

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[No. 98-37]

RIN 1550-AB13

Financial Management Policies;
Financial Derivatives**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) is proposing to issue a regulation that would apply to all financial derivatives and would replace its existing regulations on forward commitments, futures transactions, and financial options transactions. The proposal would continue to permit a savings association to engage in transactions involving financial derivatives to the extent that these transactions are authorized under applicable law and are otherwise safe and sound. In addition, the proposed rule would describe the responsibilities of a savings association's board of directors and management with respect to financial derivatives. Elsewhere in today's **Federal Register**, OTS is seeking public comment on a proposed Thrift Bulletin which would, among other things, provide supplemental supervisory guidance on the use of financial derivatives. Finally, the Federal Financial Institutions Examination Council (FFIEC) is issuing additional guidance in a supervisory policy statement addressing this area that appears elsewhere in this issue of the **Federal Register**.

DATES: Comments must be received on or before June 22, 1998.

ADDRESSES: Send comments to: Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, Attention Docket No. 98-37. These submissions may be hand-delivered to 1700 G Street, N.W., from 9:00 a.m. to 5:00 p.m. on business days; they may be sent by facsimile transmission to FAX number (202) 906-7755; or by e-mail: public.info@ots.treas.gov. Those commenting by e-mail should include their name and telephone number. Comments will be available for inspection at 1700 G Street, N.W., from 9:00 a.m. until 4:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Anthony G. Cornyn, Director of Risk Management, (202/906-5727), Ed Irmiler, Senior Project Manager, (202/

906-5730), Jonathan D. Jones, Senior Economist (202/906-5729), Risk Management; or Vern McKinley, Senior Attorney (202/906-6241), Regulations and Legislation Division, Office of the Chief Counsel, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:**I. Background**

OTS's current regulations on financial derivatives were first adopted over fifteen years ago.¹ These regulations have remained virtually unchanged, notwithstanding the development of new financial derivative instruments. Today, OTS is proposing a comprehensive revision of these outmoded regulations.

One of the goals of this proposed rule is to address the broad range of financial derivatives transactions in which thrifts may currently engage. The current regulations address three types of financial derivatives: forward commitments, futures transactions, and financial options transactions. See 12 CFR 563.173, 563.174, and 563.175. These regulations, thus, do not address all of the derivative instruments that have been developed over the past twenty years. Significantly, the current regulations do not address interest rate swaps, a derivative instrument thrifts commonly use to address interest rate risk. The proposed rule would continue to permit savings associations to use financial derivatives transactions to manage and control risk.

The overriding goal of this regulatory initiative is to ensure the safe and sound management of the risks associated with financial derivatives. Accordingly, the proposed regulation emphasizes that derivatives activities must be conducted in a safe and sound manner, and sets forth the responsibilities of the board of directors and management with respect to financial derivatives.

OTS is simultaneously issuing comprehensive proposed guidance regarding savings associations' risk management practices, including those pertaining to derivatives transactions. Elsewhere in today's issue of the **Federal Register**, OTS is issuing for comment Thrift Bulletin 13a (TB 13a) ("Management of Interest Rate Risk, Investment Securities, and Derivatives Activities"). One of the purposes of TB 13a is to provide specific guidance on how thrifts should implement the FFIEC's "Supervisory Policy Statement

on Investment Securities and End-User Derivatives Activities" (FFIEC policy statement).² The FFIEC policy statement provides general guidance on sound practices for managing the risks of investment securities and derivatives activities.

The proposed rule would also reduce regulatory burden consistent with statutory requirements for safe and sound operations. The current regulations at §§ 563.173, 563.174 and 563.175 impose many regulatory restrictions on forward commitments, futures transactions, and financial options transactions. After reviewing each of these existing regulatory requirements, OTS proposes to delete those requirements that it no longer considers essential for safety and soundness; to incorporate others into guidance; and to convert the remainder into broader and more flexible regulatory requirements for all types of financial derivative transactions. OTS's proposed approach, which relies more on guidance than detailed regulations, more closely resembles the bank regulatory agencies' approach with regard to banks' use of financial derivatives.³

II. Proposed Rule

Because OTS's concerns about the risks institutions incur from the various types of derivatives are not unique to one type of derivative, the proposed regulation would treat all financial derivatives within a common conceptual framework. Proposed § 563.172(a) would define a financial derivative as a financial contract whose value depends on the value of one or more underlying assets, indices or reference rates. This definition would specifically include the three types of financial derivatives addressed by the current rule (forward commitments, financial futures transactions, and financial options transactions), as well as swaps. The proposed definition is based on the Office of the Comptroller of the Currency definition of derivative contract. See 12 CFR Part 3, Appendix A, Section 1(a)(10) (1997). Under the proposed definition, a mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative. To avoid any confusion, OTS has explicitly excluded mortgage derivative securities from the proposed definition.

