DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 3
Docket ID OCC-2008-0025
RIN 1557-AD13

FEDERAL RESERVE SYSTEM
12 CFR Parts 208 and 225
Regulations H and Y; Docket No. R-1329

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 325
RIN 3064-AD32

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
12 CFR Part 567
Docket No. OTS-2008-0010
RIN 1550-AC22

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital: Deduction of Goodwill Net of Associated Deferred Tax Liability

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively, the Agencies) are amending their regulatory capital rules to permit banks, bank holding companies, and savings associations (collectively, banking organizations) to reduce the amount of goodwill that a banking organization must deduct from tier 1 capital by the amount of any deferred tax liability associated with that goodwill. For a banking organization that elects to apply this final rule, the amount of goodwill the banking organization must deduct from tier 1 capital would reflect the maximum exposure to loss in the event that such goodwill is impaired or derecognized for financial reporting purposes.

DATES: Effective date: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: Banking organizations may elect to apply this final rule for purposes of the regulatory reporting period ending on December 31, 2008.

FOR FURTHER INFORMATION CONTACT:

OCC: Paul Podgorski, Risk Expert, Capital Policy (202–874–4755); or Jean Campbell, Senior Attorney, or Ron Shimabukuro, Senior Counsel, Legislative and Regulatory Activities Division (202–874–5090).

Board: Barbara Bouchard, Associate Director (202-452-3072), Mary Frances Monroe, Manager (202-452-5231), David Snyder, Supervisory Financial Analyst (202-728-5893), Division of Banking Supervision and Regulation; or Mark Van Der Weide, Assistant General Counsel (202-452-2263) or Dinah Knight, Senior Attorney (202-452-3838), Legal Division. For users of Telecommunications Device for the Deaf ("TDD") only, contact 202-263-4869.

FDIC: Christine M. Bouvier, Senior Policy Analyst (Bank Accounting) (202-898–7289), Accounting and Securities Disclosure Section, Division of Supervision and Consumer Protection; Nancy Hunt, Senior Policy Analyst (202-898-6643), Capital Markets Branch, Division of Supervision and Consumer Protection; Mark Handzlik, Senior Attorney (202-898-3990), or Michael Phillips, Counsel (202-898-3581), Supervision Branch, Legal Division.

OTS: Christine A. Smith, Project Manager, Capital Policy (202-906-5740); Marvin Shaw, Senior Attorney, Regulations and Legislation (202-906-6639); Patricia M. Hildebrand, Senior Policy Accountant, Accounting (202-906-7048); or Craig Phillips, Senior Policy Accounting Fellow, Accounting (202-906-5628).

SUPPLEMENTARY INFORMATION:

I. Background

Under the Agencies' existing risk-based and leverage capital rules, a banking organization[1] must deduct certain assets from tier 1 capital.[2] A banking organization is permitted to net any associated deferred tax liability against some of those assets prior to making the deduction from tier 1 capital. Included among the assets eligible for this netting treatment are certain intangible assets arising from a nontaxable business combination. Such netting generally is not permitted for goodwill and other intangible assets arising from a taxable business combination. In these cases, the full or gross carrying amount of the asset is deducted.

On September 30, 2008, the Agencies published a notice of proposed rulemaking (the proposal or NPR) in the Federal Register that would permit a banking organization to reduce the amount of goodwill arising from a taxable business combination that it must deduct from tier 1 capital by the amount of any deferred tax liability associated with that goodwill.[3] The Board, OCC, and OTS also proposed revisions to their respective capital

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[1] Unless otherwise indicated, the term "banking organization" includes banks, savings associations, and bank holding companies (BHCs). The terms "bank holding company" and "BHC" refer only to bank holding companies regulated by the Board.

[2] See the Agencies' capital rules for more detail on what assets are required to be deducted from regulatory capital and how these deductions are calculated. See 12 CFR part 3 (national banks); 12 CFR part 208 (state member banks); 12 CFR part 225 (bank holding companies); 12 CFR part 325 (state nonmember banks); and 12 CFR part 567 (savings associations). This final rule is focused on the deduction of goodwill from tier 1 capital.

