

**BILLING CODE: 4810-33-P**

**DEPARTMENT OF THE TREASURY  
OFFICE OF THE COMPTROLLER OF THE CURRENCY**

**12 CFR Parts 1, 4, 5, 16, 23, 24, 28, 32, 34, 46, 116,**

**143, 145, 159, 160, 161, 163 and 192**

**Docket ID OCC-2014-0004**

**RIN 1557-AD73**

**Basel III Conforming Amendments Related to Cross-References, Subordinated Debt and  
Limits Based on Regulatory Capital**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Interim final rule and request for comments.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is making technical and conforming amendments to its regulations governing national banks and Federal savings associations to make those regulations consistent with the recently adopted Basel III Capital Framework. As part of these technical amendments, the OCC is revising and clarifying its regulations governing subordinated debt applicable to national banks and Federal savings associations.

**DATES:** This interim final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Basel III Conforming Amendments Related to Cross-

References, Subordinated Debt and Limits Based on Regulatory Capital” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- **Federal eRulemaking Portal—“regulations.gov”**: Go to <http://www.regulations.gov>. Enter “Docket ID OCC-2014-0004” in the Search Box and click “Search.” Results can be filtered using the filtering tools on the left side of the screen. Click on “Comment Now” to submit public comments.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- **E-mail**: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).
- **Mail**: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., Suite 3E-218, Mail Stop 9W-11, Washington, DC 20219.
- **Hand Delivery/Courier**: 400 7<sup>th</sup> Street, SW., Suite 3E-218, Mail Stop 9W-11, Washington, DC 20219.
- **Fax**: (571) 465-4326.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC-2014-0004” in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in

your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to <http://www.regulations.gov>. Enter “Docket ID OCC-2014-0004” in the Search box and click "Search." Comments can be filtered by Agency using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 400 7<sup>th</sup> Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- **Docket:** You may also view or request available background documents and project summaries using the methods described above.

**FOR FURTHER INFORMATION CONTACT:** Jean Campbell, Senior Attorney, Legislative and Regulatory Activities Division, (202) 649-5490; and Patricia D. Goings, Senior Licensing Analyst, or Patricia Roberts, Senior Licensing Analyst, Licensing Division, (202) 649-6260.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. Basel III Capital Framework**

On October 11, 2013, the OCC published in the **Federal Register** the Basel III final rule (Basel III Capital Framework),<sup>1</sup> which revised the OCC's regulatory capital rules for national banks and Federal savings associations. The Basel III Capital Framework revised the capital framework at 12 CFR part 3 applicable to national banks, which included adding a new common equity tier 1 ratio requirement, revising the definitions of tier 1 and tier 2 capital, adopting a new standardized approach for certain banks, revising the advanced approaches, revising the market risk requirements, and integrating Federal savings associations into part 3. In addition, the Basel III Capital Framework amended the prompt corrective action rules at part 6 and integrated Federal savings associations into part 6.

##### 1. Need for Conforming and Technical Amendments

As part of the process of implementing the Basel III Capital Framework, the OCC restructured the regulatory capital rules in part 3, which included redesignation of the risk-based capital rules, market risk requirements, and the advanced approaches, codified at appendixes A, B and C, as new subparts to part 3. Accordingly, this interim final rule makes technical, clarifying, and conforming amendments to the OCC's rules applicable to national banks and Federal savings associations, by providing new cross-references to parts 3 and 6, where necessary, and by deleting obsolete references to tier 3 capital, which was eliminated in the market risk rule.<sup>2</sup> In addition, this interim final rule makes various substantive and technical changes to the subordinated debt rules to clarify the applicable requirements, processes and

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<sup>1</sup> See 78 FR 62018 (Oct. 11, 2013).

<sup>2</sup> See 77 FR 53060, 53069 (Aug. 30, 2012).

procedures. Finally, the OCC notes that one consequence of revising the cross-references to the definitions of tier 1 and tier 2 capital in the new Basel III Capital Framework is that new definitions of tier 1 and tier 2 capital will be applicable with respect to the calculation of various statutory and regulatory limits in other rules that referenced the risk-based capital requirements in part 3. As part of the revisions to those cross-references, the OCC has looked at the effect that the changes in the risk-based capital would have on numerical limits in other regulations that are based on regulatory capital. As discussed in greater detail below, the OCC believes that the new definitions of capital in the Basel III Capital Framework are appropriate measures for the calculation of other various statutory and regulatory limits. However, the OCC is aware of the possibility of indirect effects of these regulatory changes and requests comment on this aspect of the new definition of capital.

## 2. Timing of Basel III Capital Framework Changes

The mandatory compliance date for the Basel III Capital Framework is January 1, 2014, for advanced approaches national banks and Federal savings associations,<sup>3</sup> and January 1, 2015, for all other national banks and Federal savings associations. In order to accommodate these different compliance dates, the OCC has retained the existing regulatory capital rules for calendar year 2014 for non-advanced approaches national banks and Federal savings

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<sup>3</sup> The Basel III Capital Framework, at 12 CFR 3.100(b)(1), defines an advanced approaches national bank or Federal savings association to mean a national bank or Federal savings association that:

1. Has consolidated total assets, as reported on its most recent year-end Consolidated Reports of Condition and Income (Call Report) equal to \$250 billion or more;

2. Has consolidated total on-balance sheet foreign exposure on its most recent year-end Call Report equal to \$10 billion or more (where total on-balance sheet foreign exposure equals total cross-border claims less claims with a head office or guarantor located in another country plus redistributed guaranteed amounts to the country of head office or guarantor plus local country claims on local residents plus revaluation gains on foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report);

3. Is a subsidiary of a depository institution that uses the advanced approaches pursuant to subpart E of 12 CFR part 3 (OCC), 12 CFR part 217 (Board of Governors of the Federal Reserve System) (Board), or 12 CFR part 325 (Federal Deposit Insurance Corporation) (FDIC) to calculate its total risk-weighted assets;

4. Is a subsidiary of a bank holding company or savings and loan holding company that uses the advanced approaches pursuant to 12 CFR part 217 to calculate its total risk-weighted assets; or

5. Elects to use subpart E of 12 CFR part 3 to calculate its total risk-weighted assets.

associations. Therefore, the existing risk-based capital requirements and the market risk requirements will stay in place as 12 CFR part 3, appendixes A and B for non-advanced approaches national banks and 12 CFR part 167 for non-advanced approaches Federal savings associations, until January 1, 2015. Thereafter, the OCC may initiate a rulemaking to remove then-obsolete provisions of the rule.

