfall to the acquirer.
- **Fairness and equitable treatment:** The OCC expects the offering to include a discount to the market price of the acquirer’s stock for subscribing members of the disappearing institution who purchase stock of the acquirer in the offering.³⁶ The appraisal guidelines generally recognize a discount in the offering price in a standard conversion, acknowledging the inherent uncertainty of an initial stock issuance. The lack of trading history is not an element to a merger conversion due to the acquirer’s stock already having market experience. Because anyone can purchase the acquirer’s stock at its market price, a discount to the trading value of the acquirer stock is made to ensure the transaction is equitable to members of the involved mutual institution.
- **Benefit to mutual account holders:** In a standard conversion, the stock is first offered to account holders of the mutual institution at a set price based on the appraisal. If the account holders purchase all the stock to which they have preferential subscription rights, they will, in the aggregate, have voting control over the institution both before and after the standard conversion. In a merger conversion, however, while account holders of the mutual institution may buy stock in the acquiring entity without paying commissions, and at a discount from the market price for that stock, they are never offered enough stock to obtain control of the acquiring entity.

The OCC permits merger conversions in cases when the converting institution is financially weak and when the institution demonstrates it has appropriately addressed the OCC’s concerns related to these transactions to ensure there is no windfall to the acquirer or unreasonable benefits to the disappearing mutual management. The OCC considers a waiver of certain conversion regulations³⁷ given the nature of the merger conversion and the fact the FSA will no longer exist following the transaction. These waivers include: i) 12 CFR 192.105(a) requiring the submission of a business plan; ii) 12 CFR 192.395 requiring a converting FSA to first fill orders for conversion stock up to a maximum of 2 percent on a

³⁵ Refer to 12 CFR 5.33(e)(1)(E).

³⁶ Generally, the practice is that the offering includes a 15 percent discount to the market price of the acquirer’s stock for subscribing members of the disappearing institution who purchase the acquirer’s stock in the offering.

³⁷ Refer to 12 CFR 192.5(c).

basis that would promote a widespread distribution of the stock; and iii) 12 CFR 192.505 restricting the ability of the FSA's officers and directors to freely trade stock obtained in the conversion.

The mutual FSA must provide support that the merger conversion is the only viable alternative and document other proposed solutions the FSA pursued.³⁸ This includes support that the standard conversion is not economically feasible and not a viable option and requires that all insider benefits to target management be fully disclosed in the application. Merger conversions are unusual and infrequent due to the regulatory scrutiny applied to these transactions. An FSA must meet with the OCC for a pre-filing meeting before adopting a Conversion Plan.³⁹ Given the complexity of these types of transactions, it is suggested the FSA consult with the OCC when it is considering pursuing a merger conversion transaction.

Conversion Mergers

A conversion merger is when a mutual institution simultaneously acquires a stock institution at the same time it completes a standard stock conversion.

A mutual FSA may acquire another insured institution that is already in the stock form of ownership at the time of its stock conversion transaction.⁴⁰ In a conversion with a simultaneous acquisition/merger, the mutual FSA converts by offering conversion stock to the FSA's members in the conversion offering, but also uses conversion stock not sold in the subscription offering, or uses a combination of the conversion stock and cash proceeds from the offering in an exchange offer to the stockholders of a target stock depository institution to be merged into the resulting stock FSA.

This type of conversion offers the converting institution an immediate use of the proceeds obtained from the stock offering. Although there have been a handful of these transactions filed and approved, these transactions are infrequent due to the challenges of converting to a stock form of organization at the same time as managing the consolidation of the merger transaction.

These transactions are evaluated under the same criteria that apply to review of a standard stock conversion. The underlying circumstances, however, receive careful review to confirm that the converting mutual institution is not only the legal survivor of the combination, but also clearly the acquirer after evaluating the terms of the combination transaction. Certain transactions in the past have raised regulatory concern when the terms of the transaction indicate that, for practical purposes, the stock target institution was the acquirer in the combination although not the legal survivor of the merger.

³⁸ Refer to 67 Fed. Reg. 52015 (August 9, 2002).

³⁹ Refer to 12 CFR 192.100.

⁴⁰ Refer to 12 CFR 192.20.

To ensure the transaction does not raise the regulatory issues present in a merger conversion, the OCC evaluates various transaction terms to determine that the mutual institution was the acquirer in a combination. These factors may involve the following:

- A comparison of the strength and capacity of the involved institutions to identify concerns that the stock institution was the survivor of the combination (compare total assets, total equity, net income, and safety and soundness concerns (delinquencies, classified assets, etc.)).
- A comparison of the relative amount of stock issued in the conversion with the amount of stock, or combination of stock and cash, issued as merger consideration to the shareholders of the merging stock insured institution, to identify concerns that the stock institution survives.
- An evaluation of the resulting management team to identify concerns that the key senior executives (particularly the president and chief executive officer (CEO) and chairman of the board), or the composition of the resulting board of directors, indicate that the stock institution was effectively the survivor of the combination.
- An evaluation of other factors that could be indicia that the stock institution survived (i.e., adoption of the stock institution's corporate title, home office location, business model, etc.).

The above factors are not an exhaustive list, but they may help to identify potential concern that the converting mutual institution is being acquired by a stock institution under circumstances that do not comport with regulatory requirements.⁴¹

Voluntary Supervisory Conversions

A voluntary supervisory conversion does not follow the process of a standard conversion. Generally, the following is a summary of the most significant differences between a standard conversion and a voluntary supervisory conversion, unless the appropriate federal banking agency provides otherwise.

- The account holders of the FSA do not vote with respect to a voluntary supervisory conversion. Refer to 12 CFR 192.610.
- Account holders do not receive subscription rights in a voluntary supervisory conversion. Refer to 12 CFR 192.610.
- No liquidation account is required in a voluntary supervisory conversion. However, savings association members may have an interest in a liquidation account if one is established. Refer to 12 CFR 192.610.
- There is no requirement that a subscription stock offering be made to the members in connection with a voluntary supervisory conversion. Refer to 12 CFR 192.605.

⁴¹ A stock institution cannot acquire a mutual institution by merger unless the mutual institution qualifies for a voluntary supervisory conversion or the circumstances meet the requirements to qualify for a merger conversion. A mutual institution with approval under 12 CFR 5.48 can be acquired by a stock institution involving a dissolution and substantial purchase and assumption transaction.

- There is no requirement that the FSA be appraised or that the stock be offered at the institution’s appraised value in a voluntary supervisory conversion.
- There are no purchase limits on the acquisition of stock of the FSA involved in a voluntary supervisory conversion.⁴² That is, a single party may, and commonly does, acquire the entire economic interest in the FSA. Refer to 12 CFR 192.605(c) and (d).
- A simple majority of directors of the FSA must vote in favor of the voluntary supervisory conversion (as compared to the two-thirds requirement for a standard conversion). Refer to 12 CFR 192.650.
- There is no anti-takeover protection under the conversion regulations after a voluntary supervisory conversion.

Eligibility for a Voluntary Supervisory Conversion

OCC regulations provide that an FSA may be eligible to undertake a voluntary supervisory conversion if any of the following circumstances exists:

- The FSA is significantly undercapitalized and would be viable, as defined in the regulations, following the conversion. Refer to 12 CFR 192.625(a)(1);
- The FSA is undercapitalized, and would be viable, as defined in the regulations, following the conversion, and a standard conversion that would cause the association to be adequately capitalized is not feasible. Refer to 12 CFR 192.625(a)(1);⁴³
- Severe financial conditions threaten the stability of the FSA and a conversion is likely to improve the association’s financial condition. The existence of “severe financial conditions” is considered on a case-by-case basis. Refer to 12 CFR 192.625(a)(2);
- The Federal Deposit Insurance Corporation (FDIC) will assist the FSA under section 13 of the Federal Deposit Insurance Act (12 USC 1813). Refer to 12 CFR 192.625(a)(3); or
- The FSA is in receivership and the conversion will assist the association. Refer to 12 CFR 192.625(a)(4).

⁴² Persons or companies who wish to acquire control of the FSA in a voluntary supervisory conversion continue to be subject to applicable banking regulations and filing requirements.

⁴³ The OCC may take into account the Prompt Corrective Action (PCA) levels and other capital standards when determining a savings association’s eligibility for a voluntary supervisory conversion. However, the PCA levels are not the sole determinant of: a “significantly undercapitalized” or “undercapitalized” determination on eligibility under 12 CFR 192.625(a)(1); a “severe financial circumstances” determination on eligibility under 12 CFR 192.625(a)(2); and an “adequately capitalized” determination on viability after a voluntary supervisory conversion under 12 CFR 192.625(b)(1). The PCA category is only one factor in making these decisions. Among other factors, these decisions may include the OCC assessing capital adequacy based on the savings association’s risk profile and risk management. The PCA capital categories generally are not considered indications of capital adequacy under 12 CFR 3, the OCC’s capital rules. For example, a bank that is well capitalized for the purposes of PCA may be found by the OCC to have inadequate capital for the purposes of 12 CFR 3. The OCC assesses capital adequacy based on the bank’s risk profile relative to its risk management. Refer to OCC Bulletin 2018-33, “Prompt Corrective Action: Guidelines and Rescissions” (September 28, 2018), available at <https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-33.html>.

Stock Conversions Involving a Mutual Holding Company

There are several types of mutual to stock conversion transactions that can involve a stock offering of conversion stock by a proposed or existing mutual holding company (MHC) parent company of the subsidiary FSA. The Board of Governors of the Federal Reserve System (FRB) is the primary federal regulator for review and approval of the stock offering application to issue stock involving an MHC. There are related application filings that must be submitted to the OCC to facilitate a reorganization of a mutual FSA into an MHC structure.