[3] See 73 FR 56756 (September 30, 2008).

rules that were intended to conform certain provisions of their rules to developments in generally accepted accounting principles (GAAP), clarify certain definitions and related provisions, and present the rule text in a manner that is consistent across the Agencies. The Agencies requested comment on all aspects of the proposal and whether to extend the proposed capital treatment for any deferred tax liability associated with goodwill to deferred tax liabilities associated with other intangible assets acquired in a taxable business combination.

II. Comments

The Agencies received 13 public comments on the proposal from banking organizations, industry associations, and other parties. The majority of the commenters supported the proposal. Five of the commenters who supported the proposal encouraged the Agencies to adopt the final rule so that it could be applicable for regulatory capital reporting purposes as of December 31, 2008. The Agencies agree and are permitting banking organizations to elect to apply the rule for purposes of the regulatory reporting period ending on December 31, 2008.

The Agencies note that the NPR requested comment and solicited data on the capital impact of potentially extending the proposed rule to intangible assets other than goodwill acquired in a taxable business combination. Although several commenters submitted general requests to extend the capital treatment proposed for goodwill to other intangible assets, they did not provide quantitative data to support broadening the scope of the proposal. In the absence of any supportive analyses, the Agencies have decided not to broaden the scope of the rule.

Two commenters noted that the proposed rule either would or should permit the inclusion of goodwill in regulatory capital. The Agencies are prohibited by law from permitting a banking organization to include goodwill in regulatory capital.[4] The Agencies note that this final rule continues to require a banking organization to deduct goodwill from tier 1 capital.

As several commenters stated, if goodwill becomes impaired or is derecognized under GAAP, a banking organization's maximum exposure to loss is equal to the carrying value of the goodwill less any associated deferred tax liability. The Agencies agree with commenters that, unlike most other liabilities, a deferred tax liability associated with goodwill does not represent a claim on or interest in the cash or assets of the organization. For these reasons, the Agencies believe that it is appropriate to permit a banking organization to reduce the amount of goodwill it must deduct from tier 1 capital by the amount of any associated deferred tax liability, that is, the amount that reflects the banking organization's maximum exposure to loss if such goodwill becomes impaired or derecognized under GAAP.

One commenter disagreed with the calculation of the maximum capital reduction that could occur as a result of the impairment of goodwill in the example in the NPR. This commenter asserted that the maximum capital reduction under GAAP should be equal to the carrying value of goodwill less the sum of tax benefits recognized as of the

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[4] See 12 U.S.C. 1828(n).

date of impairment and those tax benefits to be realized in future periods. The Agencies believe that current rules adequately address the treatment of deferred tax assets for regulatory capital purposes and that deferred tax assets that may be created for tax benefits to be realized in the future are beyond the scope of this NPR. One commenter expressed concern about the tax rate used in the example in the NPR. The Agencies emphasize that the tax rate in the example was simply an assumption for illustrative purposes.

Two commenters opposed the proposal. One expressed general opposition to any rule that would reduce the regulatory capital requirements for banking organizations. Another commenter urged the Agencies to withdraw the proposal in light of other efforts by the Federal government to provide capital support to the financial services industry. Alternatively, if the Agencies did not withdraw the proposal, this commenter requested an extension of the comment period to address valuation issues. Further, this commenter criticized the proposal as an attempt to provide artificial capital support to certain banking organizations. In addition, several commenters that supported the proposal raised questions about the valuation of goodwill. The Agencies believe that the rule as proposed achieves consistency with GAAP for regulatory reporting purposes and for determining the carrying amount of both goodwill and deferred tax liabilities.

III. Final Rule

After reviewing the comments, the Agencies have adopted the proposal without change. Under the final rule, a banking organization may reduce the amount of goodwill that it must deduct from tier 1 capital by the amount of any deferred tax liability associated with that goodwill. However, a banking organization that reduces the amount of goodwill deducted from tier 1 capital by the amount of the deferred tax liability is not permitted to net this deferred tax liability against deferred tax assets when determining regulatory capital limitations on deferred tax assets. For these banking organizations, the amount of goodwill deducted from tier 1 capital will reflect each organization's maximum exposure to loss in the event that the entire amount of goodwill is impaired or derecognized, an event which triggers the concurrent derecognition of the related deferred tax liability for financial reporting purposes.