## **II. Description of the Interim Final Rule**

### **A. Technical and Conforming Amendments**

The Basel III Capital Framework includes major revisions to the capital adequacy rules applicable to national banks and Federal savings associations. Apart from its role in establishing minimum regulatory capital requirements for the purposes of capital adequacy, regulatory capital historically also has served as a useful measure for numerous statutory and regulatory limits used as supervisory tools for safety and soundness purposes. Examples of such measures are the legal lending limits (12 CFR part 32) and limits on investment securities (12 CFR part 1).

While conforming amendments typically are straightforward, the Basel III Capital Framework introduced an additional level of complexity. As described above, the Basel III Capital Framework provided different mandatory compliance dates for advanced approaches national banks and Federal savings associations and non-advanced approaches national banks and Federal savings associations. As a result, from January 1, 2014, through December 31, 2014, the current regulatory capital rules at 12 CFR part 3, appendixes A and B and 12 CFR part 167 will apply to non-advanced approaches national banks and Federal savings associations, respectively. Accordingly, this interim final rule amends the OCC's rules to replace cross-references to the current regulatory capital rules with cross-references to both the Basel III final rule and the current regulatory capital rules, where appropriate.

The Basel III Capital Framework also integrated Federal savings associations into part 6, “Prompt Corrective Action.” Accordingly, this interim final rule replaces cross-references in various regulations to part 165, the Prompt Corrective Action rule formerly applicable to Federal savings associations, with cross-references to part 6, which applies to both national banks and Federal savings associations effective January 1, 2014. Finally, this interim final rule makes other non-substantive technical corrections.

## **B. Subordinated Debt**

### **1. Basel III Requirements for Tier 2 Capital**

This interim final rule clarifies and revises the OCC’s rules governing subordinated debt to make those rules consistent with the Basel III Capital Framework. Unlike the current regulatory capital rules, the Basel III Capital Framework does not identify specific types of instruments that are included in regulatory capital. Instead, the Basel III Capital Framework lists criteria that an instrument must satisfy to be included in regulatory capital. While the OCC acknowledges that a national bank or Federal savings association may want to issue subordinated debt for liquidity or reasons other than raising regulatory capital, the OCC expects that most subordinated debt generally would qualify as tier 2 capital. A list of the criteria for an instrument to qualify as tier 2 capital can be found at 12 CFR 3.20(d):

- The instrument is issued and paid-in;
- The instrument is subordinated to depositors and general creditors of the national bank or Federal savings association;
- The instrument is not secured, not covered by a guarantee of the national bank or Federal savings association or of an affiliate of the national bank or Federal savings association, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument in relation to more senior claims;

- 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 national bank or Federal savings association to redeem the instrument prior to maturity; and
- The instrument, by its terms, may be called by the national bank or Federal savings association 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 of 1940 (15 U.S.C. 80a-1 et seq.). In addition, with respect to any call option:
  - The national bank or Federal savings association must receive the prior approval of the OCC to exercise a call option on the instrument.
  - The national bank or Federal savings association does not create at issuance, through action or communication, an expectation the call option will be exercised.
  - Prior to exercising the call option, or immediately thereafter, the national bank or Federal savings association must either: replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under § 3.20; or demonstrate to the satisfaction of the OCC that

following redemption, the national bank or Federal savings association would continue to hold an amount of capital that is commensurate with its risk.

- 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 national bank or Federal savings association.
- 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 national bank's or Federal savings association's credit standing, but may have a dividend rate that is adjusted periodically independent of the national bank's or Federal savings association's credit standing, in relation to general market interest rates or similar adjustments.
- The national bank or Federal savings association, or an entity that the national bank or Federal savings association controls, has not purchased and has not directly or indirectly funded the purchase of the instrument.
- If the instrument is not issued directly by the national bank or Federal savings association or by a subsidiary of the national bank or Federal savings association that is an operating entity, the only asset of the issuing entity is its investment in the capital of the national bank or Federal savings association, and proceeds must be immediately available without limitation to the national bank or Federal savings association or the national bank's or Federal savings association's top-tier holding company in a form that meets or exceeds all the other criteria for tier 2 capital instruments under this section.
- Redemption of the instrument prior to maturity or repurchase requires the prior approval of the OCC.

- For an advanced approaches national bank or Federal savings association, the governing agreement, offering circular, or prospectus of an instrument issued after the date on which the advanced approaches national bank or Federal savings association becomes subject to 12 CFR part 3 under § 3.1(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 national bank or Federal savings association enters into a receivership, insolvency, liquidation, or similar proceeding.

2. Integration of Subordinated Debt Rules for National Banks and Federal Savings Associations

The OCC currently has separate rules for subordinated debt issued by national banks and Federal savings associations (12 CFR 5.47 and 12 CFR 163.81, respectively). In order to minimize confusion, this interim final rule does not integrate those rules. Instead, integration of those rules into a single subordinated debt rule applicable to both national banks and Federal savings associations may occur as part of a future rulemaking.

3. Subordinated Debt for National Banks

*i. Summary of current § 5.47*

A national bank's issuance and prepayment of subordinated debt and inclusion of subordinated debt in tier 2 capital is governed by 12 CFR 5.47, Subordinated debt as capital. Section 5.47 provides procedural and substantive requirements applicable to subordinated debt. Under paragraph (b) of the current rule, an eligible national bank<sup>4</sup> is required to obtain prior OCC approval to issue or prepay subordinated debt only if: (1) the bank will not be an eligible

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<sup>4</sup> An eligible bank is defined in 12 CFR 5.3 to mean a national bank that is "well capitalized" as defined in 12 CFR 6.4(b)(1); has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System; has a Community Reinvestment Act rating of "Outstanding" or "Satisfactory"; and is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive or, if subject to any such order, agreement or directive, is informed in writing by the OCC that the bank may be treated as an "eligible bank" for purposes of part 5.

bank after the transaction; (2) the OCC has previously notified the bank that prior approval is required; or (3) prior approval is required by law. All other national banks must receive prior OCC approval to issue or prepay subordinated debt. The major provisions of § 5.47 are summarized below.

Paragraph (e) provides that in order to qualify for inclusion in tier 2 capital, subordinated debt must meet the requirements in the OCC's regulatory capital rules (12 CFR part 3, appendix A, section 2(b)(4)) and must comply with the "OCC Guidelines for Subordinated Debt" in the OCC's Licensing Manual.

