

EMERGENCY CAPITAL INVESTMENT PROGRAM

U.S. Department of the Treasury

Frequently Asked Questions on Legal Agreements, Closing Process, and the ECIP Interim Final Rule

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1. If an ECIP recipient effectuates a charter change or conversion, becomes owned by a new holding company, or undergoes another corporate transaction after closing the transaction, can the ECIP instruments remain outstanding?

If the issuer of ECIP instruments undergoes a corporate transaction but will continue to exist as a legal entity, the ECIP instruments are not required to be redeemed.

If the issuer of ECIP instruments sells, transfers, conveys, or leases all or substantially all of its assets to any other party (including to a newly formed entity or to a holding company), then Section 4.2(a) of the Securities Purchase Agreement would be triggered, requiring the successor, transferee or lessee party to assume the due and punctual performance and observance of the covenants, agreements and conditions of the Securities Purchase Agreement, including, if applicable, the issuance by the successor party of equivalent ECIP instruments. Any such successor entity must also be eligible, at the time of the transaction, to participate in the ECIP unless Treasury's prior written approval is obtained.

2. Can ECIP instruments be redeemed at the option of an ECIP recipient, or at the direction of Treasury?

Redemptions of the ECIP instruments are governed by the transaction documents – Section 5 of the Senior Preferred Certificate of Designations; Section 6.10 of the Credit Union Securities Purchase Agreement; and Section 6.10 of the S-Corp/Mutual Securities Purchase Agreement. Under those provisions, holders of the ECIP instruments “have no right to require redemption or repurchase of any” of the instruments.

3. Will Treasury exercise the registration rights in Annex E of the Securities Purchase Agreement for banking organizations?

As stated in Section 4.1(h) of the Senior Preferred Securities Purchase Agreement and 4.1(i) of the S-Corp/Mutual Securities Purchase Agreement, the recipient must comply with the terms and conditions of Annex E only upon the request of Treasury or any holder of the instruments to which the registration rights are assigned. Treasury may determine at a future date whether to exercise its registration rights.

4. One of the closing conditions in the Securities Purchase Agreement is that the recipient must deliver to Treasury a written opinion from counsel to the recipient in substantially the form as in an Annex to the Securities Purchase Agreement. Will all institutions be required to provide this legal opinion?

Treasury intends to waive the requirement for recipients to provide a legal opinion at closing for institutions that meet all three of the following conditions: (i) the institution is issuing subordinated debt; (ii) the institution has \$500 million or less in total assets, based on the

methodology and data used by Treasury during the application review process; and (iii) Treasury's ECIP investment in the institution is \$25 million or less.

5. The deadline for approved institutions to confirm their intent to participate, the amount of ECIP instruments they intend to issue, and their preferred transaction closing windows is April 4, 2022. Will institutions be able to modify their responses after this date?

Institutions may modify their responses at any time on or before April 4, 2022 by contacting ecip@treasury.gov. Treasury will use the information received in the closing response forms to plan and schedule closings, and our expectation is that all institutions will issue the amount indicated in their closing response form. Any deviation from those amounts may affect the institution's ability to close the transaction.

6. Under the ECIP Securities Purchase Agreements, an ECIP recipient that is a CDFI as of the ECIP closing date is prohibited from revoking its status as a CDFI and must "use its reasonable best efforts to prevent its status as a CDFI from being changed." How does an ECIP recipient remain in compliance with this provision if it loses its CDFI certification?

If an ECIP recipient loses its CDFI certification but reapplies for certification with a complete and accurate application within 18 months from the date of decertification, Treasury will deem the ECIP recipient to be using its reasonable best efforts to prevent its status as a CDFI from being changed. Treasury may provide further guidance on additional steps an ECIP recipient that is decertified as a CDFI should take to continue to remain in compliance with this requirement under the ECIP Securities Purchase Agreement if its re-application for CDFI certification is unsuccessful.

7. Treasury has adopted an interim final rule (IFR) that establishes restrictions on capital distributions for ECIP participants (31 CFR Part 35 Subpart B). Section 35.23(b)(1) of the IFR requires ECIP participants that are not credit unions¹ to obtain Treasury approval before making capital distributions that exceed their "eligible distributable income." Under what circumstances will Treasury consider granting approval for a capital distribution that exceeds the limits in the IFR?