IV. Other Revisions

As discussed in the preamble to the proposed rule, the OCC is consolidating the various provisions permitting a bank to deduct assets from tier 1 capital on a basis net of any associated deferred tax liability together in one section of the regulatory text to make it easier to locate. The OCC is also clarifying the current regulatory text's special treatment of intangible assets acquired due to a nontaxable purchase business combination. In addition, the OCC is replacing the term "purchased mortgage servicing rights" with the broader term "servicing assets," making clarifying changes to more accurately reflect the OCC's existing interpretation of the current regulatory text, amending the definition of goodwill to conform to GAAP, and making other technical and miscellaneous changes to its regulatory capital rules. No comments were received on these amendments. The amendments are adopted by the OCC as proposed. However, existing regulatory text not printed in the proposal has been added at section 2(c) for ease of reader reference to clarify that goodwill is required to be deducted from tier 1 capital.

The Board is adopting as final the non-substantive technical changes proposed in the NPR that conform the definition of goodwill in its regulatory capital rules to GAAP. Further, the Board is amending Appendix A to 12 CFR part 225 to remove obsolete text that relates to goodwill recognized by a BHC prior to December 31, 1992. The Board received no comments on its proposal to make these rule changes.

OTS is adopting as final the changes to its capital regulations as proposed in the NPR as follows: First, OTS is amending its definition of "intangible assets" in 12 CFR 567.1 and 12 CFR 567.9 to reference servicing assets as intangible assets. Second, OTS is conforming its regulatory text to that of the other Agencies to provide for netting a deferred tax liability specifically related to certain intangible assets against those intangible assets, prior to deduction when calculating regulatory capital, and to add regulatory text addressing the regulatory capital limitation on deferred tax assets. In addition, OTS is amending its definition in 12 CFR 565.2(f) and other proposed regulatory text in 12 CFR 567.9(c)(1) to conform with changes in this rule.

Effective Date and Applicability Date

This final rule takes effect 30 days after publication in the Federal Register. In response to requests from commenters, the Agencies are permitting banking organizations to elect to apply this final rule for purposes of the regulatory reporting period ending on December 31, 2008.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities.[5]

Under regulations issued by the Small Business Administration,[6] a small entity includes a bank holding company, commercial bank, or savings association with assets of $175 million or less (collectively, small banking organizations).[7] This final rule would in effect permit a banking organization to compute its deduction from regulatory capital of goodwill net of any associated deferred tax liability. The Agencies believe that this final rule will not have a significant economic impact on a substantial number of small entities because the final rule is elective and, thus, does not require a banking organization to compute its deduction from regulatory capital of goodwill net of any associated deferred tax liability. In addition, the Agencies did not receive any comments that the proposal would have a significant impact on small banking organizations. Accordingly, each of the Agencies certifies that this rule will not have a significant economic impact on a substantial number of small entities.

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[5] See 5 U.S.C. 603(a) and 5 U.S.C. 605(b).
[6] See 13 CFR 121.201.
[7] As of June 30, 2008, there were approximately 2,636 small bank holding companies, 730 small national banks, 467 small state member banks, 3,222 small state nonmember banks, and 412 small savings associations.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the Agencies reviewed the rule regarding the treatment of a deferred tax liability attributable to goodwill as required by the Office of Management and Budget.[8] No collections of information pursuant to the Paperwork Reduction Act are contained in the rule. However, implementation of this rule will require certain clarifying revisions to the instructions for the Agencies' quarterly regulatory reports[9] to reflect the change in a banking organization's tier 1 capital.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Agencies to use plain language in all proposed and final rules published after January 1, 2000. In light of this requirement, the Agencies have sought to present the rule in a simple and straightforward manner.

OCC and OTS Executive Order 12866 Determinations

Executive Order 12866 requires Federal agencies to prepare a regulatory impact analysis for agency actions that are found to be significant regulatory actions. Significant regulatory actions include, among other things, rulemakings that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. The OCC and OTS each have determined that its portion of the rule is not a significant regulatory action.

OCC and OTS Executive Order 13132 Determinations

The OCC and OTS each determined that its portion of the rulemaking does not have any federalism implications for purposes of Executive Order 13132.