¹ 44 FR 29870 (May 23, 1979) (Forward commitments); 46 FR 36832 (July 16, 1981) (Futures transactions); 47 FR 36625 (August 23, 1982) (Financial options).

² Published elsewhere in this issue of the **Federal Register**.

³ See e.g., OCC Banking Circular 277 (October 27, 1993).

Proposed § 563.172(b) would allow a federal savings association to engage in a transaction involving a financial derivative if the association is authorized to invest in the assets underlying the financial derivative, and the transaction is otherwise safe and sound. A state-chartered savings association may engage in a transaction involving a financial derivative to the extent that the transaction is authorized under its charter and applicable state law, and the transaction is otherwise safe and sound. However, institutions engaging in derivatives activities generally should do so to reduce their overall exposure to risk.

Proposed § 563.172(c) would address the responsibilities of the board of directors with respect to financial derivatives. Under the proposed rule, the board would be responsible for effective oversight of financial derivatives activities. The board would be required to establish written policies and procedures governing authorized financial derivatives before the association may engage in any transactions involving these instruments. In adopting these policies and procedures, the board should review and be guided by TB 13a and other applicable agency guidance on establishing a sound risk management program. The proposed rule would also require the board to periodically review compliance with its policies and procedures, and review the adequacy of the policies and procedures to ensure that they continue to be appropriate to the nature and scope of the savings association's operations and the existing market conditions. Finally, the proposed rule would require the board to ensure that management establishes an adequate system of internal controls for transactions involving financial derivatives.

Paragraph (d) of the proposed rule would address management's responsibilities with respect to financial derivatives. Management would be responsible for daily oversight and management of financial derivatives activities, including implementing the board's policies and procedures and establishing a system of internal controls. Generally, this system of internal controls must be designed to ensure safe and sound operations, reliable financial and regulatory reporting including periodic reporting to the board, and compliance with relevant law. Finally, management would be required to ensure that derivatives activities are conducted in a safe and sound manner, and should review TB 13a and other applicable

agency guidance on implementing a sound risk management program.

Proposed § 563.172(e) would prescribe the recordkeeping requirements for financial derivatives transactions. Under the proposed rule, an association would be required to maintain records adequate to demonstrate compliance with the requirements in § 563.172, and compliance with the board's policies and procedures on financial derivatives.

As noted above, OTS is also issuing proposed TB 13a for public comment. Proposed TB 13a provides additional guidance on what OTS considers safe and sound risk management practices with regard to financial derivatives, and gives institutions more flexibility in addressing risk management concerns than the current regulations. Much of the proposed guidance addresses the evaluation of derivatives as a component of the institution's overall exposure to interest rate risk.

III. Proposed Disposition of Existing Regulations

OTS proposes to eliminate existing §§ 563.173 through 563.175. Instead, OTS would rely on the new rule on derivatives and on agency guidance. The section-by-section analysis below describes the topics addressed by the existing rules and the reasons OTS proposes to modify these rules.

Section 563.173 Forward Commitments

Section 563.173(a) defines various terms used in the regulation, and would be eliminated. As noted above, the proposed rule defines financial derivatives to include forward commitments. Proposed TB 13a would provide additional definitions implementing OTS guidelines regarding financial derivatives.⁴

Section 563.173(b) requires the board of directors of a savings association to include in the board minutes certain information regarding forward commitment transactions. Under the current rule, the minutes must identify thrift personnel that may engage in forward commitment transactions, set the limits of these employees' authority, identify the brokerage firms through which transactions may be conducted, and set a dollar limit on transactions that may be conducted with each brokerage firm.