Typically, the mutual FSA files an [Interim Bank Charter Application](#) to establish a stock bank⁴⁴ as a wholly owned interim FSA, transfers all of its insured deposits and liabilities and substantially all of its assets to the stock FSA, and subsequently converts its charter to a federal mutual holding company charter. Upon completion of the reorganization, the stock FSA will often be a second-tier subsidiary of the MHC and a first-tier subsidiary of a mid-tier holding company. The OCC acts on the [Bank Merger Act Application](#) for the purchase and assumption of the assets and liabilities of the mutual FSA by the stock FSA. In addition, the OCC grants preliminary approval to form the interim stock FSA when it acknowledges receipt of the application for the related business combination.⁴⁵ The OCC may also act on a request for a capital distribution for the stock FSA to make a distribution of cash to capitalize the holding company or companies. The applicant also files with the FDIC for insurance of deposits for the stock FSA.

Below are descriptions of the various types of stock offering transactions that may involve an MHC.

MHC reorganization with no stock offering: The mutual FSA reorganizes from a mutual form of ownership to become a stock FSA subsidiary of a parent MHC. A mid-tier federal holding company subsidiary of the MHC may also be formed to be the direct parent of the stock FSA. Upon completion of the reorganization, the members of the mutual FSA (Mutual FSA members) become members of the MHC (MHC members), and membership rights (subscription rights and voting rights) of the FSA are transferred to the parent MHC as part of reorganization.

Minority stock issuance by an MHC: A holding company may conduct a minority stock issuance at the time the mutual FSA reorganizes into an MHC or issue stock at a later date after the reorganization. Because the MHC must own at least 50.1 percent of the total outstanding voting stock, the stock FSA or mid-tier holding company can sell as much as 49.9 percent of its outstanding stock in a minority stock issuance to persons other than the

⁴⁴ The charter of the resulting subsidiary FSA must contain a provision, specified in 12 CFR 192.430(d), indicating that the claims of depositors of the FSA have the same priority as the claims of general creditors of the FSA not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the association. This ensures that claims of depositors are not relegated to a lower priority due to the fact that the deposits confer membership rights in the FSA's mutual holding company.

⁴⁵ Refer to 12 CFR 5.33(e)(4)(i) and (ii).

MHC. Mutual FSA members maintain priority subscription rights in the minority stock issuance if the stock offering is conducted simultaneously with the MHC reorganization transaction, but MHC members maintain priority subscription rights in the minority stock offering if the stock is offered at a later date after the MHC reorganization. As long as the parent MHC continues to hold at least 50.1 percent of the outstanding stock, additional stock may be sold to the public in the same manner as the original stock issuance, i.e., following priorities set forth in the conversion regulations. Private placements are not allowed, and no liquidation account is created.

Full stock conversion of the MHC: The MHC may decide to convert to full stock in a transaction called a second-step stock conversion. The MHC converts to stock form by selling shares to the public in a new stock savings and loan holding company. The MHC members receive priority subscription rights to purchase shares in the new stock savings and loan holding company. Any shares in the FSA or shares of a subsidiary holding company of the MHC, which are not owned by the MHC, are exchanged for shares in the new stock savings and loan holding company in connection with the MHC's conversion to stock form. A second-step conversion may occur regardless of whether a minority stock issuance has occurred previously. A liquidation account is typically created at both the new holding company and at the underlying FSA. The FSA must file a [Notice for Charter and Bylaw Amendment](#) with the OCC and the required amendment to the charter of the FSA must be acted on by the OCC.

Remutualization transactions: A transaction involving a formerly reorganized MHC with public shareholders that remutualizes by selling itself or its subsidiary FSA to another mutual savings association or MHC. Minority shareholders receive cash for their stock in the former mid-tier MHC or stock FSA. These transactions can raise significant issues of fairness and equitable treatment because of disparate treatment of minority stockholders and mutual members of the target entity and concerns for the effect of the transaction on the mutual members of the acquiring entity. Transactions that exceed regulatory policy⁴⁶ parameters may require the affirmative votes of the majority of votes eligible to be cast for transaction.

Decision Criteria for Mutual to Stock Conversions

Standard Conversions and Merger Conversions

The conversion application, any amendments to the institution's charter and bylaws, and other applications as appropriate for the circumstances, must receive the approval of OCC licensing. The OCC staff clears the proxy materials. The offering circular for the offering is declared effective by the OCC in cases when the FSA issues the conversion stock directly as opposed to a holding company issuing the stock. When a holding company is issuing the stock in connection with a registered stock offering, the SEC must declare the SEC

⁴⁶ Policy parameters for a remutualization transaction are set forth in [OTS Order No. 2003-24, June 24, 2003](#) (Acquisition of West Essex Bank, Caldwell, New Jersey, by Kearny Mutual Holding Company, Kearny, New Jersey).

registration statement effective. The OCC staff also clears the accounting disclosures in the offering materials and the valuation appraisals.

In addition, the regulations set forth standards and considerations for approving the conversion:

- The conversion must comply with OCC regulatory requirements.
- The FSA must meet its capital requirements after the conversion.
- The conversion must be a tax-free reorganization under the Internal Revenue Code.
- The valuation appraisal must be reviewed and found to comply with the regulatory requirements.
- The OCC reviews the institution's compliance with the Community Reinvestment Act (CRA) and the institution's business plan to determine how the institution will serve the convenience and needs of the community after the conversion, and the OCC may deny or condition the application on CRA grounds.⁴⁷
- The OCC may object to the conversion if the Conversion Plan includes provisions that the OCC concludes are inequitable; detrimental to the FSA, its account holders, or other savings associations; or are contrary to public interest.⁴⁸
- The mutual FSA involved in a merger conversion must demonstrate by clear and convincing evidence that a standard conversion is not economically feasible, that benefits to insiders (including management) do not exceed those available in a standard conversion, and that the transaction is fair and equitable to all parties.⁴⁹

Voluntary Supervisory Conversions

The voluntary supervisory conversion eligibility criteria require the FSA to be “viable” after the transaction. The regulations provide that an FSA is viable following a voluntary supervisory conversion if it meets all the following requirements:⁵⁰

- The FSA is at a minimum adequately capitalized after the conversion.
- The proposed conversion complies with supervisory policies.
- The transaction is in the best interests of the FSA and in the best interests of the Deposit Insurance Fund (DIF) and the public.
- The transaction will not injure or be detrimental to the FSA, the DIF, or the public interest.

The OCC may deny a voluntary supervisory conversion application under any of the following circumstances:

⁴⁷ Refer to 12 CFR 192.200(c).

⁴⁸ Refer to 12 CFR 192.130.

⁴⁹ Refer to 67 Fed. Reg. 52013 (August 9, 2002).

⁵⁰ Refer to 12 CFR 192.625(b).

- The FSA does not meet the eligibility requirements described above. Refer to 12 CFR 192.670(a).
- The proceeds from the sale of conversion stock, less the expenses of the conversion, would be insufficient to satisfy any applicable viability requirement. Refer to 12 CFR 192.670(a).
- The transaction is detrimental to or would cause potential injury to the DIF or is contrary to the public interest. Refer to 12 CFR 192.670(b).
- The acquirer, or the controlling parties, officers, or directors of the FSA or the acquirer have engaged in unsafe or unsound practices in connection with the voluntary supervisory conversion. Refer to 12 CFR 192.670(c).
- The FSA fails to justify an employment contract incidental to the conversion, or the employment contract will be an unsafe or unsound practice or represent a sale of control. Refer to 12 CFR 192.670(d).

In addition, the OCC may require the FSA to delete or revise any provision in the Conversion Plan if the OCC determines that the provision is inequitable, is detrimental to the FSA, its account holders or other savings associations, or is contrary to public interest. Refer to 12 CFR 192.130 and 12 CFR 192.600(b).

Specific Requirements

Plan of Conversion

The FSA's management must prepare a plan of conversion (Conversion Plan) and the board must adopt the Conversion Plan by a two-thirds vote of the directors.⁵¹ The Conversion Plan is required to conform to the requirements of 12 CFR 192.320 through 192.485 and 192.505,⁵² and include, for example, the following information: (1) the purchase priorities in the conversion; (2) the manner in which the FSA will price the conversion shares; (3) the procedures for the sale of the conversion shares; (4) the subscription rights provided to eligible account holders and supplemental eligible account holders, and purchase limitations; (5) limits on aggregate purchases by directors, officers, and their associates; and (6) provisions regarding the establishment of a liquidation account. The Conversion Plan must set a date for the completion of the conversion.⁵³ This date must not be more than 24 months from the date that the FSA members approve the Conversion Plan.⁵⁴

If the mutual to stock conversion application is not completed in twelve months, the OCC may request the FSA to review the estimated conversion expenses and determine if all of such costs are still applicable to the mutual to stock conversion. Any conversion costs determined to be no longer applicable to the current mutual to stock conversion process

⁵¹ Refer to 12 CFR 192.125.

⁵² Refer to 12 CFR 192.130.

⁵³ Refer to 12 CFR 192.420.

⁵⁴ Ibid.

should be expensed and not deferred and offset against offering proceeds once the mutual to stock conversion is successfully completed.

The Conversion Plan must be included as an exhibit to the Form AC.⁵⁵ The OCC may require the FSA to delete or revise any provision in its Conversion Plan if it determines the provision is inequitable, is detrimental to the FSA, its account holders, or other savings associations, or is contrary to public interest.⁵⁶

Once the Conversion Plan is adopted by the board of directions, the FSA must notify its members⁵⁷ that a copy of the Conversion Plan is available for inspection at the home office and in the FSA's branch offices. This initial notification can be by letter or electronically, if the member receives electronic communication, or by publishing a notice in the local newspaper where the FSA has offices.

Business/Strategic Plan

The FSA must meet with the OCC prior to board approval of a Conversion Plan and provide the OCC with a written strategic plan that outlines the objectives of the conversion and use of conversion proceeds.⁵⁸

The FSA must submit a three-year business plan including projected financial statements as a separately bound, confidential exhibit to its Form AC.⁵⁹ The business plan must be reviewed by the CEO and at least two-thirds of the board must approve the business plan. The CEO and at least two-thirds of the board must submit a certification that the business plan accurately reflects the intended plans to deploy the conversion proceeds and that any new initiatives can be reasonably achieved.⁶⁰

The business plan must conform with the requirements of 12 CFR 192.105 that meet OCC [Business Plan guidelines](#) and include, for example, the following information: (1) projected operations and activities; (2) description of and support for how the conversion proceeds will be deployed; (3) how the proceeds meet credit and lending needs in the target market; (4) how the deployment will provide a reasonable return on investment; (5) impact of the transaction on organizational resources; and (6) description of the controls in place to manage risks and growth contemplated by the bank. Business plans must not project stock

⁵⁵ Refer to 12 CFR 192.115(b).

