

determination or the earliest date permissible under applicable law or regulation, whichever is later.

(vi) *Twelve month sunset.* The countercyclical capital buffer amount will return to zero percent 12 months after the effective date that the adjusted countercyclical capital buffer amount is announced, unless the FDIC announces a decision to maintain the adjusted countercyclical capital buffer amount or adjust it again before the expiration of the 12-month period.

(3) *Countercyclical capital buffer amount for foreign jurisdictions.* The FDIC will adjust the countercyclical capital buffer amount for private sector credit exposures to reflect decisions made by foreign jurisdictions consistent with due process requirements described in paragraph (b)(2) of this section.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20758, Apr. 14, 2014; 81 FR 71354, Oct. 17, 2016]

§§ 324.12–324.19 [Reserved]

**Subpart C—Definition of Capital**

**§ 324.20 Capital components and eligibility criteria for regulatory capital instruments.**

(a) *Regulatory capital components.* An FDIC-supervised institution's regulatory capital components are:

- (1) Common equity tier 1 capital;
- (2) Additional tier 1 capital; and
- (3) Tier 2 capital.

(b) *Common equity tier 1 capital.* Common equity tier 1 capital is the sum of the common equity tier 1 capital elements in this paragraph (b), minus regulatory adjustments and deductions in § 324.22. The common equity tier 1 capital elements are:

(1) Any common stock instruments (plus any related surplus) issued by the FDIC-supervised institution, net of treasury stock, and any capital instruments issued by mutual banking organizations, that meet all the following criteria:

(i) The instrument is paid-in, issued directly by the FDIC-supervised institution, and represents the most subordinated claim in a receivership, insolvency, liquidation, or similar proceeding of the FDIC-supervised institution;

ceeding of the FDIC-supervised institution;

(ii) The holder of the instrument is entitled to a claim on the residual assets of the FDIC-supervised institution that is proportional with the holder's share of the FDIC-supervised institution's issued capital after all senior claims have been satisfied in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument has no maturity date, can only be redeemed via discretionary repurchases with the prior approval of the FDIC, and does not contain any term or feature that creates an incentive to redeem;

(iv) The FDIC-supervised institution did not create at issuance of the instrument through any action or communication an expectation that it will buy back, cancel, or redeem the instrument, and the instrument does not include any term or feature that might give rise to such an expectation;

(v) Any cash dividend payments on the instrument are paid out of the FDIC-supervised institution's net income and retained earnings and are not subject to a limit imposed by the contractual terms governing the instrument. An FDIC-supervised institution must obtain prior FDIC approval for any dividend payment involving a reduction or retirement of capital stock in accordance with 12 CFR 303.241;

(vi) The FDIC-supervised institution has full discretion at all times to refrain from paying any dividends and making any other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of any other restrictions on the FDIC-supervised institution;

(vii) Dividend payments and any other distributions on the instrument may be paid only after all legal and contractual obligations of the FDIC-supervised institution have been satisfied, including payments due on more senior claims;

(viii) The holders of the instrument bear losses as they occur equally, proportionately, and simultaneously with the holders of all other common stock instruments before any losses are borne by holders of claims on the FDIC-supervised institution with

greater priority in a receivership, insolvency, liquidation, or similar proceeding;

(ix) The paid-in amount is classified as equity under GAAP;

(x) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, did not purchase or directly or indirectly fund the purchase of the instrument;

(xi) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and is not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(xii) The instrument has been issued in accordance with applicable laws and regulations; and

(xiii) The instrument is reported on the FDIC-supervised institution's regulatory financial statements separately from other capital instruments.

(2) Retained earnings.

(3) Accumulated other comprehensive income (AOCI) as reported under GAAP.<sup>12</sup>

(4) Any common equity tier 1 minority interest, subject to the limitations in § 324.21(c).

(5) Notwithstanding the criteria for common stock instruments referenced above, an FDIC-supervised institution's common stock issued and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (b)(1)(iii), paragraph (b)(1)(iv) or paragraph (b)(1)(xi) of this section, provided that any repurchase of the stock is required solely by virtue of ERISA for an instrument of an FDIC-supervised institution that is not publicly-traded. In addition, an instrument issued by an FDIC-supervised institution to its employee stock ownership plan does not violate the criterion in paragraph (b)(1)(x) of this section.

