

§ 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 notes 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.

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 Federal Deposit Insurance Corporation (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 shall be made at least annually and the amount repaid in each year shall be no less than in the prior year; and

(vii) Provide that, where applicable, no payment (including payment pursuant to an acceleration clause, redemption prior to maturity, repurchase, or exercising a call option) shall be made without prior OCC approval.

(2) *Corporate authority.* A subordinated debt note 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:

(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 require-

ments 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.

(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), including, for an advanced approaches national bank, the disclosure requirement in 12 CFR 3.20(d)(1)(xi).

(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) *Notice to include subordinated debt in tier 2 capital.* All national banks must notify the OCC, in accordance

with paragraph (h) of this section, within ten days after issuing subordinated debt that is to be counted as tier 2 capital. 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, the national bank must notify the OCC, pursuant to paragraph (h) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt as tier 2 capital unless the national bank has filed the notice with the OCC and received notification 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—*(A) *General.* Notwithstanding paragraph (f)(2)(i)(B) of this section, all national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii)(A) of this section.

(B) *Call option.* Notwithstanding this paragraph (f)(2)(ii)(A) of this section, a

national bank must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(2)(ii)(B) of this section, when the prepayment is a result of exercising a call option.

(g) *Prior approval procedure—*(1) *Application—*(i) *Issuance of subordinated debt.* A national bank required to obtain OCC approval before issuing subordinated debt shall 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 format and note agreement; and

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

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

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

(2) 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; and

(3) A copy of the subordinated debt instrument the national bank is proposing to prepay.

(B) *Call option.* (1) Before prepaying subordinated debt if the prepayment is in the form of a call option, a national bank is required to obtain OCC approval, pursuant to paragraph (g)(2)(ii) of this section, by submitting an application to the appropriate OCC licensing office.

(2) In addition to the information required in this paragraph (g)(1)(ii)(A) of this section, the application must include:

(i) A statement explaining why the national bank believes that following

§ 5.48

12 CFR Ch. I (1–1–16 Edition)

the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(ii) 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) *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) *Call option.* Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment in the form of a call option, the national bank must receive affirmative approval from the OCC to exercise the call option. 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 exercising the call option, 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) *Notice procedure for inclusion in tier 2 capital.* (1) All national banks shall notify the appropriate OCC licensing office in writing within ten days after issuing subordinated debt that it in-

tends to include as tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received notification from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The notice must include:

(i) The terms of the issuance;

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

(iii) A copy of the final subordinated note format and note agreement; and

(iv) 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.

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§ 5.48 Voluntary liquidation of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 93a, 181, 182, 1463, 1464, and 5412(b)(1)(B).

(b) *Licensing requirements.* A national bank or a Federal savings association considering going into voluntary liquidation shall provide preliminary notice to the OCC. The bank or savings association shall also file a notice with the OCC once a liquidation plan is definite. The bank or savings association may not begin liquidation unless the OCC has notified it that the OCC does not object to the liquidation plan.

(c) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to a voluntary liquidation. However, if the OCC concludes that the notice presents significant or novel policy, supervisory or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(d) *Standards—(1) In general.* In reviewing a proposed liquidation plan, the OCC will consider:

(i) The purpose of the liquidation;

(ii) Its impact on the safety and soundness of the national bank or Federal savings association; and

(iii) Its impact on the bank's or savings association's depositors, other creditors, and customers.

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