⁵⁶ Refer to 12 CFR 192.130.

⁵⁷ Refer to 12 CFR 192.135.

⁵⁸ Refer to 12 CFR 192.100.

⁵⁹ Refer to 12 CFR 192.105.

⁶⁰ Refer to 12 CFR 192.110.

repurchases within the first year after conversion or contemplate returns of capital or special dividends over the term of the business plan.⁶¹

Valuation Appraisal

The institution must submit a valuation appraisal with its application to convert to stock that estimates the pro forma market value of the converting institution.⁶² The integrity of the conversion and stock issuance process largely depends upon the accuracy of the appraised value of the institution. No method of conversion could be considered equitable unless the conversion stock is accurately appraised and sold at its pro forma market value, eliminating any windfall distribution in the value of the converting institution. The appraiser must be independent of the institution and qualified as an appraiser having certain credentials determined by the OCC to be acceptable.⁶³ The appraiser must not receive any fee in connection with the conversion other than for appraisal services and must be unaffiliated with any parties involved in preparing the conversion business plan.⁶⁴

The OCC reviews the appraisal report to ensure it comports with the requirements of the OCC's appraisal guidelines⁶⁵ and the conversion regulations, and the OCC evaluates whether the valuation report supports the pro forma market value of the stock to be issued in the conversion. The OCC may decline to process the application if the appraisal report is materially deficient or substantially incomplete. The original appraisal is updated immediately before the offering materials are declared effective and again before the close of the offering to set the final price. These updates are needed to consider changes in market conditions and/or changes in the FSA's financial statements or condition due to the passage of time.

Public Notice and Public Comments

On the date of filing or as soon as practicable before or after filing the application to convert to stock with the OCC, notice must be published in a newspaper of general circulation in the community(s) in which the FSA has offices in accordance with the requirements of 12 CFR 5.8. The FSA must also simultaneously prominently display the notice in its home office and all branch offices and post the notice on its website.⁶⁶

⁶¹ Refer to 12 CFR 192.105.

⁶² Refer to 12 CFR 150(a)(2).

⁶³ Refer to 12 CFR 192.200(b).

⁶⁴ Ibid; also refer to [OTS CEO Memo 197, dated May 4, 2004](#).

⁶⁵ The appraisal must be prepared in compliance with the document titled "[All Firms Engaged in Mutual to Stock Conversion Appraisals](#)," dated November 22, 1994, and its attached "Guidelines for Appraisal Reports for the Valuation of Savings Institutions Converting from the Mutual to the Stock Form of Organization," revised October 21, 1994.

⁶⁶ Refer to 12 CFR 192.180.

During the 30-day comment period provided for in the public notice, public comments regarding the application may be provided to the appropriate district licensing office in accordance with the procedure set forth in 12 CFR 5.10.⁶⁷

Dividend Restrictions

The FSA must retain at least 50 percent of the net conversion proceeds from the stock offering, although the OCC may require the FSA to retain a larger percentage of the proceeds for supervisory or regulatory concerns.⁶⁸ The OCC will act on the retention of the conversion proceeds by the holding company pursuant to 12 CFR 5.55. After the conversion, the FSA may declare or pay ordinary dividends on its shares provided the institution meets the requirements in 12 CFR 192.520, including that the amount of the dividend not reduce the FSA's capital to an amount less than the liquidation account established under 12 CFR 192.450.

Member Approval and Proxy Solicitation

After approval of the conversion application by the OCC, the Conversion Plan must be approved by the members of the FSA.⁶⁹ The Conversion Plan is transmitted to members in the proxy statement prepared in the manner prescribed by Form PS and must be approved by a majority of the total outstanding votes. The FSA's members may vote in person or by proxy, and the FSA must comply with the proxy solicitation provisions in 12 CFR 192.250 through 192.295 when it provides proxy solicitation material. The FSA may not use previously executed proxies (running proxies) for the Conversion Plan vote.⁷⁰

The proxy statement must be prepared in compliance with 12 CFR 192 and Form PS.⁷¹ The OCC will review the FSA's proxy solicitation material and issue a letter clearing the proxy solicitation material.⁷² Typically, a clearance letter is issued simultaneously with the decision letter on the conversion or clearance may be included in the decision letter. The FSA must provide a cleared written proxy statement to its members before or at the same time it provides any other soliciting material. The FSA must mail cleared proxy solicitation material to its members within 10 calendar days after the OCC clears the solicitation materials.⁷³ During the offering, it may be necessary that the FSA requests additional clearance if the

⁶⁷ Refer to 12 CFR 192.185.

⁶⁸ Refer to 12 CFR 195.105(a)(1)(iii).

⁶⁹ Refer to 12 CFR 192.225.

⁷⁰ Refer to 12 CFR 192.260.

⁷¹ Refer to 12 CFR 192.270.

⁷² Refer to 12 CFR 192.270(b)(1).

⁷³ Refer to 12 CFR 192.270(b)(2).

sales price of shares in the conversion is above the maximum of the limitation noted in the original clearance letter.

Promptly after the members' meeting, the FSA must file the following information with the appropriate OCC licensing office:⁷⁴

1. A certified copy of each adopted resolution on the conversion.
2. The total votes eligible to be cast.
3. The total votes represented in person or by proxy.
4. The total votes cast in favor of and against each matter.
5. The percentage of votes necessary to approve each matter.
6. An opinion of counsel that the FSA conducted the members' meeting in compliance with all applicable federal laws and regulations.

Subscription Rights and Priorities

The FSA must distribute subscription order forms (Form OF) to all eligible account holders, supplemental eligible account holders, and other voting members to enable them to subscribe for the conversion shares under the Conversion Plan.⁷⁵ The FSA may either send the order forms with the FSA's offering circular or after the FSA distributes its offering circular. The FSA must prepare its order form in compliance with 12 CFR 192 and the instructions for Form OF.

Registration in the separate states in which the shares will be offered is a state requirement, with different states using different procedures. There is no stated, specific federal regulatory requirement addressing sales/registration of shares in states; only the overall requirement to register and offer shares to eligible account holders as part of Conversion Plan.⁷⁶ The applicant is required to provide legal opinions regarding the applicant's compliance with all applicable securities laws.⁷⁷

The FSA's officers, directors, and their associates qualify as eligible account holders. However, the portion of the officers' and directors' subscription orders arising from increased deposits in the year prior to the eligibility record date must be subordinated to subscription

⁷⁴ Refer to 12 CFR 192.240(a).

⁷⁵ Refer to 12 CFR 192.335(a).

⁷⁶ Refer to 12 CFR 192.125, 192.300, 192.365, 192.390, and 192.395.

⁷⁷ Refer to 12 CFR 192.150(a)(3)(iii) and 192.240(a)(6) and (b).

orders from other eligible account holders.⁷⁸ Also, if the converting FSA has other voting members, the FSA must give subscription rights to purchase conversion shares to the other voting members who are neither eligible account holders nor supplemental eligible account holders. The FSA must subordinate the other voting members' rights to the rights of eligible account holders, tax-qualified employee stock ownership plans, and supplemental eligible account holders.⁷⁹

Eligible account holders are any persons holding qualifying deposits⁸⁰ on the eligibility record date. The eligibility record date is the date for determining eligible account holders. The eligibility record date must be at least one year before the date the FSA's board of directors adopts the Conversion Plan. Supplemental eligible account holders are any persons, except the FSA's officers, directors, and their associates, holding qualifying deposits on the supplemental eligibility record date. The supplemental eligibility record date is the date for determining supplemental eligible account holders. The supplemental eligibility record date is the last day of the calendar quarter before the OCC approves the FSA's conversion and will only occur if the OCC has not approved the FSA's conversion within 15 months after the eligibility record date.⁸¹

The regulations contain formulas⁸² for the subscription rights that must be given to each eligible account holder and each supplemental eligible account holder. Each eligible account holder receives subscription rights to purchase conversion shares in an amount equal to the greater of

- the maximum purchase limitation established for the community offering or the public offering under 12 CFR 192.395;
- one-tenth of 1 percent of the total stock offering; or
- 15 times the following number: The total number of conversion shares that the FSA will issue, multiplied by the following fraction. The numerator is the total qualifying deposit of the eligible account holder. The denominator is the total qualifying deposits of all eligible account holders. The FSA must round down the product of this multiplied fraction to the next whole number.

Each supplemental eligible account holder receives subscription rights to purchase shares in the same amount as each eligible account holder, except that the FSA must compute the fraction described in paragraph 3 above as follows: The numerator is the total qualifying

⁷⁸ Refer to 12 CFR 192.360.

⁷⁹ Refer to 12 CFR 192.365(b).

⁸⁰ A qualifying deposit is the total balance in an account holder's savings accounts at the close of business on the eligibility or supplemental eligibility record date. The FSA's plan of conversion may provide that only savings accounts with total deposit balances of \$50 or more will qualify. Refer to 12 CFR 192.25.

⁸¹ Refer to 12 CFR 192.25.

