

in paragraph (i)(1) of this section, unless the OCC notifies the bank prior to that date that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2). An eligible bank seeking to decrease its capital may request OCC approval for up to four consecutive quarters. The request need only specify a total dollar amount for the four-quarter period and need not specify amounts for each quarter. An eligible bank may decrease its capital pursuant to such a plan only if the bank maintains its eligible bank status before and after each decrease in its capital.

(3) *Notice of increase.* (i) After a bank completes an increase in capital it must submit a notice to the appropriate OCC licensing office. The notice must be acknowledged before a notary public by the bank's president, vice president, or cashier and contain:

(A) A description of the transaction, unless already provided pursuant to paragraph (i)(1) of this section;

(B) The amount, including the par value of the stock, and effective date of the increase;

(C) A certification that the funds have been paid in, if applicable;

(D) A certified copy of the amendment to the articles of association, if required; and

(E) A statement that the bank has complied with all laws, regulations and conditions imposed by the OCC.

(ii) After it receives the notice of capital increase, the OCC issues a certification specifying the amount of the increase and the effective date (*i.e.*, the date on which the increase occurred). In the case of a capital increase for which prior approval was not required pursuant to paragraph (g)(1)(i), the increase is deemed certified by the OCC seven days after receipt of the notice if the OCC has not issued a certification prior to that date.

(4) *Notice of decrease.* A national bank that decreases its capital in accordance with paragraphs (i)(1) or (i)(2) of this section must notify the appropriate OCC licensing office following the completion of the transaction.

(5) *Expiration of approval.* Approval expires if a national bank has not completed its change in permanent capital

within one year of the date of approval, unless the OCC specifies a longer period.

(6) *Exception for accounting adjustments.* (i) Changes to the permanent capital accounts that result solely from application of GAAP are not subject to the prior approval or notice requirements in paragraph (i)(1), (3), or (4) of this section, as applicable.

(ii) Within 30 days after the end of the quarter in which the adjustment occurred, a bank must notify the OCC if the accounting adjustment resulted in an increase or decrease to permanent capital in an amount greater than 5% of the bank's total permanent capital prior to the adjustments; or, if the bank is subject to a letter, order, directive, written agreement, or otherwise related to changes in permanent capital. The notification must include the amount and description of the adjustment, including the applicable provision of GAAP.

(j) *Offers and sales of stock.* A national bank must comply with the Securities Offering Disclosure Rules in 12 CFR part 16 for offers and sales of common and preferred stock.

(k) *Shareholder approval.* A national bank must obtain the necessary shareholder approval required by statute for any change in its permanent capital.

[80 FR 28454, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80463, Dec. 11, 2020]

§ 5.47 Subordinated debt issued by a national bank.

(a) *Authority.* 12 U.S.C. 93a, 1831o, and 3907.

(b) *Scope.* This section sets forth the requirements applicable to all subordinated debt issued by national banks and the procedures for OCC review and approval of a national bank's application to issue or prepay subordinated debt and a notice to include subordinated debt in tier 2 capital.

(c) *Definitions.* The following definitions apply to this section:

Capital plan means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

Original maturity means the stated maturity of the subordinated debt note. If the subordinated debt note does not have a stated maturity, then original maturity means the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of the subordinated debt note.

Payment on subordinated debt means principal and interest, and premium, if any.

Subordinated debt document means any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement.

Tier 2 capital has the same meaning as set forth in 12 CFR 3.20(d).

(d) *Requirements for issuance of subordinated debt.* A national bank issuing subordinated debt must satisfy the requirements of this paragraph (d).

(1) *Minimum terms.* The terms of any subordinated debt note issued by a national bank must:

- (i) Have a minimum original maturity of at least five years;
- (ii) Not be a deposit and not insured by the FDIC;
- (iii) Be subordinated to the claims of depositors;
- (iv) Be unsecured, which would include prohibiting the establishment of any legally enforceable fund earmarked for payment of the subordinated debt note through:
 - (A) A sinking fund; or
 - (B) A compensating balance or any other funds or assets subject to a legal right of offset, as defined by applicable State law;
- (v) Be ineligible as collateral for a loan by the issuing national bank;
- (vi) Provide that once any scheduled payments of principal begin, all scheduled payments must be made at least annually and the amount repaid in each year may be no less than in the prior year; and
- (vii) Provide that, where applicable, no payment (including payment pursu-

ant to an acceleration clause, redemption prior to maturity, repurchase, or exercising a call option) may be made without prior OCC approval.