OTS believes that institutions should continue to perform these functions. Under proposed § 563.172(c)(2), the board would be required to adopt

policies and procedures governing authorized financial derivatives activities. In adopting these policies, the board should review and be guided by TB 13a, which addresses the content of the board's policies and procedures, including the matters specified in existing § 563.173(b). Specifically, proposed TB 13a states that an institution's policies and procedures should "identify the staff authorized to conduct * * * derivatives activities, their lines of authority, and their responsibilities [and] * * * identify dealers, brokers, and counterparties that the board * * * has authorized the institution to conduct business with and identify credit exposure limits for each authorized entity."⁵

Section 563.173(c) imposes restrictions on savings associations that engage in forward commitments. The regulation states a general requirement that forward commitments must be conducted in a safe and sound manner and includes examples of unsafe and unsound practices. This existing regulation also states that outstanding forward commitments plus short put options not exceed specified limits based on a percentage of total assets.

While the proposed rule at § 563.172(b) would continue to require that all financial derivative transactions must be safe and sound, OTS does not believe that a regulatory percentage of assets limit is appropriate. Instead, such transactions are best evaluated based upon how they affect the interest rate risk of an institution's total portfolio. Accordingly, the proposed rule would eliminate specific limitations on forward commitments as a percentage of assets. Instead, proposed § 563.172(b)(3) would state that an association should generally engage in a transaction involving a financial derivative to reduce risk exposure. Moreover, in establishing a sound risk management program, the board should review and be guided by TB 13a, which indicates that before engaging in a derivatives transaction, the savings association should evaluate the derivative's interest rate sensitivity in the context of the institution's overall exposure to interest rate risk.⁶

Section 563.173(d) requires recognition of all profit or loss upon disposal or modification of a forward

⁵ See OTS Thrift Bulletin 13a, Appendix B, Section B. This section also includes other relevant guidance. e.g., the board's policies and procedures should "[d]efine, where appropriate, position limits and other constraints on each type of authorized investment and derivative instrument, including constraints on the purpose(s) for which such instruments may be used."

⁶ See OTS Thrift Bulletin 13a, Part III, Section A.

⁴ See OTS Thrift Bulletin 13a, Part III, Section A and Appendix D.

commitment. Since this regulation was first enacted, OTS's accounting requirements have been significantly updated, removing the need for this specific requirement. OTS expects thrifts to compute gain and loss consistent with instructions to the Thrift Financial Report, which incorporates the requirements of generally accepted accounting principles and the regulatory reporting standards under 12 CFR Part 562.

Section 563.173(e) imposes detailed recordkeeping requirements on savings associations engaging in forward commitments. Under this provision, a savings association must maintain a contract register recording specific information on outstanding forward commitments and maintain documentation of its ability to fund all outstanding commitments when they are due. OTS believes that the level of detail specified in the existing regulation is unnecessary. Under proposed § 563.172(e), a savings association would be required to maintain records sufficient to demonstrate compliance with the regulation and with the board's policies and procedures. Proposed TB 13a would provide additional guidance on appropriate documentation,⁷ including a contract register containing key information on all outstanding contracts and positions.⁸

Section 563.174 Futures Transactions

Section 563.175 Financial Options Transactions

Because §§ 563.174 and 563.175 address substantially the same subjects and impose many identical requirements on futures transactions and financial options transactions, these sections are discussed together below.

Sections 563.174(a) and 563.175(a) set forth definitions relevant to futures and financial options transactions, respectively. The proposed rule would specifically include futures and financial options within the definition of financial derivative. In addition,

⁷ See OTS Thrift Bulletin 13a, Part III, Section B. "[F]or each type of financial derivative instrument authorized by the board of directors, the institution should maintain records containing: (a) the names, duties, responsibilities, and limits of authority (including position limits) of employees authorized to engage in transactions involving the instrument; (b) a list of approved counterparties with which transactions may be conducted; (c) a list showing the credit risk limit for each approved counterparty; and (d) a contract register containing key information on all outstanding contracts and positions."

⁸ *Id.* "The contract registers should specify the type of contract, the price of each open contract, the dollar amount, the trade and maturity dates, the date and manner in which contracts were offset, and the total outstanding positions."

proposed TB 13a would provide appropriate additional definitions governing derivatives transactions. One of the existing definitions at § 563.175(a)(13) restricts who may be a permissible counterparty in financial options transactions. OTS believes it is more appropriate for the board to approve counterparties, as a part of its policies and procedures. Accordingly, proposed TB 13a states that the board should identify approved counterparties with which the institution may conduct business, as well as credit risk limits for each approved counterparty.⁹

Sections 563.174(b) and 563.175(b) detail permissible transactions for savings associations. Section 563.174(b) permits a savings association to engage in a futures transaction only to the extent that the transaction reduces net interest rate risk exposure and sets other limits on these transactions. Under § 563.175(b), a thrift may enter into a financial option that is a long position or short call without any limits, but may enter into short put options only on a limited basis. OTS does not propose to place specific limitations on the ability of institutions to enter into any positions in futures or options contracts. As discussed previously, the proposed rule stipulates that, in general, institutions engaging in derivatives activities should do so to reduce their overall risk exposure. The proposed TB 13a provides extensive guidance on the management of interest rate and other risks incurred by savings associations engaging in financial derivative transactions.