⁸² Refer to 12 CFR 192.355(a).

deposit of the supplemental eligible account holder. The denominator is the total qualifying deposits of all supplemental eligible account holders.⁸³

The FSA must allocate rights to purchase its shares to each other voting member that are equal to the greater of (1) the maximum purchase limitation established for the community offering and the public offering under 12 CFR 192.395; or (2) one-tenth of 1 percent of the total stock offering. These rights are subordinate to the rights of eligible accounts holders, tax-qualified ESOPs, and supplemental eligible account holders.⁸⁴

The Conversion Plan may provide that the converting FSA can require persons exercising subscription rights to purchase a minimum number of conversion shares. The minimum number of shares must equal the lesser of the number of shares obtained by a \$500 subscription or 25 shares.⁸⁵ The converting FSA may also limit the number of shares that any person, group of associated persons, or persons otherwise acting in concert may subscribe to up to 5 percent of the total stock sold.⁸⁶ If the FSA sets a limit of 5 percent, the FSA may modify that limit with OCC approval to provide that any person, group of associated persons, or persons otherwise acting in concert subscribing for 5 percent may purchase between 5 percent and 10 percent as long as the aggregate amount that the identified subscribers purchase does not exceed 10 percent of the total stock offering.⁸⁷ If the FSA adopts this feature, it must be described in the Conversion Plan adopted by the board and in the Form OC's description of the conversion and offering.⁸⁸

If the FSA's conversion shares are oversubscribed by eligible account holders, the FSA must allocate shares among the eligible account holders so that each, to the extent possible, may purchase 100 shares. If the FSA's conversion shares are oversubscribed by the supplemental eligible account holders, the FSA must allocate shares among the supplemental eligible account holders so that each, to the extent possible, may purchase 100 shares. If a person is both an eligible account holder and a supplemental eligible account holder, the FSA must include the eligible account holder's allocation in determining the number of conversion shares that the FSA may allocate to the person as a supplemental eligible account holder. For conversion shares that the FSA does not allocate under the prior three sentences of this paragraph, the FSA must allocate the shares among the eligible or supplemental eligible account holders equitably, based on the amounts of qualifying deposits. If any shares remain after the FSA has allocated shares as provided above, and if the voting members

⁸³ Refer to 12 CFR 192.355(b).

⁸⁴ Refer to 12 CFR 192.365.

⁸⁵ Refer to 12 CFR 192.385(c).

⁸⁶ Refer to 12 CFR 192.385(a).

⁸⁷ Refer to 12 CFR 192.385(b).

⁸⁸ Refer to 12 CFR 192.125 and 192.385(b).

oversubscribe, the FSA must allocate its conversion shares among those members equitably. The FSA must describe the method of allocation in its Conversion Plan.⁸⁹

In addition to selling shares in the subscription offering, the FSA may sell its conversion shares in a community offering, a public offering, or both. The FSA may begin the community offering, the public offering, or both at any time during the subscription offering or upon conclusion of the subscription offering. The FSA must fill all orders in the subscription offering before it fills any orders in the community offering or public offering.⁹⁰ In the subscription offering, the FSA may give preference to natural persons residing in its local community. However, in the community offering, the FSA must give a purchase preference to natural persons residing in its local community.⁹¹ The local community preferences should be addressed in the Conversion Plan.

The FSA must offer and sell its stock to achieve a widespread distribution of the stock. If the FSA offers shares in a community offering, a public offering, or both, it must first fill orders for its stock up to a maximum of 2 percent of the conversion stock on a basis that will promote a widespread distribution of stock. The FSA must allocate any remaining shares on an equal number of shares per order basis until all orders are filled.⁹²

The sale of the stock must be completed within 45 calendar days after the last day of the subscription period, unless the OCC grants an extension of time.⁹³ The FSA must request, in writing, an extension of any offering period prior to the expiration of the current offering period. If the OCC grants the FSA's request for an extension of time, the FSA must provide a post-effective amendment to the offering circular pursuant to 12 CFR 192.310 to each person who subscribed for or ordered stock. The FSA's post-effective amendment must indicate that the OCC extended the offering period, the ending date of the extended offering period, the status of the offering (how many subscriptions have been received, etc.), and that each person who subscribed for or ordered stock may increase, decrease, or rescind their subscription or order within the time remaining in the extension period. The OCC or SEC (as appropriate) must declare the post-effective amendment effective prior to the expiration of the current offering period. The OCC will not grant any single extension of more than 90 days.⁹⁴

Financial statements in the post-effective amendment must meet the age and stale date requirements for financial statements reported in public filings as required by the applicable OCC and SEC rules and regulations. Refer to OCC 12 CFR 16 and SEC Regulation S-X, Article 3, Section 210.3-12(a) and (g).

⁸⁹ Refer to 12 CFR 192.375.

⁹⁰ Refer to 12 CFR 192.335(d).

⁹¹ Refer to 12 CFR 192.390(b).

⁹² Refer to 12 CFR 192.395.

⁹³ Refer to 12 CFR 192.400.

⁹⁴ Refer to 12 CFR 192.405 and 12 CFR 16.18(b).

The Conversion Plan must set a date by which the conversion must be completed. This date must not be more than 24 months from the date that the FSA's members approved the Conversion Plan. This date may not be extended by the FSA or the OCC, and the conversion must be terminated if it is not completed by that date.⁹⁵

Loan to the Employee Stock Ownership Plan

The FSA may not extend its own credit to finance funding of any employee stock benefit plan at the time of the stock conversion. An ESOP may however be funded through a loan or guarantee from the FSA's holding company using a portion of the net proceeds from the stock offering, provided the holding company has sufficient assets independent of its investment in the FSA to fund the ESOP's purchase of conversion stock. The OCC may object to any proposal to finance the ESOP when the guarantee or pledge of additional collateral poses safety and soundness concerns for the FSA.⁹⁶ The holding company must also get FRB non-objection to loan the funds to the ESOP.

Waiver of Certain Regulation Provisions

The OCC may waive any provision in a prescribed application form and may waive any regulatory requirement of 12 CFR 192⁹⁷ upon written request that i) specifies the requirement or provision to be waived; ii) supports that the waiver is equitable and not detrimental; and iii) includes a legal opinion demonstrating that granting a waiver is consistent with law.

Below are examples of waiver requests previously approved:

Payment by Personal Check: FSAs have requested waivers of 12 CFR 192.345 so that the FSA may prohibit payment by personal check in the event of any re-solicitation in connection with the offering. In the limited circumstances of a re-solicitation, when subscribers have only a brief period to respond, the amount of time available to clear checks is very limited, particularly if payment is tendered at the end of the period. Subscribers will be permitted to make payments by means such as cash, withdrawal from a savings account, or withdrawal from a certificate of deposit or bank/cashier's check. Because subscribers will have alternate means to make payments and because the waiver will facilitate the timely closing of the offering, the OCC typically finds that the waiver is equitable, not detrimental to the FSA, its account holders, or other savings associations, and is consistent with the public interest.

Allocation of Shares: FSAs have also requested a waiver of 12 CFR 192.395 regarding the allocation of shares in any syndicated offering. Section 192.395 provides that if an institution offers its conversion stock in a public offering, it must first fill orders for its stock up to a

⁹⁵ Refer to 12 CFR 192.420.

⁹⁶ Refer to OTS Ops. Chief Counsel Harris Weinstein, [August 13, 1991](#), and [October 16, 1991](#).

⁹⁷ Refer to 12 CFR 192.5(c).

maximum of 2 percent of the conversion stock on a basis that will promote widespread distribution of stock, and that any remaining shares must be offered on an equal basis until all orders are filled. While the FSA intends to achieve a wide distribution of stock, by sales in both the subscription offering and community offering, sales to retail and institutional investors would be expected in a syndicated offering. If the offering reaches the syndicated offering, it is not practical to continue the restrictions of section 192.395 when dealing with the type of investors expected to purchase in that part of the offering. The FSA may request the waiver to allow flexibility for those types of orders if the offering reaches a syndicated offering in order to increase the likelihood that the offering will be successful. Because orders in a syndicated offering can be rejected for any reason, granting this waiver will not significantly affect the allocation of shares in the offering. Moreover, underwriters in non-conversion offerings allocate shares at their discretion, and the rights of eligible account holders and supplemental eligible account holders will not be compromised as a result of the requested waiver. Because the waiver will facilitate completion of the stock offering and because it does not adversely affect subscribers, the OCC often concludes that the waiver is equitable, not detrimental to the FSA, its eligible account holders, or other savings associations and is consistent with the public interest.

Payment for Shares

A subscriber may purchase conversion shares with cash, by a withdrawal from a savings account, or a withdrawal from a certificate of deposit. If a subscriber purchases shares by a withdrawal from a certificate of deposit, the FSA may not assess a penalty for the early withdrawal of funds for payment of the conversion subscription.⁹⁸ The FSA may not extend credit to any person to purchase its conversion shares.⁹⁹

The FSA must pay interest from the date it receives a payment for conversion shares until the date the FSA completes or terminates the conversion. The FSA must pay interest at no less than its passbook rate for amounts paid in cash, check, or money order.¹⁰⁰ If a subscriber withdraws money from a savings account to purchase conversion shares, the FSA must pay interest on the payment until it completes or terminates the conversion as if the withdrawn amount remained in the account.¹⁰¹ If a depositor fails to maintain the applicable minimum balance requirement because he or she withdraws money from a certificate of deposit to purchase conversion shares, the FSA may cancel the certificate and pay interest at no less than its passbook rate on any remaining balance.¹⁰²

⁹⁸ Refer to 12 CFR 192.345(a).

⁹⁹ Refer to 12 CFR 192.345(b).

¹⁰⁰ Refer to 12 CFR 192.350(a).

¹⁰¹ Refer to 12 CFR 192.350(b).

¹⁰² Refer to 12 CFR 192.350(c).

Prohibited Solicitation Practices

The use of proxy materials is subject to certain limitations and anti-fraud prohibitions. No one may use proxy solicitation material for the members' meeting if the proxy material contains any statement which, considering the time and the circumstances of the statement,

- is false or misleading with respect to any material fact;
- omits any material fact that is necessary to make the statements not false or misleading; or
- omits any material fact that is necessary to correct a statement in an earlier communication that has become false or misleading.¹⁰³

In addition, no one may represent or imply that the OCC determined that the proxy solicitation material is accurate, complete, not false or not misleading, or that the OCC passed upon the merits of or approved any proposal.¹⁰⁴ Further, no person may solicit

- an undated or post-dated proxy;
- a proxy that states it will be dated after the date it is signed by a member;
- a proxy that is not revocable at will by the member; or
- a proxy that is part of another document or instrument.¹⁰⁵

If a solicitation violates any of the provisions of 12 CFR 192.285 by, for example, including false or misleading statements, the OCC may require remedial measures, including the following:¹⁰⁶

- Correction of the violation by a retraction and a new solicitation;
- Rescheduling the members' meeting; or
- Any other actions necessary to ensure a fair vote.