(2) *Corporate authority.* A subordinated debt document must not include any provision or covenant that unduly restricts or otherwise acts to unduly limit the authority of a national bank or interferes with the OCC's supervision of the national bank. Specifically, this would include a provision or covenant that:

- (i) Maintains a certain minimum amount in its capital accounts or other metric, such as minimum capital assets, liquidity, or loan ratios;
 - (ii) Unreasonably restricts a national bank's ability to raise additional capital through the issuance of additional subordinated debt or other regulatory capital instruments;
 - (iii) Provides for default and acceleration of the subordinated debt as the result of a change in control, if such change in control results from the OCC's exercise of its statutory authority to require a national bank to sell stock in that national bank, enter into a merger or consolidation, or be acquired by a bank holding company;
 - (iv) Requires the prior approval of a purchaser or holder of the subordinated debt note in the case of a voluntary merger by a national bank where the resulting institution:
 - (A) Assumes the due and punctual performance of all conditions of the subordinated debt note and agreement; and
 - (B) Is not in default of the various covenants of the subordinated debt; and
 - (v) Provides for default and acceleration of the subordinated debt as the result of a default by a subsidiary (including a limited liability company) of the national bank, unless:
 - (A) There is a separate agreement between the subsidiary and the purchaser of the national bank's subordinated debt note; and
 - (B) Such agreement has been reviewed and approved by the OCC.
- (3) *Disclosure requirements.* (i) A national bank must disclose clearly on the face of any subordinated debt note the following language in all capital letters:

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(A) THIS OBLIGATION IS NOT A DEPOSIT AND IS NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION; and

(B) THIS OBLIGATION IS SUBORDINATED TO CLAIMS OF DEPOSITORS AND GENERAL CREDITORS, IS UNSECURED, AND IS INELIGIBLE AS COLLATERAL FOR A LOAN BY [INSERT NAME OF ISSUING NATIONAL BANK].

(ii) A national bank must disclose clearly and accurately in the subordinated debt note:

(A) The order and level of subordination, and in addition to being subordinated to the claims of depositors, provide that, at a minimum, the subordinated debt note is subordinate and junior in its right of payment to the obligations of all creditors, including both secured and unsecured or general creditors, except those specifically designated as ranking on a parity with, or subordinated to, the subordinated debt note;

(B) A general description of the OCC's regulatory authority with respect to a national bank in danger of insolvency that includes:

(1) With respect to insolvency, that the FDIC, acting as receiver, has authority to transfer a national bank's obligation under the subordinated debt note and to supersede or void any default, acceleration, or subordination that may have occurred;

(2) If a national bank that is "undercapitalized" as defined by applicable law fails to satisfactorily implement a required capital restoration plan, the national bank may be subject to all the additional restrictions and requirements applicable to a "significantly undercapitalized" institution, as defined by applicable law, including being required to sell shares in the national bank, being acquired by a depository institution holding company, or being merged or consolidated with another depository institution, and this authority supersedes and voids any defaults that may have occurred; and

(3) If a national bank is "critically undercapitalized," as defined by applicable law, the national bank is prohibited from making principal or interest payments on the subordinated debt

note without prior regulatory approval; and

(C) A description of the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default, if applicable to the subordinated debt issuance.

(D) A statement that the obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding.

(iii) A national bank must comply with the Securities Offering Disclosure Rules in 12 CFR part 16.

(e) *Additional requirements to qualify as tier 2 capital.* In order to qualify as tier 2 capital, a national bank's subordinated debt must meet the requirements in 12 CFR 3.20(d).

(f) *Process and procedures—(1) Issuance of subordinated debt—(i) Approval—(A) Eligible bank.* An eligible bank is required to receive prior approval from the OCC to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section, if:

(1) The national bank will not continue to be an eligible bank after the transaction;

(2) The OCC has previously notified the national bank that prior approval is required; or

(3) Prior approval is required by law.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section.

(ii) *Application to include subordinated debt in tier 2 capital.* A national bank that intends to include subordinated debt in tier 2 capital must submit an application to the OCC for approval, in accordance with paragraph (h) of this section, before or within ten days after issuing the subordinated debt. Where a national bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (g)(2)(i) of this section, and the national bank does not contemporaneously receive approval from the OCC

to include the subordinated debt as tier 2 capital, the national bank must submit an application for approval to include subordinated debt in tier 2 capital, pursuant to paragraph (h) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt in tier 2 capital unless the national bank has filed the application with the OCC and received approval from the OCC that the subordinated debt issued by the national bank qualifies as tier 2 capital.