OCC and OTS Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA)[10] requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year.[11] If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.[12] The OCC and OTS each have determined that its rule will not result in expenditures by state, local, and tribal

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[8] See 44 U.S.C. 3506; 5 CFR 1320 Appendix A.1.
[9] Consolidated Reports of Condition and Income (Call Report) (OMB Nos. 7100-0036, 3064-0052, 1557-0081), Thrift Financial Report (TFR) (OMB No. 1550-0023), Consolidated Financial Statements for Bank Holding Companies (FR Y-9C) (OMB No. 7100-0128).
[10] See 2 U.S.C. 1532.
[11] The OCC and OTS adjusted $100 million for inflation using the GDP implicit price deflator with the second quarter of 1995 as the base index. The result was $132.64 million, which OCC and OTS rounded to $133 million.
[12] See 2 U.S.C. 1535.

governments, or by the private sector, of $133 million or more. Accordingly, neither OCC nor OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 3

Accounting, Administrative practice and procedure, Banks, Banking, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Accounting, Administrative practice and procedure, Banks, Banking, Capital, Reporting and recordkeeping requirements, Risk.

12 CFR Part 225

Accounting, Administrative practice and procedure, Banks, Banking, Capital, Federal Reserve System, Reporting and recordkeeping requirements, Risk.

12 CFR Part 325

Accounting, Banks, Banking, Administrative practice and procedure, Capital, Reporting and recordkeeping requirements, Risk.

12 CFR Part 565

Administrative practice and procedure, Capital, Savings associations.

12 CFR Part 567

Capital, Reporting and recordkeeping requirements, Risk, Savings associations.

Department of the Treasury
Office of the Comptroller of the Currency
12 CFR Chapter I
Authority and Issuance

For the reasons set forth in the common preamble, part 3 of chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 3 – MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907 and 3909.

2. In Appendix A to part 3, Section 1 is amended by:

a. Removing, in paragraph (c)(1), the third sentence, the phrase "section 1(c)(8)" and by adding in lieu thereof the phrase "section 1(c)(10)"; and

b. Revising paragraph (c)(17) to read as follows:

APPENDIX A TO PART 3—RISK-BASED CAPITAL GUIDELINES

Section 1. Purpose, Applicability of Guidelines, and Definitions.

* * * * *

(c) * * *

(17) Goodwill is an intangible asset that represents the excess of the cost of an acquired entity over the net of the amounts assigned to assets acquired and liabilities assumed.
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3. In Appendix A to part 3, Section 2 is amended by:

a. Revising in paragraphs (c) introductory text, and (c)(1) introductory text;

b. Removing, in paragraph (c)(1)(iii), the phrase "section 2(c)(3)" and by adding in lieu thereof the phrase "sections 2(c)(3) and (2)(c)(6)";

c. Removing, in paragraph (c)(1)(iv), the phrase "section 4(a)(3)" and by adding in lieu thereof the phrase "section 4(a)(2)";

d. Removing, in footnote 6, the phrase "section 1(c)(14)" and by adding in lieu thereof the phrase "section 1(c)(18)", and removing the phrase "section 4(a)(3)" and by adding in lieu thereof the phase "section 4(a)(2)";

e. Removing paragraph (c)(2)(iv);

f. Adding a heading to paragraph (c)(3)(i);

g. Removing paragraph (c)(3)(iii) and redesignating paragraph (c)(3)(iv) as paragraph (c)(3)(iii);

h. Removing paragraph (c)(4)(iii);

i. Redesignating paragraph (c)(6) as paragraph (c)(7) and adding a new paragraph (c)(6) to read as follows; and

j. Revising the introductory text of newly designated paragraph (c)(7) by removing the word "items" and adding in lieu thereof the word "assets".

The revisions and addition are set forth below.