In addition, the OCC may bring enforcement action against the violator.

Applicants should also note that the Securities Offering Disclosure Rules contained in 12 CFR 16.32 include anti-fraud provisions requiring that

- no person in the offer or sale of FSA securities shall directly or indirectly
 - employ any device, scheme, or artifice to defraud;
 - make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

¹⁰³ Refer to 12 CFR 192.285(a)(1).

¹⁰⁴ Refer to 12 CFR 192.285(a)(2).

¹⁰⁵ Refer to 12 CFR 192.285(b).

¹⁰⁶ Refer to 12 CFR 192.290.

- engage in any act, practice, or course of business that operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security of an FSA.
- nothing in 12 CFR 16.32 limits the applicability of section 17 of the Securities Act (15 USC 77q) or section 10(b) of the Exchange Act (15 USC. 78j) or Rule 10b-5 promulgated thereunder (17 CFR 240.10b-5).
- any violation of this section also constitutes an unsafe or unsound practice under 12 USC 1818.¹⁰⁷

Stock Benefit Plans

The FSA may implement an SOP, an ESOP, and an MRP in connection with, or after, a conversion. If the FSA implements any of these plans during the 12 months after the conversion, it must comply with the requirements of 12 CFR 192.500. The FSA is required to disclose the benefit plans in its Conversion Plan, the proxy statement and the offering circular, and indicate in its offering circular that there will be a separate shareholder vote on the SOP and the MRP at least six months after the conversion. No shareholder vote is required to implement a tax-qualified ESOP. The FSA's SOP cannot encompass more than 10 percent of the number of shares that the FSA issued in the conversion.¹⁰⁸

The FSA's ESOP and MRP cannot encompass, in the aggregate, more than 10 percent of the number of shares that it issued in the conversion, with the MRP limited to 3 percent of the number of shares issued in the conversion.¹⁰⁹ However, if the FSA has tangible capital of 10 percent or more following the conversion, the OCC may permit the ESOP and MRP to encompass, in the aggregate, up to 12 percent of the number of shares issued in the conversion, and the MRP to encompass up to 4 percent of the number of shares that the FSA issued in the conversion.¹¹⁰ The conversion application and Conversion Plan must address specifically the proposed increase to permit the OCC to review and potentially approve the planned increase.

Additionally, no individual can receive more than 25 percent of the shares under any plan. The FSA's directors who are not its officers cannot receive more than 5 percent of the shares of the FSA's MRP or SOP individually, or 30 percent of any such plan in the aggregate. The FSA's shareholders must approve each of the SOP and the MRP by a majority of the total votes eligible to be cast at a duly called meeting before the FSA establishes or implements the plan. The FSA may not hold this meeting until six months after its conversion. When the FSA distributes proxies or related material to shareholders in connection with the vote on a plan, the FSA must state that the plan complies with the OCC's regulations and that the OCC

¹⁰⁷ Refer to 12 CFR 16.32.

¹⁰⁸ Refer to 12 CFR 192.500(a)(1)-(2).

¹⁰⁹ The various MRPs, SOPs, and the ESOP have differing limits under the regulations of how many shares can be issued and when.

¹¹⁰ Refer to 12 CFR 192.500(a)(3).

does not endorse or approve the plan in any way. The FSA may not make any written or oral representations to the contrary.¹¹¹

The FSA cannot grant stock options at less than the market price at the time of grant. The FSA cannot fund the SOP or the MRP at the time of the conversion. An SOP or MRP that is subject to 12 CFR 192.500 cannot begin to vest earlier than one year after shareholders approve the plan and may not vest at a rate exceeding 20 percent per year. Such a plan may permit accelerated vesting only for disability or death or if the FSA undergoes a change of control.¹¹²

The benefit plan must provide that the FSA's executive officers or directors must exercise or forfeit their options in the event the institution becomes critically undercapitalized as defined in 12 CFR 6.4, is subject to OCC enforcement action, or receives a capital directive under 12 CFR 6, subpart B.¹¹³

Within five calendar days after its shareholders approve the plan, the FSA must file a copy of the proposed SOP or MRP with the OCC and certify that the plan approved by the shareholders is the same plan that it filed with, and disclosed in, the proxy materials distributed to shareholders in connection with the vote on the plan.¹¹⁴ These restrictions do not apply to plans implemented more than 12 months after the conversion, provided that materials pertaining to any shareholder vote regarding such plans are not distributed within the 12 months after the conversion. If a plan adopted in conformity with 12 CFR 192.500(a) is amended more than 12 months following the FSA's conversion, the FSA's shareholders must ratify any material deviations to the requirements in 12 CFR 192.500(a).¹¹⁵

The FSA may provide dividend equivalent rights or dividend adjustment rights to allow for stock splits or other adjustments to its stock in its ESOP, MRP, and SOP.¹¹⁶

Limitation on Purchases by Officers, Directors, and ESOPs

The conversion regulations establish aggregate limits on purchases of conversion shares by officers, directors, and their associates.¹¹⁷ The amount of purchases is limited to a particular percentage of the aggregate shares sold in the conversion. For institutions with \$50 million or less in assets, officers, directors, and their associates may purchase up to 35 percent of the

¹¹¹ Refer to 12 CFR 192.500(a)(4)-(7).

¹¹² Refer to 12 CFR 192.500(a)(8)-(11).

¹¹³ Refer to 12 CFR 192.500(a)(12) and (13).

¹¹⁴ Refer to 12 CFR 192.500(a)(13) and (14).

¹¹⁵ Refer to 12 CFR 192.500(c).

¹¹⁶ Refer to 12 CFR 192.500(b).

¹¹⁷ Refer to 12 CFR 192.370(a).

shares sold in the conversion. As the size of the institution increases, the limit on the percentage of shares purchased by officers, directors, and their associates declines. The table in 12 CFR 192.370(a) establishes a limit of 25 percent of aggregate conversion shares for institutions with over \$500 million in assets. In setting this purchase limitation, the FSA does not aggregate conversion shares attributed to a person in the FSA's tax-qualified ESOP with shares purchased directly by, or otherwise attributable to, that person.¹¹⁸ Further, the limits of 12 CFR 192.370 are essentially apart from the purchase limits of 12 CFR 192.385.

In general, no person or party may acquire control of the converting FSA in a mutual to stock conversion.¹¹⁹

A converting FSA may elect to establish a tax-qualified ESOP. The Conversion Plan may provide that the ESOP may purchase up to 10 percent of the total offering¹²⁰ of the FSA's conversion shares.¹²¹ The number of shares sold to any person, group of associated persons, or persons otherwise acting in concert may be limited to up to 5 percent of the total stock sold.¹²² If the OCC approves a revised stock valuation range as described in 12 CFR 192.330(d), and the final conversion stock valuation range exceeds the former maximum stock offering range, the FSA may allocate conversion shares to the tax-qualified ESOP, up to the 10 percent limit.¹²³

If the ESOP is not able to, or chooses not to, purchase stock in the offering, the ESOP may, with prior OCC approval and appropriate disclosure in the Conversion Plan and the converting FSA's offering circular, purchase stock in the open market, or purchase authorized but unissued conversion shares.¹²⁴

Establishing a Charitable Foundation in a Conversion

An FSA may contribute a portion of its conversion shares or proceeds to a charitable organization if (1) the FSA's Conversion Plan provides for the contribution; (2) the FSA's members approve the contribution; and (3) the IRS either has approved, or approves within

¹¹⁸ Refer to 12 CFR 192.370(b).

¹¹⁹ Refer to 12 CFR 5.50(d) for definitions of "acting in concert," "control," and other terms. Refer to 12 CFR 5.50(f)(2)(ii) regarding the presumption of acting in concert and 12 CFR 5.50(f)(2)(iii) – (viii) for the presumption of rebuttable control discussion.

¹²⁰ Refer to 12 CFR 192.380(a).

¹²¹ The FSA may include stock contributed to a charitable organization in the conversion in the calculation of the total offering of conversion shares under paragraphs (a) and (b) of 12 CFR 192.380, unless the OCC objects on supervisory grounds. Refer to 12 CFR 192.380(d). The role of charitable organizations in a mutual to stock conversion or mutual holding company reorganization is described in this booklet

¹²² Refer to 12 CFR 192.385(a).

¹²³ Refer to 12 CFR 192.380(b).

¹²⁴ Refer to 12 CFR 192.380(c).

two years after formation, the charitable organization as a tax-exempt charitable organization under the Internal Revenue Code.¹²⁵ At the meeting to consider the conversion, the FSA's members must separately approve by at least a majority of the total eligible votes the charitable contribution.¹²⁶

The FSA may contribute a reasonable amount of conversion shares or proceeds to a charitable organization, if its contribution will not exceed limits for charitable deductions under the Internal Revenue Code and the OCC does not object on supervisory grounds.¹²⁷ If the FSA is well-capitalized, the OCC generally will not object if the FSA contributes an aggregate amount of 8 percent or less of the conversion shares or proceeds.¹²⁸

The charitable organization's charter (or trust agreement) and gift instrument must provide that

- the charitable organization's primary purpose is to serve and make grants in the FSA's local community;
- as long as the charitable organization controls shares, the charitable organization must vote those shares in the same ratio as all other shares voted on each proposal considered by the FSA's shareholders;
- for at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for an independent director (or trustee) from the FSA's local community. This director may not be an FSA officer, director, or employee, or the FSA affiliate's officer, director, or employee and should have experience with local community charitable organizations and grant making; and
- for at least five years after the charitable organization's organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for a director from the FSA's board of directors or the board of directors of an acquirer or resulting institution in the event of a merger or acquisition of the FSA's organization.¹²⁹

Directors, officers, employees, or persons who have the power to direct an FSA's management or policies or otherwise owe a fiduciary duty to the FSA (for example, holding company directors) and who will serve as an officer, director, or employee of the charitable organization are subject to 12 CFR 163.200 regarding conflicts of interest. See Form AC, Exhibit 9 for further information on operating plans and conflict of interest plans.¹³⁰

¹²⁵ Refer to 12 CFR 192.550.