The regulatory capital rules in 12 CFR part 3, appendix A, limit the amount of subordinated debt that a bank may include in tier 2 capital, provide that in each of the last five years of the life of the instrument the amount eligible to be included in tier 2 capital is reduced by 20 percent of the original amount of that instrument, and require that subordinated debt included in tier 2 capital must meet the requirements of 12 CFR 3.100(f)(1) (2013).<sup>5</sup> By cross-reference, § 3.100(f)(1) (2013) further requires that issues of subordinated debt must: (1) have original weighted average maturities of at least five years; (2) be subordinated to the claims of depositors; (3) state on the face of the instrument that it is not a deposit and is not insured by the FDIC; (4) be unsecured; (5) be ineligible as collateral for a loan by the issuing bank; (6) 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 (7) provide that no prepayment (including payment pursuant to an acceleration clause or redemption prior to maturity) shall be made without prior OCC approval unless the bank remains an eligible bank after the prepayment.

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<sup>5</sup> The Basel III Capital Framework redesignated 12 CFR 3.100 as 12 CFR 3.701 effective January 1, 2014. Therefore, to avoid confusion, this interim final rule refers to 12 CFR 3.100 as 12 CFR 3.100 (2013).

Paragraphs (f), (g), and (i) generally address automatic approval, information requested to be included in the after-the-fact notice, and compliance with securities offering disclosure rules.

*ii. Structural changes to § 5.47 to comply with the Basel III Capital Framework*

In order to accommodate the different compliance dates for an advanced approaches bank and a non-advanced approaches bank, this interim final rule retains the current provisions of § 5.47 and makes amendments to clarify that the current rules will continue to apply to a non-advanced approaches bank prior to January 1, 2015. In addition, this interim final rule adds new paragraphs (j) through (p) that are based on the Basel III Capital Framework and provides that those paragraphs will be applicable to an advanced approaches bank beginning on the effective date of this interim final rule and to a non-advanced approaches bank on January 1, 2015. The OCC notes that these changes will apply to an advanced approaches bank when it files the Call Report for the first quarter of 2014. The OCC further notes that while paragraphs (b) through (i) and paragraphs (j) through (p) seem duplicative, this structure is intended to be temporary. Section 5.47 has been designed so that the paragraph numbering in the current rules remains unchanged until January 1, 2015. After January 1, 2015, when paragraphs (b) through (i) are no longer necessary, the OCC intends to delete them, along with all references to advanced approaches banks and non-advanced approaches banks.

Because the Basel III Capital Framework requires prior OCC approval for prepayment of subordinated debt, the interim final rule reorganizes paragraphs (j) through (p) by transaction type. As described in more detail below, the interim final rule retains current procedures for the issuance of subordinated debt, including the distinction between eligible and non-eligible banks, while the OCC adds new procedures for prepayment of subordinated debt included in tier 2 capital and prepayment in the form of a call option.

*iii. Description of changes to § 5.47*

As mentioned above, paragraphs (b) through (j) represent the current version of § 5.47, which needs to be retained until January 1, 2015. With respect to those provisions, the OCC makes minimal technical and clarifying changes.

A new paragraph (a)(2), “Applicability,” explains which banks are subject to which set of rules, and when they are subject to the rules. Specifically, an advanced approaches bank will be required to use the new set of rules reflecting the new Basel III Capital Framework for tier 2 capital beginning as of the effective date of this interim final rule. Non-advanced approaches banks (generally speaking, standardized approach banks) will not be subject to the new rules until January 1, 2015. In the meantime, standardized approach banks will continue to use the current rules (in paragraphs (b) through (i)).

Consistent with the Basel III Capital Framework, an advanced approaches bank is defined as a national bank that is subject to 12 CFR part 3, subpart E; a non-advanced approaches bank is defined as a national bank that is not subject to 12 CFR part 3, subpart E.

Based on a review of §§ 5.47 and 3.100(f) (2013), the OCC believes the current rules will benefit from clarifications regarding what, if any, requirements apply to subordinated debt that is not included in tier 2 capital. While § 5.47 itself does not specifically apply any requirements to such subordinated debt, through § 3.100(f) (2013) the OCC’s longstanding practice has been to apply those requirements to all subordinated debt. From a safety and soundness perspective, the OCC believes that it is important to apply certain basic requirements to all subordinated debt, regardless of whether it is included in tier 2 capital. Accordingly, new paragraph (l)(1) clarifies the list of requirements applicable to all subordinated debt. The interim final rule carries over the requirements in § 3.100(f) (2013) into paragraph (l)(1), with one minor change. Section 3.100(f) (2013) requires that subordinated debt must have an “original weighted average maturity” of at least five years. In order to be consistent with the Basel III Capital Framework,

this interim final rule, in paragraph (l)(1)(i), adopts the phrase “minimum original maturity” of at least five years.<sup>6</sup> This interim final rule carries over in paragraph (l)(1)(vi) the requirement in § 3.100(f)(1)(v) (2013) 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. This requirement appears to have been intended to ensure that an instrument that counted as secondary capital would have a sufficient degree of permanence and predictability to justify including it in secondary capital.<sup>7</sup> The OCC is considering whether to delete this requirement as no longer necessary from a supervisory perspective.

Question 1: The OCC invites comment on whether this payment requirement designed to ensure that a subordinated debt instrument has a sufficient degree of permanence and predictability is necessary, especially in light of the five year minimum maturity requirement.

Finally, the OCC notes that this interim final rule also carries over, in new paragraph (l)(1), the requirement in paragraph (i) of the current rule that a national bank must comply with the Securities Offering Disclosures Rules in 12 CFR part 16 when issuing subordinated debt.

Question 2: Given the clarifications in this interim final rule, are there any other requirements that the OCC should include?

*iv. New subordinated debt rules revised to reflect the Basel III Capital Framework*

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<sup>6</sup> We note that for amortizing bonds (or bonds with a sinking fund) a minimum original maturity of five years could be calculated as an original weighted average maturity of at least five years. For most bonds, the weighted average life is simply the time until maturity. For amortizing bonds, however, weighted average maturity must be calculated, with each repayment time weighted by the repayment amount. First, weighted payments must be determined by multiplying each principal repayment by the number of each payment period. For example, if a bond has an outstanding principal of \$100, and \$10 was repaid in the first year, \$20 in the second year, \$30 in the third year, and the remaining \$40 in the fourth year, then multiplying each payment period’s number by its repayment amount results in \$10 (\$10 X 1), \$40 (\$20 X 2), \$90 (\$30 X 3), and \$160 (\$40 X 4). Next the weighted payments are added. In this example the weighted total principal repayments equal \$300. Finally, the weighted total principal repayment is divided by the outstanding principal or face value of the bond. In this example, \$300 is divided by \$100, and the weighted average maturity of the amortizing bond is three years.

<sup>7</sup> See 46 FR 32498 (June 23, 1981). This requirement was included as part of a proposal by the FFIEC to promote a uniform definition of capital for use by the Federal bank supervisory agencies (Board, FDIC and OCC).

