NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

FILED
09/21/2020 11:53 AM
ARCHIVES DIVISION
SECRETARY OF STATE

CHAPTER 441
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
FINANCE AND SECURITIES REGULATION

FILING CAPTION: Authorization to pay dividends in excess of retained earnings

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/29/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Karen Winkel
Rules Coordinator

HEARING(S)

Auxilary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 10/22/2020
TIME: 10:30 AM
OFFICER: Lauren Winters
ADDRESS: Labor & Industries Building
350 Winter Street NE
Salem, OR 97301
SPECIAL INSTRUCTIONS:
Conference call only due to COVID-19.
Dial in: 866-434-5269
Access code: 7728585

NEED FOR THE RULE(S):

The proposed rule makes permanent the temporary rule allowing Oregon chartered banks that meet safety and soundness requirements to make shareholder distributions, the aggregate amount of which may exceed the bank's retained earnings, provided written approval to do so is granted by the director of the Department of Consumer and Business Services (DCBS). Allowing banks to pay dividends in excess of retained earnings with the approval of the director will not in any way be detrimental to the public interest.

Under ORS 706.795, "notwithstanding any other provision of law," the director has the authority to adopt rules that achieve parity among Oregon chartered banks, national banks, and other banks doing business in Oregon that may be chartered in other states. Absent the proposed rule, Oregon chartered banks suffer a clear and immediate competitive disadvantage vis-à-vis national banks and banks chartered in California and Washington in attracting investors and raising capital to fund their business operations. Additionally, investors in Oregon banks may be deprived of their ability to receive dividend income for reasons not applicable to non-Oregon chartered banks. Also, severe harm could be caused to the financial health of bank holding companies, which rely on dividend income from their subsidiary banks to meet their expenses and other financial obligations.

The inability to make dividend payments when otherwise financially healthy Oregon chartered banks may have a need to do so, places a restriction on these institutions that is not applicable to national banks and banks chartered in Washington and California that do business in Oregon. This inability to pay dividends may also potentially hamper a bank's ability to access capital that the Federal government may in the future make available to banks (as it did during the Great Recession), given the economic deterioration triggered by the COVID-19 pandemic.

Capital is essential to a bank's continued existence and is necessary for a bank to be able to continue offering banking products and services, including but not limited to making loans and accepting deposits, to Oregon consumers and businesses. The accounting treatment of certain transactions such as impairment of goodwill can cause a reduction in retained earning; however, this is not a cash loss and does not adversely impact regulatory capital. Under these circumstances, the restrictions on the payment of dividends are unnecessary.

The proposed rule will enhance and maintain competition among Oregon chartered banks, national banks, and banks chartered in California and Washington by enabling Oregon chartered banks to pay dividends on terms that are currently available to other financial institutions. It allows Oregon chartered banks that satisfy safety and soundness requirements to make shareholder distributions, the aggregate amount of which may exceed the bank's retained earnings, subject to receiving prior approval from the director. The proposed rule is needed to ensure that Oregon chartered banks are not at a competitive disadvantage, vis-a-vis national banks and banks chartered in California and Washington doing business in Oregon, in regards to their ability to attract and retain capital.

Additionally, the proposed rule is consistent with Oregon corporation laws governing dividends. Under Oregon law, a corporation may make a distribution to its shareholders as long as (1) the corporation meets a statutorily prescribed "solvency test"), and (2) the articles of incorporation do not restrict the corporation from making such a distribution. ORS 60.181(1), (3). The same standard governing the distributions by an Oregon corporation will be entitled to an Oregon corporation that is required to operate under the Oregon Bank Act because it is engaged in the business of banking.

DCBS invited the Oregon Bankers Association and members of the banking community, including banks with 50 or fewer employees, to participate in a Rulemaking Advisory Committee (RAC). The RAC meeting was held via teleconference on September 3, 2020, and the RAC members unanimously supported the adoption of the proposed rule.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Draft rules are available from Karen Winkel, 350 Winter St. NE, Salem, OR 97301 and are also available on the division's website at:
http://dfr.oregon.gov/laws-rules/Pages/proposed-rules.aspx.

FISCAL AND ECONOMIC IMPACT:

The proposed rule does not add any new requirements on public entities. Other state agencies and local governments are not involved in enforcing the Oregon Bank Act and are not expected to incur any fiscal impact from the proposed rule's adoption. DCBS is not expected to incur any fiscal impact as a result of the proposed rule because it simply gives Oregon chartered banks the flexibility to pay dividends in excess of retained earnings with the director's prior approval. It is unlikely that allowing Oregon chartered banks to pay dividends in excess of retained earnings with the approval of the will have any impact on the general public.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The proposed rule will not economically affect any state agencies, units of local government, or members of public.

(2)(a) The department estimates that 6 small businesses would be subject to the rule. The department currently charters and supervises 13 state banks and 3 trust companies. Six of the 13 banks employ 50 or fewer employees, and therefore meet the definition of "small business" under ORS 183.310. Based on feedback from the RAC, no regulated entities will be adversely affected by the proposed rule. The only change in the compliance requirements for paying dividends is that an Oregon chartered bank must obtain prior approval from the director of the Department of Consumer and Business Services before declaring and making dividend payments in excess of retained earnings.

(2)(b) Based on the available information and feedback from the RAC, it is unlikely that the proposed rule will require Oregon chartered banks to file additional reports, increase recordkeeping activities, or perform other administrative activities in order to comply with the proposed rule.

(2)(c) Based on available information and feedback from the RAC, the proposed rule does not mandate that Oregon chartered banks with fewer than 50 employees will need to acquire additional equipment or supplies or require increased labor costs or administration in order to comply with the proposed rule.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Oregon Bankers Association, whose membership includes Oregon chartered banks with fewer than 50 employees, as well as an Oregon chartered bank with fewer than 50 employees were consulted as part of the proposed rule's development.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

ADOPT: 441-505-2010

RULE SUMMARY: Allows Oregon chartered banks to pay dividends in excess of retained earnings.

CHANGES TO RULE:

<u>441-505-2010</u>
<u>Dividend Payments in Excess of Retained Earnings</u>

An institution may not pay dividends in an amount that exceeds the institution's retained earnings except with the prior written approval of the director of the Department of Consumer and Business Services.
Statutory/Other Authority: ORS 706.795
Statutes/Other Implemented: ORS 707.415, ORS 707.410