(c) *Additional tier 1 capital.* Additional tier 1 capital is the sum of additional tier 1 capital elements and any related surplus, minus the regulatory adjustments and deductions in § 324.22. Additional tier 1 capital elements are:

(1) Instruments (plus any related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to depositors, general creditors, and subordinated debt holders of the FDIC-supervised institution in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(iv) The instrument has no maturity date and does not contain a dividend step-up or any other term or feature that creates an incentive to redeem; and

(v) If callable by its terms, the instrument may be called by the FDIC-supervised institution only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called earlier than five years upon the occurrence of a regulatory event that precludes the instrument from being included in additional tier 1 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act. In addition:

(A) The FDIC-supervised institution must receive prior approval from the FDIC to exercise a call option on the instrument.

(B) The FDIC-supervised institution does not create at issuance of the instrument, through any action or communication, an expectation that the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the FDIC-supervised institution must either: Replace the instrument to be called with an equal amount of instruments that meet the criteria under paragraph (b) of this section or this paragraph (c);<sup>13</sup> or demonstrate to the satisfaction of the FDIC that following

<sup>12</sup> See § 324.22 for specific adjustments related to AOCI.

<sup>13</sup> Replacement can be concurrent with redemption of existing additional tier 1 capital instruments.

redemption, the FDIC-supervised institution will continue to hold capital commensurate with its risk.

(vi) Redemption or repurchase of the instrument requires prior approval from the FDIC.

(vii) The FDIC-supervised institution has full discretion at all times to cancel dividends or other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of other restrictions on the FDIC-supervised institution except in relation to any distributions to holders of common stock or instruments that are *pari passu* with the instrument.

(viii) Any cash dividend payments on the instrument are paid out of the FDIC-supervised institution's net income and retained earnings and are not subject to a limit imposed by the contractual terms governing the instrument. An FDIC-supervised institution must obtain prior FDIC approval for any dividend payment involving a reduction or retirement of capital stock in accordance with 12 CFR 303.241.

(ix) The instrument does not have a credit-sensitive feature, such as a dividend rate that is reset periodically based in whole or in part on the FDIC-supervised institution's credit quality, but may have a dividend rate that is adjusted periodically independent of the FDIC-supervised institution's credit quality, in relation to general market interest rates or similar adjustments.

(x) The paid-in amount is classified as equity under GAAP.

(xi) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, did not purchase or directly or indirectly fund the purchase of the instrument.

(xii) The instrument does not have any features that would limit or discourage additional issuance of capital by the FDIC-supervised institution, such as provisions that require the FDIC-supervised institution to compensate holders of the instrument if a new instrument is issued at a lower price during a specified time frame.

(xiii) If the instrument is not issued directly by the FDIC-supervised institution or by a subsidiary of the FDIC-supervised institution that is an oper-

ating entity, the only asset of the issuing entity is its investment in the capital of the FDIC-supervised institution, and proceeds must be immediately available without limitation to the FDIC-supervised institution or to the FDIC-supervised institution's top-tier holding company in a form which meets or exceeds all of the other criteria for additional tier 1 capital instruments.<sup>14</sup>

(xiv) For an advanced approaches FDIC-supervised institution, the governing agreement, offering circular, or prospectus of an instrument issued after the date upon which the FDIC-supervised institution becomes subject to this part as set forth in § 324.1(f) must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the FDIC-supervised institution enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Tier 1 minority interest, subject to the limitations in § 324.21(d), that is not included in the FDIC-supervised institution's common equity tier 1 capital.

(3) Any and all instruments that qualified as tier 1 capital under the FDIC's general risk-based capital rules under 12 CFR part 325, appendix A (state nonmember banks) and 12 CFR part 390, subpart Z (state savings associations) as then in effect, that were issued under the Small Business Jobs Act of 2010<sup>15</sup> or prior to October 4, 2010, under the Emergency Economic Stabilization Act of 2008.<sup>16</sup>

(4) Notwithstanding the criteria for additional tier 1 capital instruments referenced above:

(i) An instrument issued by an FDIC-supervised institution and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (c)(1)(iii) of this section, provided that any repurchase is required solely by virtue of ERISA for an instrument of an FDIC-supervised institution that is not publicly-traded. In addition, an instrument issued by an

<sup>14</sup> See 77 FR 52856 (August 30, 2012).

<sup>15</sup> Public Law 111-240; 124 Stat. 2504 (2010).

<sup>16</sup> Public Law 110-343, 122 Stat. 3765 (2008).