New paragraph (1) clarifies the substantive requirements for subordinated debt to qualify as tier 2 capital. Specifically, paragraph (1)(2)(i) requires subordinated debt included in tier 2 capital to meet the requirements set forth in 12 CFR 3.20(d) of the Basel III Capital Framework and comply with applicable OCC guidance for subordinated debt. The requirements in 12 CFR 3.20(d) are described in II.B.1. of this Supplementary Information.

By virtue of the cross-reference to 12 CFR 3.20(d), the interim final rule makes clear that any subordinated debt intended to count as tier 2 capital must satisfy the Basel III Capital Framework. While the interim final rule does not enumerate each and every requirement, the new requirements related to acceleration and prepayment are worth noting. Under the tier 2 capital requirements in the Basel III Capital Framework, the holder of a subordinated debt instrument must have no contractual right to accelerate principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or other similar proceeding of the bank. Thus, the interim final rule makes clear that subordinated debt that the bank does not intend to count as tier 2 capital may have broader acceleration clause triggers, while subordinated debt included in tier 2 capital may provide for acceleration only in the event of receivership, insolvency, liquidation, or similar proceedings.

With respect to call options, the Basel III Capital Framework provides that any exercise of a call option in the first five years following issuance is limited to: (1) a change in the applicable regulatory capital rules or policies that would preclude the instrument from being included in tier 2 capital; (2) the occurrence of a tax event; or (3) if the issuing entity is required to register as an investment company pursuant to the Investment Company Act of 1940. A bank may exercise a call option at any time after five years following issuance of the instrument. In addition, under the Basel III Capital Framework, prior to exercising a call option, or immediately thereafter, the bank must either: (1) replace any amount called with an equivalent amount of an

instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20; or (2) demonstrate to the satisfaction of the OCC that following redemption, the bank would continue to hold an amount of capital commensurate with its risk. The Basel III Capital Framework further clarifies in a footnote that a bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.<sup>8</sup> In order to remain consistent with the Basel III Capital Framework, the interim final rule incorporates this interpretation as footnote 1 in new paragraph (n)(2)(ii).

Assuming that the subordinated debt satisfies the substantive requirements in paragraph (l), paragraph (m) sets out the procedural requirements that a bank must follow in order to issue or prepay subordinated debt. Specifically, as to prior OCC approval, these procedural requirements reflect, to a large extent, the requirements of the current subordinated debt rule and the approval requirements in the Basel III Capital Framework.

Under the current subordinated debt rule, prior OCC approval generally is required for the issuance and prepayment of all subordinated debt, except in limited instances where the bank qualifies as an “eligible bank.” The Basel III Capital Framework also explicitly requires prior OCC approval for the exercise of a call option, redemption prior to maturity, and repurchase of subordinated debt.

This interim final rule attempts to reconcile these varying approval requirements while carrying forward the existing exception for eligible banks. Consequently, this interim final rule clarifies that, while prior approval generally is required for the issuance and prepayment of all subordinated debt, in certain areas where the bank is an eligible bank, this requirement may be satisfied by an after-the-fact notice. One important qualification to the eligible bank exception, however, concerns the prepayment of subordinated debt. The prior approval requirements for

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<sup>8</sup> See 12 CFR 3.20(d)(1)(v)(C), footnote 13.

such prepayments are set out in paragraph (m)(2), which distinguishes between prepayments on subordinated debt included in tier 2 capital and subordinated debt not included in tier 2 capital.

With respect to prepayment of subordinated debt that is not included in tier 2 capital, paragraph (m)(2)(i) adds a new threshold requirement, which provides that even if a bank is an eligible bank, prior OCC approval is required to prepay subordinated debt that is not included in tier 2 capital if the amount of the proposed prepayment is equal to or greater than one percent of the bank's total capital, as defined in 12 CFR 3.2. The OCC is adding this threshold because of a concern that, even in the case of an eligible bank, from a safety and soundness perspective the subordinated debt being prepaid may be significant enough, as a percentage of the bank's total capital, that the OCC should have a prior opportunity to review the prepayment.

Question 3: Is the new threshold appropriate? Should the percentage of total capital be higher or lower? Is there a different threshold that would serve the same purpose?

With respect to prepayment of subordinated debt that is included in tier 2 capital, consistent with the Basel III Capital Framework, the interim final rule requires all national banks to obtain prior OCC approval to prepay subordinated debt in accordance with the procedures in paragraph (n). New paragraph (n)(1)(i) sets forth the information that a bank must include in an application to issue or prepay subordinated debt. The information is nearly identical to the OCC current application requirements to issue or prepay subordinated debt, except for additional submission requirements necessary to implement the substantive Basel III Capital Framework requirements on the exercise of call options. Specifically, in addition to the general information required to be submitted under paragraph (n)(1)(ii)(A), paragraph (n)(1)(ii)(B) requires a national bank to submit either: (1) a statement explaining why the bank believes that following the proposed prepayment the 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.

New paragraph (n)(1)(iii) provides that the OCC retains the right to request additional relevant information as appropriate. Although there is no similar provision in the current rule, this right to request additional relevant information is consistent with the OCC's current licensing authority.

New paragraph (n)(2)(i) carries over the current automatic 30-day approval provisions which provide that an application is deemed approved by the OCC as of the 30<sup>th</sup> day after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory or compliance concern, or raises a significant legal or policy issue. This is identical to the procedure in the current rule, with the addition of procedures to address call options set out in new paragraph (n)(2)(ii). A special procedure is required because, as described above, the Basel III Capital Framework requires a bank exercising a call option either to replace the instrument or satisfy the OCC that following redemption the bank would continue to hold an amount of capital commensurate with its risk. Therefore, the "deemed approved" procedure in paragraph (n)(2)(i) applicable for all other applications for prepayment is not consistent with the Basel III Capital Framework when call options are involved.

Accordingly, new paragraph (n)(2)(ii) states that the bank must receive affirmative approval to exercise the call option and, if the OCC requires the bank to replace the subordinated debt, requires the bank to receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20. In addition, consistent with the Basel III Capital Framework, paragraph (n)(2)(ii) further requires that the bank must issue the replacement instrument prior to exercising the call option, or immediately thereafter, and

clarifies in footnote 1 that a bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.<sup>9</sup>

New paragraph (n)(2)(iv) carries over the current transaction timing requirements, which provide that approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval. This provision is generally the same as the current rule, with the addition of clarifying language necessary to address the issuance of replacement capital instruments.

The OCC notes that, consistent with longstanding practice, this interim final rule does not require the bank to notify the OCC or receive OCC prior approval to redeem subordinated debt in accordance with the stated maturity in the instrument.