(2) *Prepayment of subordinated debt—*(i) *Subordinated debt not included in tier 2 capital—*(A) *Eligible bank.* An eligible bank is required to receive prior approval from the OCC to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section, only if:

(1) The national bank will not be an eligible bank after the transaction;

(2) The OCC has previously notified the national bank that prior approval is required;

(3) Prior approval is required by law; or

(4) The amount of the proposed prepayment is equal to or greater than one percent of the national bank's total capital, as defined in 12 CFR 3.2.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section.

(ii) *Subordinated debt included in tier 2 capital.* All national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii) of this section.

(3) *Material changes to existing subordinated debt documents.* A national bank must receive prior approval from the OCC in accordance with paragraph (g)(1)(iii) of this section prior to making a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the secu-

rity under paragraph (f)(1)(i) of this section or to include it in tier 2 capital under paragraph (h) of this section.

(g) *Prior approval procedure—*(1) *Application—*(i) *Issuance of subordinated debt.* A national bank required to obtain OCC approval before issuing subordinated debt must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed issuance;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the proposed subordinated note and any other subordinated debt documents; and

(D) A statement that the subordinated debt issue complies with all applicable laws and regulations.

(ii) *Prepayment of subordinated debt.* A national bank required to obtain OCC approval before prepaying subordinated debt, pursuant to paragraph (f)(2) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed prepayment;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the subordinated debt note the national bank is proposing to prepay and any other subordinated debt documents; and

(D) Either:

(1) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(2) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(iii) *Material changes to existing subordinated debt.* A national bank required to obtain OCC approval before making a material change to an existing subordinated debt document, pursuant to

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paragraph (f)(3) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of all proposed changes;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the revised subordinated debt documents reflecting all proposed changes; and

(D) A statement that the proposed changes to the subordinated debt documents complies with all applicable laws and regulations.

(iv) *Additional information.* The OCC reserves the right to request additional relevant information, as appropriate.

(2) *Approval*—(i) *General.* The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the national bank prior to that date that the filing presents a significant supervisory or compliance concern or raises a significant legal or policy issue.

(ii) *Prepayment.* Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment, the national bank must receive affirmative approval from the OCC. If the OCC requires the national bank to replace the subordinated debt, the national bank must receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20 and must issue the replacement instrument prior to prepaying the subordinated debt, or immediately thereafter.⁴

(iii) *Tier 2 capital.* Following notification to the OCC pursuant to paragraph (f)(1)(ii) of this section that the national bank has issued the subordinated debt, the OCC will notify the national bank whether the subordinated debt qualifies as tier 2 capital.

(iv) *Expiration of approval.* Approval expires if a national bank does not

complete the sale of the subordinated debt within one year of approval.

(h) *Application procedure for inclusion in tier 2 capital.* (1) A national bank must submit an application to the appropriate OCC licensing office in writing before or within ten days after issuing subordinated debt that it intends to include in tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received approval from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The application must include:

(i) The terms of the issuance;

(ii) The amount or projected amount and date or projected date of receipt of funds;

(iii) The interest rate or expected calculation method for the interest rate;

(iv) Copies of the final subordinated debt documents; and

(v) A statement that the issuance complies with all applicable laws and regulations.

(i) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to transactions governed by this section.

(j) *Subordinated debt issued under the Emergency Capital Investment Program.* A provision or covenant included in a subordinated debt document does not unduly restrict or otherwise act to unduly limit the authority of a national bank or interfere with the OCC's supervision of the national bank, for purposes of paragraph (d)(2) of this section, if the provision or covenant is included pursuant to requirements imposed by the U.S. Department of the Treasury and the subordinated debt is issued under the U.S. Department of the Treasury's Emergency Capital Investment Program pursuant to section 104A of the Community Development Banking and Financial Institutions Act of 1994, added by the Consolidated Appropriations Act, 2021.

[79 FR 75421, Dec. 18, 2014, as amended at 80 FR 28455, May 18, 2015; 85 FR 80464, Dec. 11, 2020; 86 FR 15080, Mar. 22, 2021]

⁴A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.