FDIC-supervised institution to its employee stock ownership plan does not violate the criteria in paragraph (c)(1)(v) or paragraph (c)(1)(xi) of this section; and

(ii) An instrument with terms that provide that the instrument may be called earlier than five years upon the occurrence of a rating agency event does not violate the criterion in paragraph (c)(1)(v) of this section provided that the instrument was issued and included in an FDIC-supervised institution's tier 1 capital prior to the January 1, 2014, and that such instrument satisfies all other criteria under this paragraph (c).

(d) *Tier 2 Capital.* Tier 2 capital is the sum of tier 2 capital elements and any related surplus, minus regulatory adjustments and deductions in § 324.22. Tier 2 capital elements are:

(1) Instruments (plus related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to depositors and general creditors of the FDIC-supervised institution;

(iii) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument in relation to more senior claims;

(iv) The instrument has a minimum original maturity of at least five years. At the beginning of each of the last five years of the life of the instrument, the amount that is eligible to be included in tier 2 capital is reduced by 20 percent of the original amount of the instrument (net of redemptions) and is excluded from regulatory capital when the remaining maturity is less than one year. In addition, the instrument must not have any terms or features that require, or create significant incentives for, the FDIC-supervised institution to redeem the instrument prior to maturity;<sup>17</sup> and

(v) The instrument, by its terms, may be called by the FDIC-supervised institution only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called sooner upon the occurrence of an event that would preclude the instrument from being included in tier 2 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act. In addition:

(A) The FDIC-supervised institution must receive the prior approval of the FDIC to exercise a call option on the instrument.

(B) The FDIC-supervised institution does not create at issuance, through action or communication, an expectation the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the FDIC-supervised institution must either: Replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under this section;<sup>18</sup> or demonstrate to the satisfaction of the FDIC that following redemption, the FDIC-supervised institution would continue to hold an amount of capital that is commensurate with its risk.

(vi) The holder of the instrument must have no contractual right to accelerate payment of principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or similar proceeding of the FDIC-supervised institution.

(vii) The instrument has no credit-sensitive feature, such as a dividend or interest rate that is reset periodically based in whole or in part on the FDIC-supervised institution's credit standing, but may have a dividend rate that is adjusted periodically independent of the FDIC-supervised institution's credit standing, in relation to general market interest rates or similar adjustments.

<sup>17</sup>An instrument that by its terms automatically converts into a tier 1 capital instrument prior to five years after issuance complies with the five-year maturity requirement of this criterion.

<sup>18</sup>A FDIC-supervised institution may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(viii) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, has not purchased and has not directly or indirectly funded the purchase of the instrument.

(ix) If the instrument is not issued directly by the FDIC-supervised institution or by a subsidiary of the FDIC-supervised institution that is an operating entity, the only asset of the issuing entity is its investment in the capital of the FDIC-supervised institution, and proceeds must be immediately available without limitation to the FDIC-supervised institution or the FDIC-supervised institution's top-tier holding company in a form that meets or exceeds all the other criteria for tier 2 capital instruments under this section.<sup>19</sup>

(x) Redemption of the instrument prior to maturity or repurchase requires the prior approval of the FDIC.

(xi) For an advanced approaches FDIC-supervised institution, the governing agreement, offering circular, or prospectus of an instrument issued after the date on which the advanced approaches FDIC-supervised institution becomes subject to this part under § 324.1(f) must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the FDIC-supervised institution enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Total capital minority interest, subject to the limitations set forth in § 324.21(e), that is not included in the FDIC-supervised institution's tier 1 capital.

(3) ALLL up to 1.25 percent of the FDIC-supervised institution's standardized total risk-weighted assets not including any amount of the ALLL (and excluding in the case of a market risk FDIC-supervised institution, its standardized market risk-weighted assets).

(4) Any instrument that qualified as tier 2 capital under the FDIC's general risk-based capital rules under 12 CFR

part 325, appendix A (state nonmember banks) and 12 CFR part 390, appendix Z (state saving associations) as then in effect, that were issued under the Small Business Jobs Act of 2010,<sup>20</sup> or prior to October 4, 2010, under the Emergency Economic Stabilization Act of 2008.<sup>21</sup>

(5) For an FDIC-supervised institution that makes an AOCI opt-out election (as defined in § 324.22(b)(2), 45 percent of pretax net unrealized gains on available-for-sale preferred stock classified as an equity security under GAAP and available-for-sale equity exposures.