¹²⁶ Refer to 12 CFR 192.555.

¹²⁷ Refer to OTS Op. Chief Counsel Harris Weinstein, November 12, 1992, <https://www.occ.gov/topics/consumers-and-communities/community-affairs/resource-directories/public-welfare-investments/11-12-1992-OTS-Letter-re-FSA-Charitable-Contributions.pdf>.

¹²⁸ Refer to 12 CFR 192.560.

¹²⁹ Refer to 12 CFR 192.565.

¹³⁰ Refer to 12 CFR 192.570.

Before the FSA’s board of directors may adopt a Conversion Plan that includes a charitable organization, the FSA must identify its directors who will serve on the charitable organization’s board. These directors may not participate in the FSA board’s discussions concerning contributions to the charitable organization and may not vote on the matter.¹³¹

For additional information and requirements for establishing a charitable foundation as a part of a conversion, please refer to appendix A.

Sale of Conversion Stock at FSA Offices

An FSA may not offer or sell debt or equity securities issued by the FSA or an affiliate of the FSA at an office of the FSA,¹³² except for equity securities issued by the FSA or an affiliate in connection with the FSA’s conversion from the mutual to stock form of organization in a conversion approved pursuant to 12 CFR 192.

An FSA must request and receive the written non-objection of the OCC prior to offering conversion stock in the offices of the FSA.¹³³ The OCC will provide its written non-objection if the OCC does not object on supervisory grounds to the offer and sale of the securities.

The request to the OCC must represent that the FSA has decided that it will conduct sales activity onsite, list the location(s) where the sales activity will be conducted, and affirm in the request that the sales activity will be conducted in compliance with each of the regulatory requirements outlined in the regulation.¹³⁴

Securities sales practices, advertisements, and other sales literature used in connection with offers and sales of securities by the FSA are subject to 12 CFR 16.32.

When permitted, offers and sales of securities of an FSA or its affiliates in any office of the FSA must use a one-page, unambiguous certification in substantially the same form as the example in the regulation.¹³⁵

¹³¹ Refer to 12 CFR 192.570(b).

¹³² For purposes of 12 CFR 163.76, an “office” of a savings association means any premises used by the savings association that are identified to the public through advertising or signage using the savings association’s name, trade name, or logo.

¹³³ Refer to, for example, the approval to establish a Stock Information Center for a standard conversion; [OCC Approval Letter, dated May 12, 2016](#), for Home Federal Savings and Loan Association of Collinsville, Collinsville, Illinois.

¹³⁴ Refer to 12 CFR 163.76(a)(1)-(8).

¹³⁵ Refer to 12 CFR 163.76(8)(c).

Blue Sky Issues

The OCC undertakes a review of the state (Blue Sky) securities registration memo to help ensure that the mutual depositors' interests are protected (i.e., all mutual account holders are provided subscription rights) in the separate state offerings. To determine whether the FSA has undertaken appropriate efforts to protect account holders' subscription rights, the OCC considers: the number of states where account holders reside; number of members/accounts/dollars of deposits in each state; and the cost of registration in each state. If applicable, the FSA's Blue Sky memo should state clearly why the FSA has determined that it will not offer securities in a state.

Liquidation Account

The resulting stock FSA must provide a liquidation account for each eligible and supplemental eligible account holder.¹³⁶ A liquidation account represents the potential interest of eligible account holders and supplemental eligible account holders in the FSA's net worth at the time of conversion.¹³⁷ The initial liquidation sub-account balance of each eligible and supplemental eligible account holder must be calculated by the FSA at the time of conversion.¹³⁸ In the event of a liquidation, before the FSA may provide a liquidation distribution to common stockholders, the FSA must make a liquidation distribution to those account holders with an interest in the liquidation account.¹³⁹ The liquidation account is not part of the stock FSA's financial statements and does not affect the FSA's net worth.¹⁴⁰ Instead, the FSA must disclose the liquidation account in the footnotes to its financial statements as a contingency on retained earnings.¹⁴¹

The initial balance of the liquidation account is the FSA's net worth in the statement of financial condition included in the final offering circular.¹⁴² The FSA determines the initial sub-account balance for a savings account held by an eligible account holder or supplemental eligible account holder as specified by the OCC's regulation.¹⁴³ The sub-account balance should be the higher account balance of the savings account on either the eligibility record date or the supplemental eligibility record date.¹⁴⁴ The FSA may not increase the initial sub-

¹³⁶ Refer to 12 CFR 192.445(b).

¹³⁷ Refer to 12 CFR 192.450(a).

¹³⁸ Refer to 12 CFR 192.460(a).

¹³⁹ Refer to 12 CFR 192.450(b).

¹⁴⁰ Refer to 12 CFR 192.450(c) and 480.

¹⁴¹ Refer to 12 CFR 192.450(c).

¹⁴² Refer to 12 CFR 192.455.

¹⁴³ Refer to 12 CFR 192.460.

¹⁴⁴ Refer to 12 CFR 192.460(a)(4).

account balances.¹⁴⁵ Pursuant to 12 CFR 192.470, the FSA must decrease the initial balance as depositors reduce or close their accounts.

A liquidation is a sale of the FSA's assets and settlement of its liabilities with the intent to cease operations and close. Upon liquidation, the FSA must return its charter to the OCC. A merger, consolidation, or similar combination or transaction with another depository institution is not a liquidation. If the FSA is involved in such a transaction, the surviving institution must assume the liquidation account.¹⁴⁶

Charter and Bylaws

Along with its application for conversion, the FSA must also apply to the OCC to amend its charter and bylaws consistent with 12 CFR 5.22.¹⁴⁷ The amended charter must require the FSA to establish and maintain a liquidation account for eligible and supplemental eligible account holders. Only pre-approved anti-takeover provisions may be included in the amended charter and bylaws, including the optional provision that limits acquisitions of more than 10 percent of any class of equity security for up to a five-year period from the date of the stock conversion.¹⁴⁸

The converted FSA must include the following provision in its new charter:

“Liquidation Account. Under OCC regulations, the association must establish and maintain a liquidation account for the benefit of its savings account holders as of _____, 20XX. If the association undergoes a complete liquidation, it must comply with the OCC regulations with respect to the amount and priorities on liquidation of each of the savings account holder's interests in the liquidation account. A savings account holder's interest in the liquidation account does not entitle the savings account holder to any voting rights.”¹⁴⁹

Federal Register Notice

Following OCC action on an FSA's conversion application, the OCC will publish notice of its action in the *Federal Register*.¹⁵⁰ Any person aggrieved by the OCC's final action on an application for conversion may ask the court of appeals of the U.S. for the circuit in which

¹⁴⁵ Refer to 12 CFR 192.460(b).

¹⁴⁶ Refer to 12 CFR 192.475.

¹⁴⁷ Refer to 12 CFR 192.430.

¹⁴⁸ Refer to 12 CFR 5.22(g)(7).

¹⁴⁹ Refer to 12 CFR 192.485.

¹⁵⁰ The *Federal Register* notice requirement applies to both standard and voluntary supervisory conversion transactions.

the principal office of residence of such person is located, or the U.S. District Court of Appeals for the District of Columbia Circuit, to review the action under 12 USC 1464(i)(2)(B). The aggrieved person must file a written petition with the court, requesting that the court modify, terminate, or set aside the OCC's action, within the later of 30 days of the date of the *Federal Register* notice or 30 days after the FSA mails its proxy statement to its members under 12 CFR 192.235.

Conditions

The OCC may impose conditions for approvals to protect the safety and soundness of the bank, prevent conflicts of interest, provide customer protections, ensure that approval is consistent with the statutes and regulations, or provide for other supervisory or policy considerations. The OCC may apply these conditions as “regulatory conditions imposed in writing” within the meaning of 12 USC 1818. These enforceable conditions remain in effect after the effective or consummation date of an approved transaction or activity and continue until the OCC removes them.

To ensure the safe and sound operations of the converting FSA, the OCC routinely imposes a condition that requires the FSA to enter into a written operating agreement similar to the one contained in appendix B of this booklet on terms and conditions acceptable to the OCC. Although the regulations impose the requirements on the converted institution as long as it remains an FSA, the agreement ensures the requirements apply in the event the institution converts its charter from an FSA during the restricted period. The principal terms of the standard operating agreement include commitments to abide by certain regulatory restrictions and include (in general terms):

- maintaining the liquidation account.
- officers and directors purchasing shares only from a registered broker-dealer, or from the FSA in negotiated transactions for less than 1 percent of the outstanding common stock during the three years after the conversion.
- officers and directors who purchased shares in the conversion may not sell their shares for one year after the conversion.
- for three years after consummation of the conversion, the FSA shall not enter into any agreement to sell any of the FSA's shares to any person or group acting in concert to own more than 10 percent of the savings association's shares.
- the FSA can not declare or pay any dividend if the dividend would reduce the FSA's capital below the amount of the liquidation account and the dividend complies with the regulatory capital distribution requirements.
- the FSA not returning any capital, other than by ordinary dividends to purchasers.
- for one year after the consummation of the conversion, the FSA may implement a stock option, management or employee stock benefit plan, only if the plan complies with the OCC and FRB regulations.

Appendix A—Charitable Foundations

The charitable organization’s charter (or trust agreement) and the gift instrument for the FSA’s contribution must provide that

- the OCC may examine the charitable organization at the charitable organization’s expense;
- the charitable organization must comply with all supervisory directives that the OCC imposes;
- the charitable organization must operate according to written policies adopted by its board of directors (or board of trustees), including a conflict of interest policy; and
- the charitable organization must not engage in self-dealing and must comply with all laws necessary to maintain its tax-exempt status under the Internal Revenue Code.¹⁵¹

The FSA must include the following legend in the stock certificates of shares that it contributes to the charitable organization or that the charitable organization otherwise acquires:

“The board of directors must consider the shares that this stock certificate represents as voted in the same ratio as all other shares voted on each proposal considered by the shareholders, as long as the shares are controlled by the charitable organization.”¹⁵²

As long as the charitable organization controls FSA shares, the FSA must consider those shares as voted in the same ratio as all of the shares voted on each proposal considered by the FSA’s shareholders.¹⁵³

After the FSA completes its stock offering, the FSA must submit copies of the following documents with the appropriate OCC licensing office:

- The charitable organization’s charter and bylaws (or trust agreement);
- Operating plan (within six months after the FSA’s stock offering);
- Conflict of interest policy; and
- The gift instrument for its contributions of either stock or cash to the charitable organization.¹⁵⁴

The foundation operating plan should fully describe how the foundation will operate and should include at least the following information:

¹⁵¹ Refer to 12 CFR 192.575(a).