Sections 563.174(c) and 563.175(c) authorize savings associations to engage in futures and financial options transactions using contracts designated by the Commodity Futures Trading Commission (CFTC). Section 563.175(c) also authorizes savings associations to engage in financial options contracts approved by the Securities and Exchange Commission (SEC), or financial options contracts entered into with a permissible counterparty. OTS proposes to delete these requirements. The guidance in proposed TB 13a states that an institution should adequately evaluate the enforceability of its derivatives agreement before an individual transaction is consummated. As a part of this review, the institution should, among other things, ensure that the counterparty has authority to enter into the transaction and establish credit exposure limits for each counterparty.¹⁰

⁹ See OTS Thrift Bulletin 13a, Appendix B, Section B.

¹⁰ See OTS Thrift Bulletin 13a, Appendix B and the FFIEC policy statement (Legal Risk).

Sections 563.174(d) and 563.175(d) impose extensive requirements for board authorization of interest rate futures and financial options transactions. Under the existing rules, a savings association's board must authorize such activities before the savings association engages in any financial derivatives transactions. These sections also address implementation plans, written policies regarding these transactions, policy objectives regarding permissible transactions, and internal control procedures. Furthermore, the rule requires that board minutes must list limits for such transactions, identify personnel authorized to engage in such transactions, and specify the duties, responsibilities and limits of these personnel. The board must also review the institution's position at each regular board meeting.

The proposed rule would retain those requirements essential for developing and maintaining safe and sound risk management practices, but would provide institutions more flexibility in designing management systems for achieving safe and sound practices. As discussed above, proposed § 563.172(c) would continue to require the board to adopt policies and procedures before the association may engage in any financial derivatives transaction. This section would also require the board to monitor compliance with the policies and procedures and to ensure that management establishes an adequate system of internal control. Moreover, proposed TB 13a would provide guidance on the board's establishment of objectives, strategies and major policies,¹¹ as well as the other areas of board oversight addressed by the current regulation.¹²

Sections 563.174(e) and 563.175(e) require a savings association to notify the appropriate OTS Regional Director following board authorization to engage in financial futures and options transactions. Furthermore, § 563.175(e) requires counterparties engaging in over-the-counter financial options transactions with savings associations to notify the appropriate OTS Regional Director. Long over-the-counter financial options transactions with permissible counterparties in excess of a specified limit are subject to the prior approval of the Regional Director. These detailed requirements governing OTS notification and approval of

¹¹ See OTS Thrift Bulletin 13a, Appendix B, Section A (addressing the board of directors' approval of broad objectives and strategies and major policies relating to interest rate risk management).

¹² See the discussion of existing § 563.173(b) above.

counterparties are not essential to safe and sound risk management. Accordingly, OTS proposes to delete this subsection. We note, however, that proposed TB 13a would state that institutions should establish a list of approved counterparties, as well as record-keeping requirements related to counterparties, including individual credit risk limits.¹³

Sections 563.174(f) and 563.175(f) require a savings association to maintain records of futures and financial options transactions, including a contract register containing specified information and other documentation. Section 563.174(f) specifically requires a savings association to retain documents and records for ten years. As discussed above, proposed § 563.172 would require a savings association to maintain records sufficient to demonstrate compliance with the regulation and with the board policy and procedures. Proposed TB 13a, which supplements this recordkeeping requirement includes, as an example of appropriate documentation, a contract register containing information on all outstanding contracts and positions.¹⁴

IV. Executive Order 12866

OTS has determined that this proposed rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

V. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed rule would reduce the burden of complying with detailed regulations and allow for more flexible treatment of derivatives activities for all institutions, including small institutions.