(6) Notwithstanding the criteria for tier 2 capital instruments referenced above, an instrument with terms that provide that the instrument may be called earlier than five years upon the occurrence of a rating agency event does not violate the criterion in paragraph (d)(1)(v) of this section provided that the instrument was issued and included in an FDIC-supervised institution's tier 1 or tier 2 capital prior to January 1, 2014, and that such instrument satisfies all other criteria under this paragraph (d).

(e) *FDIC approval of a capital element.*

(1) An FDIC-supervised institution must receive FDIC prior approval to include a capital element (as listed in this section) in its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital unless the element:

(i) Was included in an FDIC-supervised institution's tier 1 capital or tier 2 capital prior to May 19, 2010, in accordance with the FDIC's risk-based capital rules that were effective as of that date and the underlying instrument may continue to be included under the criteria set forth in this section; or

(ii) Is equivalent, in terms of capital quality and ability to absorb losses with respect to all material terms, to a regulatory capital element the FDIC determined may be included in regulatory capital pursuant to paragraph (e)(3) of this section.

(2) When considering whether an FDIC-supervised institution may include a regulatory capital element in

<sup>19</sup> A FDIC-supervised institution may disregard *de minimis* assets related to the operation of the issuing entity for purposes of this criterion.

<sup>20</sup> Public Law 111-240; 124 Stat. 2504 (2010)

<sup>21</sup> Public Law 110-343; 122 Stat. 3765 (2008)

its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, the FDIC will consult with the OCC and the Federal Reserve.

(3) After determining that a regulatory capital element may be included in an FDIC-supervised institution's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, the FDIC will make its decision publicly available, including a brief description of the material terms of the regulatory capital element and the rationale for the determination.

[78 FR 55471, Sept. 10, 2013, as amended at 81 FR 71354, Oct. 17, 2016]

#### § 324.21 Minority interest.

(a) *Applicability.* For purposes of § 324.20, an FDIC-supervised institution is subject to the minority interest limitations in this section if:

(1) A consolidated subsidiary of the FDIC-supervised institution has issued regulatory capital that is not owned by the FDIC-supervised institution; and

(2) For each relevant regulatory capital ratio of the consolidated subsidiary, the ratio exceeds the sum of the subsidiary's minimum regulatory capital requirements plus its capital conservation buffer.

(b) *Difference in capital adequacy standards at the subsidiary level.* For purposes of the minority interest calculations in this section, if the consolidated subsidiary issuing the capital is not subject to capital adequacy standards similar to those of the FDIC-supervised institution, the FDIC-supervised institution must assume that the capital adequacy standards of the FDIC-supervised institution apply to the subsidiary.

(c) *Common equity tier 1 minority interest includable in the common equity tier 1 capital of the FDIC-supervised institution.* For each consolidated subsidiary of an FDIC-supervised institution, the amount of common equity tier 1 minority interest the FDIC-supervised institution may include in common equity tier 1 capital is equal to:

(1) The common equity tier 1 minority interest of the subsidiary; minus

(2) The percentage of the subsidiary's common equity tier 1 capital that is not owned by the FDIC-supervised institution, multiplied by the difference

between the common equity tier 1 capital of the subsidiary and the lower of:

(i) The amount of common equity tier 1 capital the subsidiary must hold, or would be required to hold pursuant to paragraph (b) of this section, to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor; or

(ii)(A) The standardized total risk-weighted assets of the FDIC-supervised institution that relate to the subsidiary multiplied by

(B) The common equity tier 1 capital ratio the subsidiary must maintain to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor.

(d) *Tier 1 minority interest includable in the tier 1 capital of the FDIC-supervised institution.* For each consolidated subsidiary of the FDIC-supervised institution, the amount of tier 1 minority interest the FDIC-supervised institution may include in tier 1 capital is equal to:

(1) The tier 1 minority interest of the subsidiary; minus

(2) The percentage of the subsidiary's tier 1 capital that is not owned by the FDIC-supervised institution multiplied by the difference between the tier 1 capital of the subsidiary and the lower of:

(i) The amount of tier 1 capital the subsidiary must hold, or would be required to hold pursuant to paragraph (b) of this section, to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor; or

(ii)(A) The standardized total risk-weighted assets of the FDIC-supervised institution that relate to the subsidiary multiplied by

(B) The tier 1 capital ratio the subsidiary must maintain to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor.

(e) *Total capital minority interest includable in the total capital of the FDIC-*