Section 2. Components of Capital.
* * * * *

(c) Deductions from Capital. The following items are deducted from the appropriate portion of a national bank's capital base when calculating its risk-based capital ratio:

(1) Deductions from Tier 1 Capital. The following items are deducted from Tier 1 capital before the Tier 2 portion of the calculation is made:

(i) Goodwill;
* * * * *

(3) * * * (i) Net unrealized gains and losses on available-for-sale securities. * * *
* * * * *

(6) Netting of Deferred Tax Liability. (i) Banks may elect to deduct the following assets from Tier 1 capital on a basis that is net of any associated deferred tax liability:

(A) Goodwill;

(B) Intangible assets acquired due to a nontaxable purchase business combination, except banks may not elect to deduct from Tier 1 capital on a basis that is net of any associated deferred tax liability, regardless of the method by which they were acquired:

(1) Purchased credit card relationships; and

(2) Servicing assets that are includable in Tier 1 capital;

(C) Disallowed servicing assets;

(D) Disallowed credit-enhancing interest-only strips; and

(E) Nonfinancial equity investments, as defined in section 1(c)(1) of this appendix A.

(ii) Deferred tax liabilities netted in this manner cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income as calculated under section 2(c)(1)(iii) of this appendix A.

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Federal Reserve System
12 CFR Chapter II
Authority and Issuance

For the reasons set forth in the common preamble, the Board of Governors of the Federal Reserve System amends parts 208 and 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 208 – MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 92(a), 248(a), 248(c), 321-328a, 371 d, 461, 481-486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1823(j), 1828(o), 1831, 1831o, 1831p-1, 1831r-1, 1831w, 1831x, 1835(a), 1882, 2901-2907, 3105, 3310, 3331-3351, and 3906-3909; 15 U.S.C. 78b, 781(b), 781(g), 781(i), 78o-4(c)(5), 78q, 78q-1, and 78w, 1681s, 1681w, 6801 and 6805; 31 U.S.C. 5318;42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. In appendix A to part 208, amend section II.B. by revising paragraphs 1.a., 1.e.iii., and 1.f. to read as follows:

Appendix A to Part 208: Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure

* * * * *

II. * * *

B. * * *

1. * * *

a. Goodwill. Goodwill is an intangible asset that represents the excess of the cost of an acquired entity over the net of the amounts assigned to assets acquired and liabilities assumed. Goodwill is deducted from the sum of core capital elements in determining Tier 1 capital.

* * * * *

e. * * *

iii. Banks may elect to deduct goodwill, disallowed mortgage servicing assets, disallowed nonmortgage servicing assets, and disallowed credit-enhancing I/Os (both purchased and retained) on a basis that is net of any associated deferred tax liability. Deferred tax liabilities netted in this manner cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income.

f. Valuation. Banks must review the book value of goodwill and other intangible assets at least quarterly and make adjustments to these values as necessary. The fair value of mortgage servicing assets, nonmortgage servicing assets, purchased credit card relationships, and credit-enhancing I/Os also must be determined at least quarterly. This determination shall include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates or account attrition rates. Examiners will review both the book value and the fair value assigned to these assets, together with supporting documentation, during the examination process. In addition, the

Federal Reserve may require, on a case-by-case basis, an independent valuation of a bank's goodwill, other intangible assets, or credit-enhancing I/Os.
* * * * *

PART 225 – BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

3. The authority citation for part 225 continues to read as follows:
Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331-3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

4. In appendix A to part 225, amend section II.B. by revising paragraphs 1.a., 1.e.iii, and 1.f. to read as follows:

Appendix A to Part 225: Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

* * * * *

II. * * *

B. * * *

1. * * *

a. <u>Goodwill.</u> Goodwill is an intangible asset that represents the excess of the cost of an acquired entity over the net of the amounts assigned to assets acquired and liabilities assumed. Goodwill is deducted from the sum of core capital elements in determining tier 1 capital.

* * * * *

e. * * *

iii. Bank holding companies may elect to deduct goodwill, disallowed mortgage servicing assets, disallowed nonmortgage servicing assets, and disallowed credit-enhancing I/Os (both purchased and retained) on a basis that is net of any associated deferred tax liability. Deferred tax liabilities netted in this manner cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income.

f. <u>Valuation.</u> Bank holding companies must review the book value of goodwill and other intangible assets at least quarterly and make adjustments to these values as necessary. The fair value of mortgage servicing assets, nonmortgage servicing assets, purchased credit card relationships, and credit-enhancing I/Os also must be determined at least quarterly. This determination shall include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates or account attrition rates. Examiners will review both the book value and the fair value assigned to these assets, together with supporting documentation, during the inspection process. In addition, the Federal Reserve may require, on a case-by-case basis, an independent valuation of a bank holding company's goodwill, other intangible assets, or credit-enhancing I/Os.