VI. Paperwork Reduction Act

The recordkeeping requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on all aspects of this information collection should be sent to Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503 with copies to the Office of Thrift Supervision, Regulations and Legislation Division, Chief Counsel's

Office, 1700 G Street, NW., Washington, D.C. 20552.

The information collection requirements currently found in 12 CFR 563.173, 563.174, and 563.175 have been modified and moved to 12 CFR 563.172. The burden for these requirements would be reduced from 120,500 hours to 2,880 hours.

OTS invites comment on:

(1) Whether the proposed information collection contained in this proposed regulation is necessary for the proper performance of OTS's functions, including whether the information has practical utility;

(2) The accuracy of OTS's estimate of the burden of the proposed information collection;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(5) Estimate of capital and start-up costs of operation, maintenance and purchases of services to provide information.

Recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number.

The information collection requirements contained in this regulation are found at 12 CFR 563.172. OTS requires this information for the proper supervision of interest rate risk for its regulated savings associations. The likely respondents/recordkeepers are OTS-regulated savings associations. The burden estimates found below reflect the burden found in 12 CFR 563.172:

Estimated average annual burden hours per recordkeeper: 36.

Estimated number of recordkeepers: 80.

Estimated total annual recordkeeping burden: 2,880.

Start up costs to respondents: None.

VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the

Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed above, this proposed rule would reduce regulatory burden by eliminating unnecessarily restrictive regulations. OTS has, therefore, determined that the effect of the proposed rule will not result in expenditures by State, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

Accordingly, the Office of Thrift Supervision proposes to amend part 563, chapter V, title 12, Code of Federal Regulations as set forth below:

PART 563—OPERATIONS

1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 3806, 42 U.S.C. 4106.

§§ 563.173, 563.174, 563.175 [Removed]

2. Sections 563.173, 563.174, and 563.175 are removed.

3. Section 563.172 is added to read as follows:

§ 563.172 Financial derivatives.

(a) *What is a financial derivative?* A financial derivative is a financial contract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this section.

(b) *May I engage in transactions involving financial derivatives?* (1) If you are a federal savings association, you may engage in a transaction involving a financial derivative if you are authorized to invest in the assets underlying the financial derivative, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(2) If you are a state-chartered savings association, you may engage in a transaction involving a financial derivative if your charter or applicable

¹³ See OTS Thrift Bulletin 13a, Part III, Section B (recordkeeping) and Appendix B, Section B (identification of counterparties).

¹⁴ See OTS Thrift Bulletin 13a, Part III, Section B.

state law authorizes you to engage in such transactions, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(3) In general, if you engage in a transaction involving a financial derivative, you should do so to reduce your risk exposure.

(c) *What are my board of directors' responsibilities with respect to financial derivatives?* (1) Your board of directors is responsible for effective oversight of financial derivatives activities.

(2) Before you may engage in any transaction involving a financial derivative, your board of directors must establish written policies and procedures governing authorized financial derivatives. Your board of directors should review Thrift Bulletin 13a, "Management of Interest Rate Risk, Investment Securities, and Derivatives Activities," (available at the address listed in § 516.1 of this chapter) and other applicable agency guidance on establishing a sound risk management program.

(3) Your board of directors must periodically review:

(i) Compliance with the policies and procedures established under paragraph (c)(2) of this section; and

(ii) The adequacy of these policies and procedures to ensure that they continue to be appropriate to the nature and scope of your operations and existing market conditions.

(4) Your board of directors must ensure that management establishes an adequate system of internal controls for transactions involving financial derivatives.

(d) *What are management's responsibilities with respect to financial derivatives?* (1) Management is responsible for daily oversight and management of financial derivatives activities. Management must implement the policies and procedures established by the board of directors and must establish a system of internal controls. This system of internal controls should, at a minimum, provide for periodic reporting to the board of directors and

management, segregation of duties, and internal review procedures.

(2) Management must ensure that financial derivatives activities are conducted in a safe and sound manner and should review Thrift Bulletin 13a, "Management of Interest Rate Risk, Investment Securities, and Derivatives Activities," and other applicable agency guidance on implementing a sound risk management program.

(e) *What records must I keep on financial derivative transactions?* You must maintain records adequate to demonstrate compliance with this section and with your board of directors' policies and procedures on financial derivatives.

By the Office of Thrift Supervision.

Dated: April 9, 1998.

Ellen Seidman,

Director.

[FR Doc. 98-9881 Filed 4-22-98; 8:45 am]

BILLING CODE 6720-01-P