The restrictions on capital distributions in Section 35.23 of the IFR promote the integrity of ECIP by promoting the use of ECIP investments to provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities, including persistent poverty counties, that may have been disproportionately impacted by the economic effects of the COVID-19 pandemic, in

¹ Participants that are credit unions are also subject to restrictions on capital distributions as set out in 31 CFR § 35.23(b)(2). The process outlined in this FAQ only applies to Participants that are not credit unions. Credit unions that seek Treasury approval to make capital distributions in excess of the limits set out in 31 CFR § 35.23(b)(2) should contact ECIP@treasury.gov.

accordance with the statutory purpose of the program. The restrictions help ensure that ECIP investments are not used to fund undue distributions or compensation for an ECIP participant's shareholders or executives.

If an ECIP participant believes that special circumstances justify a capital distribution in excess of the limitations under the IFR, it may request Treasury approval to make such a distribution. ECIP participants should submit any such request to ECIP@treasury.gov at least 90 days before the date of the proposed distribution. Treasury will consider requests that meet the following criteria:

1. The ECIP participant's primary federal banking regulator has confirmed in writing that it has approved (or does not object to) the proposed capital distribution, or the ECIP participant has confirmed that no such approval is required. In addition, if the ECIP participant is a bank holding company or savings and loan holding company and the capital distribution requires approval of the primary federal regulators of any of its bank or savings and loan subsidiaries, such regulators must confirm in writing that they have approved (or do not object to) the capital distribution.
2. An executive officer of the ECIP participant has represented in writing that (a) the proposed capital distribution is permissible under applicable federal and state law and regulation and the participant's organizational governance documents (e.g., charter and bylaws) and (b) all required regulatory or stockholder approvals have been or, prior to the making of the capital distribution, will be, obtained.
3. The ECIP participant will remain "well capitalized" under the FDIC's Prompt Corrective Action Guidelines² after the proposed capital distribution, calculated as of the end of the most recently completed fiscal quarter for which the Participant has filed a Call Report, without including the amount of the ECIP investment.
4. The ECIP participant has credibly demonstrated in writing that the proposed capital distribution would not impair the ECIP participant's ability to use the entirety of the benefit of its ECIP investment to increase its ECIP-related activities, including providing loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities, including persistent poverty counties, that may have been disproportionately impacted by the economic effects of the COVID-19 pandemic.
5. The ECIP participant has demonstrated that its rationale for the proposed capital distribution includes at least one of the following:
 - a. the request relates to a one-time capital distribution in connection with a repurchase of shares to enable a conversion from C-Corporation to S-Corporation status, a mutual-to-stock conversion, or a bona fide restructuring conducted for the purpose of enabling a reasonably foreseeable initial public offering by the participant;

² 12 CFR § 324.403.

- b. if the participant is an S-Corporation, the proposed share repurchase is intended to ensure that the participant maintains its S-Corporation status;
- c. the proposed capital distribution is limited and routine (e.g., regular dividends, a share repurchase program, or share repurchases effected pursuant to a Participant's equity compensation programs), consistent with the participant's historical practices in 2019 and 2020, and does not significantly exceed the participant's level of limited and routine capital distributions during this time period, measured by reference to the percentage of outstanding shares to be purchased in the case of share repurchases or by reference to percentage of net income in the case of dividends; or
- d. the participant's eligible distributable income during the relevant look-back period under the IFR has been negatively impacted by a significant nonrecurring or nonoperating expense, in the absence of which the proposed capital distribution would have complied with the IFR, and the participant has reported positive net income without any adjustments for at least the four quarters following the most recent quarter in which the significant nonrecurring or nonoperating expense occurred.

Any request for approval must be credibly supported with adequate documentation, such as:

1. Audited consolidated annual financial statements for the two most recently completed fiscal years for which financial statements are available, and unaudited consolidated quarterly financial statements for each completed fiscal quarter thereafter for which financial statements are available.
2. The ECIP participant's projected income statement and balance sheet as of the end of the current fiscal year.
3. A pro forma balance sheet, including capital ratios, as of the end of the most recently completed fiscal quarter for which the ECIP participant has filed a Call Report, giving effect to the proposed capital distribution and excluding the amount of the ECIP investment from calculations of equity, capital ratios, and related figures.

This FAQ only applies to ECIP participants that are not credit unions. ECIP participants that are credit unions are subject to restrictions on capital distributions under 31 CFR 35.23(b)(2). Credit unions that wish to request Treasury approval to make capital distributions in excess of the limits set out in the IFR should contact ECIP@treasury.gov.