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Federal Deposit Insurance Corporation
12 CFR Chapter III
Authority and Issuance

For the reasons set forth in the common preamble, part 325 of chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 325 – CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102-233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102-242, 105 Stat. 2236, 2355, as amended by Pub. L. 103-325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102-242, 105 Stat. 2236, 2386, as amended by Pub. L. 102-550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note).

2. Section 325.5 is amended by revising paragraph (g)(5) to read as follows:

§ 325.5 Miscellaneous.

* * * * *

(g) * * *

(5) Goodwill and other intangible assets. This paragraph (g)(5) provides the capital treatment for intangible assets acquired in a nontaxable business combination, and goodwill acquired in a taxable business combination.

(i) Intangible assets acquired in nontaxable purchase business combinations. A deferred tax liability that is specifically related to an intangible asset (other than mortgage servicing assets, nonmortgage servicing assets, and purchased credit card relationships) acquired in a nontaxable purchase business combination may be netted against this intangible asset. Only the net amount of this intangible asset must be deducted from Tier 1 capital.

(ii) Goodwill acquired in a taxable purchase business combination. A deferred tax liability that is specifically related to goodwill acquired in a taxable purchase business combination may be netted against this goodwill. Only the net amount of this goodwill must be deducted from Tier 1 capital.

(iii) Treatment of a netted deferred tax liability. When a deferred tax liability is netted in accordance with paragraph (g)(5)(i) or (ii) of this section, the taxable temporary difference that gives rise to this deferred tax liability must be excluded from existing taxable temporary differences when determining the amount of deferred tax assets that are dependent upon future taxable income and calculating the maximum allowable amount of such assets.

(iv) Valuation. The FDIC in its discretion may require independent fair value estimates for goodwill and other intangible assets on a case-by-case basis where it is deemed appropriate for safety and soundness purposes.

Office of Thrift Supervision
12 CFR Chapter V

For the reasons set forth in the common preamble, parts 565 and 567 of chapter V of title 12 of the Code of Federal Regulations are amended as follows:

PART 565—PROMPT CORRECTIVE ACTION

1. The authority citation for part 565 continues to read as follows:

Authority: 12 U.S.C. 1831o

2. Section 565.2 is amended by revising paragraph (f) to read as follows:

* * * * *

(f) Tangible equity means the amount of a savings association's core capital as computed in part 567 of this chapter plus the amount of its outstanding cumulative perpetual preferred stock (including related surplus), minus intangible assets as defined in § 567.1 of this chapter, except mortgage servicing assets to the extent they are includable under § 567.12. Non-mortgage servicing assets that have not been previously deducted in calculating core capital are deducted.

* * * * *

PART 567—CAPITAL

3. The authority citation for part 567 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828 (note).

4. Section 567.1 is amended by revising the definition for intangible assets to read as follows:

§ 567.1 Definitions

* * * * *

Intangible assets. The term intangible assets means assets considered to be intangible assets under generally accepted accounting principles. These assets include, but are not limited to, goodwill, core deposit premiums, purchased credit card relationships, favorable leaseholds, and servicing assets (mortgage and non-mortgage). Interest-only strips receivable and other nonsecurity financial instruments are not intangible assets under this definition.

* * * * *

5. Section 567.5 is amended by adding new paragraph (a)(2)(vii) to read as follows:

§ 567.5 Components of capital.

* * * * *

(a) * * *

(2) * * *

(vii) Deferred tax assets that are not includable in core capital pursuant to § 567.12 of this part are deducted from assets and capital in computing core capital.

* * * * *

6. Section 567.9 is amended by revising paragraph (c)(1) to read as follows:

§ 567.9 Tangible capital requirements

* * * * *

(c) * * *

(1) Intangible assets (as defined in § 567.1) except for mortgage servicing assets to the extent they are includable in tangible capital under § 567.12, and credit enhancing interest-only strips and deferred tax assets not includable in tangible capital under § 567.12.