Question 4: Do commenters agree with this approach? Are there any circumstances where the OCC should require notice or prior approval to redeem a subordinated debt instrument at maturity?

4. Subordinated Debt for Federal Savings Associations

i. *Background information regarding § 163.81*

A Federal savings association's issuance of subordinated debt and mandatorily redeemable preferred stock (collectively referred to as "covered securities") to be included in supplementary (tier 2) capital is governed by § 163.81, "Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital." This interim final rule amends § 163.81 to make it consistent with the Basel III Capital Framework and to make other non-substantive technical amendments. The Basel III Capital Framework's requirements for tier

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<sup>9</sup> In order to ensure enforceability of the requirement to issue a replacement instrument, consistent with longstanding practice, the OCC approval letter may provide that approval of the application is conditioned upon the bank issuing the replacement instrument within a specified period of time and that the condition is "imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request" within the meaning of 12 U.S.C. 1818, and as such, is enforceable under 12 U.S.C. 1818.

2 capital are set forth at 12 CFR 3.20(d) and listed above in Section II.B.1. of the Supplementary Information. The OCC notes that this interim final rule does not create a single subordinated debt rule applicable to both national banks and Federal savings associations. The OCC may integrate the two rules into a single subordinated debt rule applicable to both national banks and Federal savings associations as part of a future rulemaking.

ii. *Structural changes to § 163.81 to comply with Basel III Capital Framework*

To comply with the Basel III Capital Framework, this interim final rule makes structural changes to § 163.81 that mirror the structural changes to the national bank rules for subordinated debt in § 5.47 described in Section II.B.3.ii. of the Supplementary Information. Specifically, this interim final rule retains the current structure of § 163.81 and makes amendments to clarify that the current rule will continue to apply to a non-advanced approaches savings association prior to January 1, 2015. In addition, this interim final rule adds new paragraphs (h) through (q) that comply with the Basel III Capital Framework and provides that those paragraphs are applicable to an advanced approaches savings association beginning on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER], and a non-advanced approaches savings association on January 1, 2015. The OCC notes that, similar to the amendments to § 5.47, the amendments to § 163.81 are intended to be temporary. Section 163.81 has been structured in a manner so that the paragraph numbering in the current rules will remain unchanged, and after January 1, 2015, when paragraphs (a) through (g) are no longer necessary, the OCC intends to delete those paragraphs, along with all references to advanced approaches and non-advanced approaches savings associations. After paragraphs (a) through (g) are deleted, paragraphs (h) through (q) will be redesignated as paragraphs (a) through (j).

Because the Basel III Capital Framework requires prior OCC approval for prepayment of subordinated debt and imposes additional requirements when the prepayment is in the form of a

call option, neither of which are included in the current § 163.81, this interim final rule adds new provisions requiring prior approval for prepayment of covered securities included in tier 2 capital. As described in more detail below, the interim final rule retains current procedures for the issuance of covered securities included in tier 2 capital and the distinction between expedited and standard processing, while new procedures are being added for prepayment of subordinated debt included in tier 2 capital and prepayment in the form of a call option.

*iii. Description of changes to § 163.81*

(a) Changes to the current rule

For a non-advanced approaches savings association prior to January 1, 2015, the OCC retains the current rule with no substantive changes. The interim final rule revises paragraph (a) by renaming it “Applicability and scope” and adding a new paragraph (a)(1), “Applicability.” New paragraph (a)(1)(i) defines an advanced approaches savings association as a Federal savings association that is subject to 12 CFR part 3, subpart E, and a non-advanced approaches savings association as a Federal savings association that is not subject to 12 CFR part 3, subpart E. New paragraph (a)(1)(ii) provides that an advanced approaches savings association must comply with new paragraphs (h) through (q) of this section beginning on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. New paragraph (a)(1)(iii) provides that a non-advanced approaches savings association, prior to January 1, 2015, must comply with paragraphs (a) through (g) of this section, and beginning on January 1, 2015, must comply with paragraphs (h) through (q) of this section. This interim final rule redesignates the scope section as paragraph (a)(2) and amends it to clarify that paragraphs (a) through (g) of § 163.81 apply to a non-advanced approaches savings association prior to January 1, 2015. In addition, this interim final rule adds a sentence at the end of paragraph (a)(2) clarifying that covered securities not included in tier 2 capital are subject to the requirements of §163.80, “Borrowing limitations.”

The OCC is adding this sentence, which appears in the thrift supervision applications handbook,<sup>10</sup> to clarify that there are some requirements that apply to covered securities not included in tier 2 capital. Finally, the interim final rule makes non-substantive, technical amendments to the current rule.

(b) New provisions to comply with the requirements of the Basel III Capital Framework

To comply with the requirements of the Basel III Capital Framework, this interim final rule adds new paragraphs (h) through (q), which are applicable to an advanced approaches savings association beginning on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER], and a non-advanced approaches savings association beginning on January 1, 2015. Under new paragraph (h), “Scope,” a new paragraph (h)(1) provides the relevant dates on which advanced approaches and non-advanced approaches savings associations must comply with paragraphs (h) through (q) and, in order to comply with the Basel III Capital Framework, adds that those paragraphs also apply to the prepayment of covered securities included in tier 2 capital. In addition, this interim final rule adds the identical sentence described in Section II.B.4.iii.a. of the Supplementary Information, at the end of paragraph (h)(2) clarifying that covered securities not included in tier 2 capital are subject to the requirements of §163.80, “Borrowing limitations.” This interim final rule adds new paragraph (h)(3) that carries over the definition of mandatorily redeemable preferred stock from the current regulatory capital rules for savings associations.<sup>11</sup> This is necessary because the Basel III Capital Framework does not define this term and the current regulatory capital rules for savings

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<sup>10</sup> See Office of Thrift Supervision Applications Handbook, section 610, “Subordinated Debt and Mandatorily Redeemable Preferred Stock” (April 2001).

<sup>11</sup> See 12 CFR 167.5(b)(2)(iv).

associations will sunset after the Basel III Capital Framework becomes effective for all savings associations.

To comply with the Basel III requirement that Federal savings associations must obtain prior OCC approval to prepay instruments included in tier 2 capital, this interim final rule adds new paragraph (i). Paragraph (i) provides that a savings association must obtain prior OCC approval to prepay covered securities included in tier 2 capital. Consistent with Basel III, paragraph (i) further provides that, for the purposes of this requirement, the term “prepayment” includes acceleration of a covered security, repurchase of a covered security, redemption of a covered security prior to maturity, and exercise of a call option in connection with a covered security.