¹⁵² Refer to 12 CFR 192.575(b).

¹⁵³ Refer to 12 CFR 192.575(c).

¹⁵⁴ Refer to 12 CFR 192.575(d).

- Plans and expenses for any office space, employees, office equipment, supplies, and other items;
- Director, officer, and employee requirements and job descriptions for the foundation;
- The terms of any expected compensation for any foundation directors, officers, or employees;
- Identification of the targeted charitable causes to be supported by the foundation, including their location and how the activities will aid the local community;
- Plans, policies, and procedures for soliciting and accepting grant applications;
- Decision standards for grant approval;
- The anticipated number and dollar amount of grants to be made in the current year after the conversion and projected over the next three years;
- Projected sources of revenues, including whether the foundation and its grant activities will be funded by dividends, stock sales, or additional contributions; and
- How directors of the foundation are selected and the required amount of experience in local community grant making activities.

Both the foundation operating plan and the conflicts of interest plan should provide that officers, directors, and employees of the FSA, and any affiliate thereof, including members of such persons' immediate families, shall not be eligible to receive grants from the foundation.

The FSA will need to request waivers of: 12 CFR 192.330(a) (a converting association shall issue and sell its stock at a total price equal to the estimated pro forma market value of such stock); 12 CFR 192.335 (any shares not sold to subscribers shall be sold in a public offering); 12 CFR 192.385 (the total shares subscribed for or purchased by any group shall be subject to a limit that shall not exceed 5 percent of the total offering of shares); and 12 CFR 192.330(a) (all shares sold in the conversion shall be sold at a uniform price). There may be other waivers required based on the unique features of a particular transaction.

Appendix B—Sample Operating Agreement

OPERATING AGREEMENT

By and Between
[Name of Converting FSA]
and
The Office of the Comptroller of the Currency

WHEREAS, [name, city, and state of converting FSA] (Bank) is a mutual federal savings association supervised by the Office of the Comptroller of the Currency (OCC);

WHEREAS, the Bank plans to convert to a federally chartered stock savings association, to be known as [name of resulting stock bank];

WHEREAS, the Bank filed the application for conversion (Application) with the OCC on [date of filing];

WHEREAS, upon consummation of the mutual-to-stock conversion (Conversion), the Bank will be a stock institution and will have no holding company;

WHEREAS, on [date of approval], the OCC approved the Application, subject to the condition that the Bank enter into this Operating Agreement (Agreement) with the OCC;

WHEREAS, the Bank and the OCC seek to ensure that the Bank operates in a safe and sound manner and in accordance with all applicable laws, rules, and regulations, and that the Bank adheres to the post-conversion requirements in the OCC's mutual-to-stock conversion regulations at 12 CFR 192;

NOW THEREFORE, it is agreed between the OCC, by and through its authorized representative, and the Bank, by and through its Board of Directors, that the Bank shall enter into and at all times operate in compliance with the articles of this Agreement in all material respects.

ARTICLE I **JURISDICTION**

- (1) The Bank is a federal savings association examined by the OCC pursuant to the Home Owners' Loan Act of 1933, as amended, 12 USC 1461, et seq. and is a "federal savings association" within the meaning of 12 USC 1813(b)(2).
- (2) The OCC is the "appropriate federal banking agency" regarding the Bank pursuant to 12 USC 1813(q) and 1818(b).

- (3) This Agreement shall be construed to be a “written agreement” within the meaning of 12 USC 1818.
- (4) This Agreement shall not be construed to be a “formal written agreement” within the meaning of 12 CFR 5.3(g)(5), and 12 CFR 5.51(c)(7), unless the OCC informs the Bank otherwise.
- (5) This Agreement shall not be construed to be a “written agreement, order [or] capital directive” within the meaning of 12 CFR 6.4, unless the OCC informs the Bank otherwise.

ARTICLE II

THE BANK’S COMMITMENTS

- (1) At all times, the Bank shall continue to maintain the liquidation account established at the time of the Conversion;
- (2) For three years following consummation of the Conversion officers and directors of the Bank or their associates may purchase common stock of the Bank only from a broker or dealer registered with the Securities and Exchange Commission, provided that officers or directors of the Bank or their associates also may purchase common stock of the Bank in negotiated transactions involving more than 1 percent of the outstanding common stock and may purchase stock through the Bank’s employee stock plans;
- (3) Directors or officers of the Bank who have purchased conversion stock may not sell their shares for one year after the date of purchase, except in the event of the death of the officer or director, the successor in interest may sell the shares;
- (4) For three years following the consummation of the Conversion the Bank shall not: (a) sell, or enter into any agreement to sell, any of the Bank’s equity securities to any person or group of persons acting in concert, when the purchaser (including any persons acting in concert with the purchaser) will own more than 10 percent of any class of equity security of the Bank upon consummation of the transaction; or (b) enter into any agreement with any person with respect to the acquisition of the Bank, whether by merger, purchase and assumption transaction, or similar transaction. In addition, for three years following the Conversion, in the event any person (or group acting in concert), acquires more than 10 percent of any class of equity security of the Bank, the Bank shall not permit such person (or group) to vote their shares, and shall not count such person’s (or group’s) shares in any shareholder vote. The above restrictions in this paragraph (4) shall not apply: (i) if the OCC determines that the acquisition is being undertaken to resolve supervisory concerns at the Bank, or (ii) under the circumstances set forth in 12 CFR 192.525(c)(3) or (4);
- (5) The Bank shall not declare or pay a dividend on its capital stock if the dividend would reduce the Bank’s capital below the level required for the liquidation account and unless such dividend also complies with regulatory capital distribution requirements;

- (6) The Bank shall not return any capital, other than ordinary dividends, to purchasers until the completion of the term of the business plan submitted in conjunction with the Conversion; and
- (7) For one year from the date of the Conversion, the Bank may implement a stock option, management or employee stock benefit plan, only if such plan complies with OCC and FRB regulations.

ARTICLE III **CONCLUDING PROVISIONS**

- (1) Effective Date. This Agreement shall become effective immediately upon its execution by all parties hereto (Effective Date). After the Effective Date, the provisions of the Agreement shall continue in full force and effect.
- (2) Term of Agreement. The term of this Agreement shall commence on the Effective Date and will continue unless or until (a) it is terminated in writing by the OCC, or (b) the consummation of a merger, consolidation, or other business combination in which the Bank is not the resulting entity.
- (3) Other Action. It is expressly and clearly understood that if, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States to undertake any action affecting the Bank, nothing in this Agreement shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.
- (4) Controlling Agreement. To the extent that any of the provisions of this Agreement conflict with the terms found in any existing agreement between the Comptroller and the Bank, the provisions of this Agreement shall control.
- (5) Agreement Not a Contract. This Agreement is intended and shall be construed to be a supervisory “written agreement entered into with the agency,” as contemplated by 12 USC 1818(b)(1), and expressly does not form, and may not be construed to form, a contract binding on the OCC or the United States. Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the OCC may enforce any of the commitments or obligations herein undertaken by the Bank under its supervisory powers, including 12 USC 1818(b)(1), and not as a matter of contract law. The Bank expressly acknowledges that neither it nor the OCC has any intention to enter into a contract. The Bank also expressly acknowledges that no OCC officer or employee has statutory or other authority to bind the United States, the U.S. Treasury Department, the OCC, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the OCC’s exercise of its supervisory responsibilities. The terms of this Agreement, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements or arrangements, or negotiations between the parties, whether oral or written.

(6) Execution in Counterparts. This Agreement may be executed in counterparts each of which shall be considered an original and all of which together shall constitute one and the same instrument.

(7) Notices. All notices, written submissions, or other correspondence required by, included in, or relating to this Agreement shall be in writing and shall be made by electronic mail or facsimile transmission, with a copy sent by overnight mail, to the following persons:

If to the OCC:

Assistant Deputy Comptroller
[Field Office address]

If to the Bank:

Board of Directors
[Bank address]

IN TESTIMONY WHEREOF, the undersigned, authorized by the Comptroller, has hereunto set his or her hand on behalf of the Comptroller.

Assistant Deputy Comptroller

Date

[Name and Signature of Directors]

IN TESTIMONY WHEREOF, the undersigned, as the directors of the Bank, have hereunto set their hands on behalf of the Bank.

Glossary

Acquire: When used in connection with the acquisition of stock of a bank, means obtaining ownership, control, power to vote, or sole power of disposition of stock, directly or indirectly or through one or more transactions or subsidiaries, through purchase, assignment, transfer, pledge, exchange, succession, or other disposition of voting stock, including

- an increase in percentage ownership resulting from a redemption, repurchase, reverse stock split, or a similar transaction involving other securities of the same class, and
- the acquisition of stock or voting securities by a group of persons and/or companies acting in concert, which shall be deemed to occur upon formation of such group.

Acting in concert: Knowing participation in a joint activity or parallel action toward a common goal of acquiring control whether or not pursuant to an express agreement. The term also can mean combining or pooling voting or other interests for a common purpose pursuant to any contract, understanding, relationship, agreement, or other arrangement whether or not written.

Affiliate of or a person affiliated with a specified person: A person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the specified person.

Appropriate licensing office: The OCC office responsible for processing applications or notices to engage in various corporate activities or transactions as described at occ.gov.