* * * * *

7. Section 567.12 is amended by:

a. Revising the heading and paragraphs (a) and (b)(3);

b. Adding paragraph (b)(5);

c. Revising paragraph (e)(3); and

d. Adding paragraph (h) to read as follows:

§ 567.12 Purchased credit card relationships, servicing assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets.

(a) Scope. This section prescribes the maximum amount of purchased credit card relationships, serving assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets that savings associations may include in calculating tangible and core capital.

(b) * * *

(3) Intangible assets, as defined in § 567.1 of this part, other than purchased credit card relationships described in paragraph (b)(1) of this section, servicing assets described in paragraph (b)(2) of this section, and core deposit intangibles described in paragraph (g)(3) of this section, are deducted in computing tangible and core capital, subject to paragraph (e)(3)(ii) of this section.

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(5) Deferred tax assets may be included (that is not deducted) in computing core capital subject to the restrictions of paragraph (h) of this section, and may be included in tangible capital in the same amount.

* * * * *

(e) * * *

(3) * * *

(i) For purposes of computing the limits and sublimits in paragraphs (e) and (h) of this section, core capital is computed before the deduction of disallowed servicing assets, disallowed purchased credit card relationships, disallowed credit-enhancing interest-only strips (purchased and retained), and disallowed deferred tax assets.

(ii) A savings association may elect to deduct the following items on a basis net of deferred tax liabilities:

(A) Disallowed servicing assets;

(B) Goodwill such that only the net amount must be deducted from Tier 1 capital;

(C) Disallowed credit-enhancing interest only strips (both purchased and retained); and

(D) Other intangible assets arising from non-taxable business combinations. A deferred tax liability that is specifically related to an intangible asset (other than purchased credit card relationships) arising from a nontaxable business combination may be netted against this intangible asset. The net amount of the intangible asset must be deducted from Tier 1 capital.

(iii) Deferred tax liabilities that are netted in accordance with paragraph (e)(3)(ii) of this section cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income.

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(h) Treatment of deferred tax assets. For purposes of calculating Tier 1 capital under this part (but not for financial statement purposes) deferred tax assets are subject to the conditions, limitations, and restrictions described in this section.

(1) Tier 1 capital limitations. (i) The maximum allowable amount of deferred tax assets net of any valuation allowance that are dependent upon future taxable income will be limited to the lesser of:

(A) The amount of deferred tax assets that are dependent upon future taxable income that is expected to be realized within one year of the calendar quarter-end date, based on a projected future taxable income for that year; or

(B) Ten percent of the amount of Tier 1 capital that exists before the deduction of any disallowed servicing assets, any disallowed purchased credit card relationships, any disallowed credit-enhancing interest-only strips, and any disallowed deferred tax assets.

(ii) For purposes of this limitation, all existing temporary differences should be assumed to fully reverse at the calendar quarter-end date. The recorded amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, in excess of this limitation will be deducted from assets and from equity capital for purposes of determining Tier 1 capital under this part. The amount of deferred tax assets that can be realized from taxes paid in prior carryback years and from the reversal of existing taxable temporary differences generally would not be deducted from assets and from equity capital.

(iii) Notwithstanding paragraph (h)(1)(B)(ii) of this section, the amount of carryback potential that may be considered in calculating the amount of deferred tax assets that a savings association that is part of a consolidated group (for tax purposes) may include in Tier 1 capital may not exceed the amount which the association could reasonably expect to have refunded by its parent.

(2) Projected future taxable income. Projected future taxable income should not include net operating loss carryforwards to be used within one year of the most recent calendar quarter-end date or the amount of existing temporary differences expected to reverse within that year. Projected future taxable income should include the estimated effect of tax planning strategies that are expected to be implemented to realize tax carryforwards that will otherwise expire during that year. Future taxable income projections for the current fiscal year (adjusted for any significant changes that have occurred or are expected to occur) may be used when applying the capital limit at an interim calendar quarter-end date rather than preparing a new projection each quarter.

(3) Unrealized holding gains and losses on available-for-sale debt securities. The deferred tax effects of any unrealized holding gains and losses on available-for-sale debt securities may be excluded from the determination of the amount of deferred tax assets that are dependent upon future taxable income and the calculation of the maximum allowable amount of such assets. If these deferred tax effects are excluded, this treatment must be followed consistently over time.