New paragraph (j), “Application and notice procedures,” is divided into two parts: (1) an application or notice to include covered securities in tier 2 capital, and (2) an application to prepay covered securities included in tier 2 capital. The requirements for an application to prepay covered securities included in tier 2 capital contain general rules, and rules that apply if the prepayment is in the form of a call option. The requirements in paragraph (j)(1) for an application or notice to include covered securities in tier 2 capital remain the same as the requirements in the current rule. The final rule adds a new paragraph (j)(2), “Application to prepay covered securities included in tier 2 capital.” Because the Basel III Capital Framework requires OCC prior approval to prepay all instruments included in tier 2 capital, paragraph (j)(2)(i), “General,” provides that such a filing is subject to standard treatment under 12 CFR part 116, subpart E. Paragraph (j)(2)(ii)(A) implements the Basel III Capital Framework requirement that, prior to exercising a call option, or immediately thereafter, a Federal savings association must either: replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under 12 CFR 3.20, or demonstrate to the satisfaction of the

OCC that following redemption, the savings association would continue to hold an amount of capital that is commensurate with its risk. The language in this provision mirrors the new language in the subordinated debt rule applicable to national banks. When the prepayment is in the form of a call option, paragraph (j)(2)(ii)(B) provides a special requirement that, if the OCC conditions its approval of repayment in the form of a call option on a requirement that a savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for a tier 1 or tier 2 instrument, the savings association must file an application to issue the replacement covered security and must receive prior OCC approval.

This interim final rule adds a new paragraph (k), “General requirements,” which provides that a covered security issued under this § 163.81 must satisfy the requirements for tier 2 capital in 12 CFR 3.20(d).

This interim final rule adds new paragraph (l), “Securities requirements for inclusion in tier 2 capital,” which addresses the form of a certificate evidencing a covered security and the disclosure of certain information. This interim final rule carries forward the disclosures required under the current rule, with an amendment to the requirement that a certificate must disclose that the savings association is required to obtain OCC approval before the acceleration of payment of principal on subordinated debt securities. In addition to acceleration, the Basel III Capital Framework requires prior OCC approval in the case of redemption prior to maturity, repurchase, or exercising a call option. Accordingly, this interim final rule adds those transactions to the disclosure. Also, since not all subordinated debt may include the ability to prepay in those circumstances, this interim final rule also adds the phrase, “where applicable” to clarify that the disclosure should include only those transactions that are provided for in the subordinated debt security.

New paragraph (l) carries over two provisions under the securities requirements of the current rule in paragraph (c)(2) and (3). The first requirement that is being removed is a requirement that covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years. The OCC is removing this requirement because the Basel III Capital Framework already requires that an instrument included in tier 2 capital must have a minimum original maturity of at least five years. The second requirement we are removing addresses mandatory prepayment and provides the circumstances under which covered securities may provide for events of default or contain other provisions that could result in a mandatory prepayment of principal. This provision is being removed because it is inconsistent with the requirement in the Basel III Capital Framework that the holder of an instrument included in tier 2 capital 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 other similar proceeding of the Federal savings association.

This interim final rule carries over with no substantive changes the provisions that address review by the OCC, amendments, sale of covered securities, and reports as new paragraphs (m), (n), (o), and (q), respectively.

In order to comply with the Basel III Capital Framework, this interim final rule adds new paragraph (p), “Issuance of a replacement regulatory capital instrument in connection with exercising a call option.” Paragraph (p) provides that when a Federal savings association seeks prior approval to exercise a call option in connection with a covered security included in tier 2 capital, the OCC may require the savings association to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes such a requirement, paragraph (p) requires the savings association to complete the sale of the covered security prior to, or immediately after, the prepayment. As discussed in Section

II.B.3.iv. of the Supplemental Information, consistent with the Basel III Capital Framework and amendments to the subordinated debt rule for national banks, the interim final rule adds a footnote clarifying that a savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

### **C. Limitations Based on Capital**

The OCC's rules currently cross-reference the part 3 definitions of tier 1 and tier 2 regulatory capital as the basis for limits in other regulations that are based on capital. Examples of such limits are the lending limit and the limit applicable to investment securities. One consequence of this final rule, which revises cross-references to the definitions of tier 1 and tier 2 capital to pick up the definitions in the new Basel III Capital Framework, is that the new definitions of tier 1 and tier 2 capital will be applicable with respect to the calculation of these other regulatory limits for advanced approaches banks and advanced approaches savings associations on the effective date of this interim final rule and for non-advanced approaches banks and savings associations on January 1, 2015. In determining to revise the cross-references, the OCC looked at the potential effect of the changes in capital on numerical limits that are based on regulatory capital.

The OCC has reviewed the effect of cross-referencing the Basel III Capital Framework on other OCC limits based on the amount of a bank's or savings association's capital and surplus.<sup>12</sup> Our overall assessment of the effect of these changes is that for most FDIC-insured institutions, we do not expect reliance on the Basel III Capital Framework to have a significant impact on lending limits or other components of a bank's or savings association's activities that

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<sup>12</sup> For national banks, the limitations based on capital use the term "capital and surplus," which is defined as tier 1 capital and tier 2 capital plus the amount of the allowance for loan and lease losses (ALLL) not included in the bank's tier 2 capital. For Federal savings associations, except for lending limits, which are based on "capital and surplus," the limitations based on capital use the term "total capital," which is defined as tier 1 capital plus tier 2 capital. The OCC determined that the difference between the two definitions was de minimis and therefore its analysis uses the term "capital and surplus" for both national banks and Federal savings associations.

are linked to the amount of a bank's or savings association's capital and surplus. While the Basel III rule is tightening the definition of what may count towards a bank's or savings association's capital and surplus, we expect that banks and savings associations generally will increase the amount of capital rather than reduce the amount of assets, in order to comply with minimum capital requirements under the capital rules. In addition, we further anticipate that banks and savings associations generally will choose to hold an additional 2.5 percent of total risk-weighted assets, for a total of 10.5 percent of total risk-weighted assets, in order to remain "well capitalized" and avoid limitations on distributions and discretionary bonus payments imposed by the new capital conservation buffer. Therefore, the OCC believes that under the Basel III Capital Framework, banks and savings associations holding capital at minimum required amounts generally will be holding more capital than under current rules, and thus, their lending limits and other limits tied to the amount of their capital and surplus will be unambiguously higher.