Associate: An associate of a person is

- a corporation or organization (other than an FSA or its majority-owned subsidiaries) if the person is a senior officer or partner, or beneficially owns, directly or indirectly, 10 percent or more of any class of equity securities of the corporation or organization.
- a trust or other estate if the person has a substantial beneficial interest in the trust or estate or is a trustee or fiduciary of the trust or estate.
- any person who is related by blood or marriage to such person and who lives in the same home as the person or who is the FSA's director or senior officer, or a director or senior officer of the FSA's holding company or its subsidiary.

Bank holding company (BHC): An entity controlling a national bank must be approved by the FRB as a BHC if the controlled bank is covered by the definition of a bank found in the Bank Holding Company Act (BHCA) (12 USC 1841(c)). Certain limited purpose banks, such as Competitive Equality Banking Act credit card banks and trust banks, are not defined as banks under the BHCA.

Business combination:

- Any merger or consolidation between a national bank or FSA with one or more depository institutions or state trust companies, in which the resulting institution is a national bank or FSA.
- In the case of an FSA, any merger or consolidation with a credit union in which the resulting institution is an FSA.
- In the case of a national bank, any merger between a national bank and one or more nonbank affiliates.
- The acquisition by a national bank or FSA of all, or substantially all, of the assets of another depository institution.
- The assumption by a national bank or an FSA of any deposit liabilities of another insured depository institution or deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or FSA.

Capital stock: Includes par value of common and preferred stock.

Community offering: The offer to sell to the members of the general public in the FSA's community the securities not subscribed in the subscription offer. The community offering may occur concurrently with the subscription offering and any syndicated community offering, or upon conclusion of the subscription offering.

Consolidation: A form of business combination in which existing depository institutions are combined into a new bank entity. Shareholders or members, as applicable, of the consolidating institutions surrender their equity in return for either equity in the consolidated bank or another form of consideration. Shareholders or members, as applicable, of the consolidating depository institutions must approve the transaction.

Control: The power, directly or indirectly, to direct or exercise a controlling influence over the management or policies of a person, whether through the ownership of voting securities, by contract or as otherwise described in 12 CFR 5.50. It should be noted there are separate definitions of control in the Bank Holding Company Act at 12 USC 1841, the Savings and Loan Holding Company Act at 12 USC 1467a, the Change in Bank Control Act at 12 USC 1817(j), and the affiliate transactions provisions of the Federal Reserve Act at 12 USC 371c (and the regulations implementing each of these statutory definitions).

Demand accounts: Non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the FSA and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

Depository institution: Any bank or savings association.

Director: A member of a bank's board of directors.

Effective registration statement: A registration statement that has been authorized by the OCC or SEC for use in offering for sale and selling stock in the new bank or its holding company.

Eligibility record date: The date for determining eligible account holders. The eligibility record date must be at least one year before the date an FSA's board of directors adopts the plan of conversion.

Eligible account holders: Any persons holding qualifying deposits on the eligibility record date.

Employee stock option plan (ESOP): A contract between a company and its employees giving the employees the right to buy a specific number of the company's shares at a fixed price within a certain period of time.

Executive officer: An officer of a bank who participates in or has the authority to participate in (other than in the capacity of a director) the bank's major policymaking functions, whether or not the individual has an official title, is designated as an assistant, or serves without compensation. Executive officer positions normally include the board chairman, president, every vice president, cashier, secretary, treasurer, chief investment officer, and any other individual the OCC identifies as having significant influence over major policymaking decisions.

Existing BHC or SLHC: A company that has received FRB approval to become a bank holding company or savings and loan holding company and has been operating as such for at least three years before filing its application to organize a new bank.

Federal savings association (FSA): An FSA or federal savings bank chartered pursuant to section 5 of HOLA (12 USC 1464).

Foreign national: An individual who is not a U.S. citizen.

Holding company: Any company that controls or proposes to control a bank regardless of whether the company is a BHC under 12 USC 1841(a)(1) or an SLHC under 12 USC 1467a.

Home Owners' Loan Act: The statute that provides for the chartering, regulation, and supervision of FSAs, including the extent to which an FSA may invest in, sell, or otherwise deal in loans and investments.

Insured depository institution: Any bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Local community: Every county, parish, or similar governmental subdivision in which an FSA has a home or branch office; each county's, parish's, or subdivision's metropolitan statistical area; all zip code areas in the FSA's CRA assessment area; and any other area or category that an FSA sets out in its plan of conversion, as approved the OCC.

Members: Persons who, under applicable law and as identified in the FSA's corporate governance documents, are eligible to vote at the meeting on the conversion from mutual to stock.

Merger: Generally refers to the acquisition of one or more depository institution by an existing national bank, FSA, interim national bank, or interim FSA. The shareholders of the target institution surrender their equity in return for either equity in the acquiring bank or another form of consideration.

Offer, offer to sell, or offer for sale: An attempt or offer to dispose of, or a solicitation of an offer to buy, a security or interest in a security for value. Preliminary negotiations or agreements with an underwriter, or among underwriters who are or will be in privity of contract with an FSA, are not included.

Offering circular: The securities offering materials for the conversion from mutual to stock.

Person: An individual, corporation, a partnership, an association, a joint-stock company, a limited liability company, a trust, an unincorporated organization, or a government or political subdivision of a government.

Proxy soliciting material: Includes a proxy statement, form of proxy, or other written or oral communication regarding the mutual to stock conversion.

Purchase or buy: Includes every contract to acquire a security or interest in a security for value.

Qualifying deposit: The total balance in an account holder's savings accounts at the close of business on the eligibility or supplemental eligibility record date.

Sale or sell: Includes every contract to dispose of a security or interest in a security for value.

Savings account: Any withdrawable account, including a demand account, except this term does not mean a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

Savings and loan holding company (SLHC): A company controlling a savings association, including an FSA, must be approved by the FRB as an SLHC unless an exception is available. The term SLHC does not include a company that controls a savings association that functions solely in a trust or fiduciary capacity (1467a(a)(1)(D)(ii)(II)).

Solicitation and solicit: A request for a proxy, whether or not accompanied by or included in a form of proxy; a refusal to execute, not execute or revoke a proxy; or the furnishing of a form of proxy or other communication reasonably calculated to cause an FSA's members to procure, withhold, or revoke a proxy.

State: Any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands.

State savings association: A state savings association as defined in section 3 of the Federal Deposit Insurance Act (12 USC 1813(b)(3)).

Subscription offering: The offering of shares through nontransferable subscription rights to the following:

- Eligible account holders under 12 CFR 192.355;
- Tax-qualified employee stock option plans under 12 CFR 192.380;
- Supplemental eligible account holders under 12 CFR 192.355; and
- Other voting members under 12 CFR 192.365.

Supplemental eligibility record date: The date for determining supplemental eligible account holders. The supplemental eligibility record date is the last date of the calendar quarter before the OCC approves an FSA's conversion and will only occur if such agency has not approved such conversion within 15 months after the eligibility record date.

Supplemental eligible account holders: Persons, except an FSA's officers, directors, and their associates, holding qualifying deposits on the supplemental eligibility record date.

Tax-qualified employee stock benefit plan: Any defined benefit plan or defined contribution plan, such as an employee stock ownership plan (ESOP), a stock bonus plan, profit-sharing plan, or other plan and related trust, that is qualified under section 501 of the Internal Revenue Code (26 USC 401).

Undercapitalized bank: An FDIC-insured depository institution that meets the criteria established in 12 CFR 6.4(b)(3), (4), or (5), for an undercapitalized, significantly undercapitalized, or critically undercapitalized bank, respectively.

Underwriter: Any person who purchases any securities from an FSA with a view to distributing the securities, offers or sells securities for an FSA in connection with the securities' distribution, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking. Underwriter does not include person whose interest is limited to a usual and customary distributor's or seller's commission from an underwriter or dealer.

Well capitalized bank: A bank that has capital at the levels described in 12 CFR 6.4(b)(1).

References

Bank Merger Act

Law 12 USC 1828(c)
Regulation 12 CFR 5.33

Bank Holding Company Act

Law 12 USC 1841 et seq.

Bylaws

Law 12 USC 1464
Regulation 12 CFR 5.21, 5.22

Capital Structure Change

Regulation 12 CFR 5.45, 5.55, 5.56

Capital Requirements

Law 12 USC 1464(s) and (t)
12 USC 3907
Regulation 12 CFR 3 and 6

Capital Stock

Law 12 USC 1464
Regulation 12 CFR 5.22

Change in Bank Control

Law 12 USC 1817(j)
Regulation 12 CFR 5.50

Charter

Law 12 USC 1464
Regulation 12 CFR 5.21, 5.22

Community Reinvestment Act of 1977

Law 12 USC 2901 to 2908
Regulation 12 CFR 25

Compensation Plans

Law 12 USC 1828(k)
Regulation 12 CFR 359

Conditions

Law 12 USC 1818

Conversions, Mutual to Stock

Law 12 USC 1463, 1464

Regulation	12 CFR 192
Corporate Governance Procedures	
Law	15 USC 78j-1, 78m (k)
Regulation	12 CFR 5.21, 5.22
Corporate Title	
Law	12 USC 1464
Regulation	12 CFR 5.22, 5.42
Directors	
Regulation	12 CFR 5.22, 163.33
Golden Parachute and Indemnification Payments	
Law	12 USC 1828(k)
Regulation	12 CFR 359
Mutual Holding Companies	
Law	12 USC 1467a
Regulation	12 CFR 239
Proxy	
Regulation	12 CFR 11
Proxy Solicitations or Information Statement	
Law	12 USC 1463, 1464 15 USC 78l(i)
Regulation	12 CFR 11 12 CFR 169 12 CFR 5.21(j)
Savings and Loan Holding Companies	
Law	12 USC 1467a
Regulation	12 CFR 238
Securities Offering Disclosure Rules and Offers of and Sales of Securities at an Office	
Law	12 USC 1463, 1464 15 USC 77c(a)(5)
Regulation	12 CFR 16 12 CFR 163.76
Securities Offering Disclosures Rules	
Regulation	12 CFR 16

Stock Loans

Law

12 USC 1464

12 USC 1828(v)

Regulation

12 CFR 160

Voting Rights of Members and Shareholders

Law

12 USC 1464

Regulation

12 CFR 5.21, 5.22