Even with respect to national banks and Federal savings associations that experience decreasing capital-linked limits because of the Basel III changes, the OCC does not expect this to be a problem for most institutions. First, based on our analysis, most banks and savings associations will experience little change in capital and surplus under the Basel III Capital Framework relative to current rules. Second, most banks and Federal savings associations typically hold capital in excess of regulatory minimums. The Basel III changes could cause capital amounts to decrease or increase for these institutions.<sup>13</sup> Banks that encounter lower limits on capital-linked activities because of the Basel III changes can increase these activity limits by

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<sup>13</sup> In particular, inclusion of accumulated other comprehensive income (AOCI) could increase the volatility of capital and surplus for those institutions required to include AOCI in common equity tier 1 capital. However, the OCC notes that under the Basel III Capital Framework, a bank or savings association that is not an advanced approaches bank or savings association may make a one-time election to opt out of the requirement to include all components of AOCI in common equity tier 1. For those institutions, the treatment of AOCI will remain the same.

increasing the amount of capital they hold, which is generally the intent of capital-linked activity regulations. Finally, a number of banks and savings associations have internal limits on activities far below the statutory limit; for those institutions, there would be no impact on their level of activity. However, even if the reduced statutory limit becomes a binding constraint, those institutions can make appropriate adjustments to their capital.

In addition, we note that, due to differing compliance dates in the Basel III Capital Framework, non-advanced approaches banks and savings associations will not experience any impact on the limits based on capital until January 1, 2015. Furthermore, the Basel III Capital Framework provides various transitions for the capital conservation and countercyclical capital buffers, regulatory capital adjustments and deductions, and non-qualifying capital instruments, which provides institutions an opportunity to adjust their capital and surplus levels to accommodate desired levels of any capital-linked activities. Nevertheless, we advise any banks or savings associations that have concerns about the potential negative impact of these conforming amendments, particularly advanced approaches banks during 2014, to discuss those concerns with their supervisors.

While the OCC does not anticipate that the definitional changes to capital in the Basel III Capital Framework will have a material impact on a significant number of national banks and Federal savings associations, the OCC is sensitive to potential concerns about the impact of these changes on limitations based on capital. To address these concerns, the OCC intends to closely monitor and assess the impact of the implementation of the Basel III Capital Framework on such limitations. As part of this process, the OCC may issue a separate notice of proposed rulemaking if the OCC sees specific safety and soundness or other supervisory concerns.

Question 5: To assist the OCC in information gathering, we are requesting comments on the impact of changes in the definition of capital on a bank's or savings association's limits based on capital.

### **III. Request for Comments**

In addition to the specifically enumerated questions in the preamble, the OCC requests comment on all aspects of this interim final rule. The OCC requests that, for the specifically enumerated questions, commenters include the number of the question in their response to make review of the comments more efficient.

### **IV. Regulatory Analysis**

#### **A. Administrative Procedure Act**

Pursuant to sections 553(b) and (d) of the Administrative Procedure Act (APA),<sup>14</sup> the OCC finds that there is good cause for issuing this interim final rule. The Basel III Capital Framework made major revisions to the capital adequacy rules applicable to national banks and Federal savings associations, including the substantive criteria and approval process for instruments included in tier 2 capital. All of those revisions to the OCC's capital adequacy rules were adopted through the notice and comment procedure in accordance with the APA. As described in the preamble to the Basel III Capital Framework, the agencies revised their regulatory capital requirements to promote safe and sound banking practices and implement Basel III and other aspects of the Basel III Capital Framework by adopting, among other things, rules intended to improve both the quality and quantity of a banking organization's capital.

This interim final rule revises §§ 5.47 and 163.81 to be consistent with those rules and makes other necessary clarifying and technical amendments to various regulations that impose regulatory limits based on capital. Because the mandatory compliance date for the Basel III

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<sup>14</sup> See 5 U.S.C. 553(b) and (d).

Capital Framework is January 1, 2014, for advanced approaches national banks and Federal savings associations, such institutions will be required to comply with the Basel III Capital Framework when they file their Call Report for the first quarter of 2014. It is necessary to publish this interim final rule in order to clarify for banks and savings associations which capital rules are applicable with respect to subordinated debt and the various limits based on capital. For these reasons, the OCC has determined that issuing a notice of proposed rulemaking would be impracticable, unnecessary, or contrary to the public interest. Accordingly, the OCC finds good cause to issue this interim final rule.

**B. Riegle Community Development and Regulatory Improvement Act**

The Riegle Community Development and Regulatory Improvement Act of 1994 requires that the effective date of new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions shall be the first day of a calendar quarter that begins on or after the date the regulations are published in final form.<sup>15</sup> For the reasons described above, the OCC finds good cause to make this interim final rule effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

**C. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>16</sup> generally requires an agency that is issuing a proposed rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA does not apply to a rulemaking where a general notice of proposed rulemaking is not required.<sup>17</sup> For the reasons described above, the OCC has determined, for good cause, that it is unnecessary to

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<sup>15</sup> See 12 U.S.C. 4802(b)(1).

<sup>16</sup> See 5 U.S.C. 601 et seq.

<sup>17</sup> See 5 U.S.C. 603 and 604.

publish a notice of proposed rulemaking for this interim final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

**D. Unfunded Mandates Reform Act**

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more, as adjusted for inflation, in any one year. The Unfunded Mandates Reform Act only applies when an agency issues a general notice of proposed rulemaking. Because the OCC is not publishing a notice of proposed rulemaking, this final rule is not subject to section 202 of the Unfunded Mandates Reform Act.

**E. Paperwork Reduction Act**

Under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501, et seq.), the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The OCC has submitted the information collection requirements contained in this rule to OMB.

This interim final rule amends a number of regulatory provisions that have currently approved collections of information under the PRA.<sup>18</sup> The amendments adopted today do not change the rules in a way that substantively modifies the collections of information that OMB has approved. Therefore, the changes to these collections will be limited to adjustments in the number of responses or frequency of response.

One new collection of information is introduced by the interim final rule. In order to prepay subordinated debt in the form of a call option, in addition to the general information

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<sup>18</sup> OMB Control Nos. 1557-0014, 1557-0190, 1557-0243, and 1557-0310.

required to be submitted by a national bank under § 5.47(n)(1)(ii)(A) and by a Federal savings association under 12 CFR part 116, subpart A, a bank or savings association must submit either a statement explaining why it believes that, following the proposed prepayment, it would continue to hold an amount of capital commensurate with its risk, or a description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under § 3.20, including the amount of such instrument and the time frame for issuance.

Title: Prepayment of Subordinated Debt in the Form of a Call Option.

Frequency of Response: Event generated.

Affected Public: Businesses or other for-profit organizations.

Total Burden for § 5.47 after issuance of interim final rule:

Number of Respondents: 184.

Burden per Respondent: 1.30 hours.

Total Burden: 239 hours.

The OCC requests comment on:

- a. Whether the information collection is necessary for the proper performance of the OCC's functions, and how the instructions can be clarified so that information gathered has more practical utility;
  - b. The accuracy of the OCC's estimates of the burdens of the information collection, including the validity of the methodology and assumptions used;
  - c. Ways to enhance the quality, utility, and clarity of the information to be collected;
  - d. Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology;
- and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

## **List of Subjects in 12 CFR**

### **Part 1**

Banks, banking, National banks, Reporting and recordkeeping requirements, Securities.

### **Part 4**

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

### **Part 5**

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

### **Part 16**

National banks, Reporting and recordkeeping requirements, Securities.

### **Part 23**

National banks.

### **Part 24**

Community development, Credit, Investments, Low and moderate income housing, National banks, Reporting and recordkeeping requirements, Rural areas, Small businesses.

### **Part 28**

Foreign banking, National banks, Reporting and recordkeeping requirements.

### **Part 32**

National banks, Reporting and recordkeeping requirements.

**Part 34**

Mortgages, National banks, Reporting and recordkeeping requirements.

**Part 46**

Banking, Banks, Capital, Disclosures, National banks, Recordkeeping, Reporting, Risk, Stress test.

**Part 116**

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations.

**Part 143**

Reporting and recordkeeping requirements, Savings associations.

**Part 145**

Consumer protection, Credit, Electronic funds transfers, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations.

**Part 159**

Reporting and recordkeeping requirements, Savings associations, Subsidiaries.

**Part 160**

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities.

**Part 161**

Administrative practice and procedure, Savings associations.

**Part 163**

Accounting, Administrative practice and procedure, Advertising, Conflict of interests, Crime, Currency, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

**Part 192**

Reporting and recordkeeping requirements, Savings associations, Securities.

For the reasons set forth in the preamble, the Office of the Comptroller of the Currency amends 12 CFR Chapter I as follows:

**PART 1—INVESTMENT SECURITIES**

1. The authority citation for part 1 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 24 (Seventh), and 93a.

2. Section 1.2 is amended by:

i. Revising paragraph (a)(1) to read as follows; and

ii. In paragraph (j)(4), removing the phrase “12 CFR 6.4(b)(1)” and adding the phrase “12 CFR 6.4” in its place.

The revision is set forth below.

**§ 1.2 Definitions.**

(a) \* \* \*

(1) A bank’s tier 1 and tier 2 capital calculated under the OCC’s risk-based capital standards set forth in 12 CFR part 3, as applicable (or comparable capital guidelines of the appropriate Federal banking agency), as reported in the bank’s Consolidated Reports of Condition and Income (Call Report) filed under 12 U.S.C. 161 (or under 12 U.S.C. 1817 in the case of a state member bank); plus

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**PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS**

3. The authority citation for part 4 is revised to read as follows:

**Authority:** 12 U.S.C. 1, 12 U.S.C. 93a, 12 U.S.C. 5321, 12 U.S.C. 5412, and 12 U.S.C. 5414. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p-1, 1831o, 1867, 1951 et seq., 2601 et seq., 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq.; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e. Subpart E is also issued under 12 U.S.C. 1820(k).

4. Section 4.7(b)(1)(iii)(A) is revised to read as follows:

**§ 4.7 Frequency of examination of Federal agencies and branches.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) \* \* \*

(A) The foreign bank's most recently reported capital adequacy position consists of, or is equivalent to, common equity tier 1, tier 1 and total risk-based capital ratios that satisfy the definition of “well capitalized” set forth at 12 CFR 6.4, respectively, on a consolidated basis; or

\* \* \* \* \*

**PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES**

5. The authority citation for part 5 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 93a, 215a-2, 215a-3, 481, 3907, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

6. Section 5.3 is amended by:

i. Revising paragraph (d)(1) to read as follows; and

ii. In paragraph (g)(1), removing the phrase “12 CFR 6.4(b)(1)” and adding the phrase “12 CFR 6.4” in its place.

The revision is set forth below.

**§ 5.3 Definitions.**

\* \* \* \* \*

(d) \* \* \*

(1) A bank’s tier 1 and tier 2 capital calculated under the OCC’s risk-based capital standards set forth in 12 CFR part 3, as applicable, as reported in the bank’s Consolidated Reports of Condition and Income (Call Report) filed under 12 U.S.C. 161; plus

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**§ 5.34 [Amended]**

7. Section 5.34(d)(2) is amended by removing the phrase “12 CFR 6.4(b)(1)” and adding the phrase “12 CFR 6.4” in its place.

**§ 5.36 [Amended]**

8. Section 5.36(c)(2) is amended by removing the phrase “12 CFR 6.4(b)(1)” and by adding the phrase “12 CFR 6.4” in its place.

**§ 5.39 [Amended]**

9. Section 5.39(d)(10) is amended by removing the phrase “12 CFR 6.2(g)” and adding the phrase “12 CFR 6.2” in its place.

**§ 5.46 [Amended]**

10. Section 5.46(e)(1) is amended by removing the phrase “, including a plan to achieve minimum capital ratios filed with the appropriate district office under 12 CFR 3.7”.

11. Section 5.47 is revised to read as follows:

**§ 5.47 Subordinated debt as capital.**

(a) Authority and applicability. (1) Authority. 12 U.S.C. 93a.

(2) Applicability. (i) For purposes of this section, an advanced approaches bank means a national bank that is subject to 12 CFR part 3, subpart E, and a non-advanced approaches bank means a national bank that is not subject to 12 CFR part 3, subpart E.

(ii) An advanced approaches bank, beginning on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER], must comply with paragraphs (j) through (p) of this section.

(iii) A non-advanced approaches bank, prior to January 1, 2015, must comply with paragraphs (b) through (i) of this section. Beginning on January 1, 2015, a non-advanced approaches bank must comply with paragraphs (j) through (p) of this section.

(b) Licensing requirements for non-advanced approaches banks prior to January 1, 2015.

A national bank does not need prior OCC approval to issue subordinated debt, or to prepay subordinated debt (including payment pursuant to an acceleration clause or redemption prior to maturity) provided the bank remains an eligible bank after the transaction, unless the OCC has previously notified the bank that prior approval is required, or unless prior approval is required by law. No prior approval is required for an eligible bank to count the subordinated debt as tier 2. However, an eligible bank issuing subordinated debt shall notify the OCC after issuance if the debt is to be counted as tier 2.

(c) Scope. For non-advanced approaches banks prior to January 1, 2015, paragraphs (b) through (i) of this section set forth the procedures for OCC review and approval of an application to issue or prepay subordinated debt and inclusion of subordinated debt in tier 2 capital.

(d) Definitions. (1) 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.

(2) Tier 2 capital has the same meaning as set forth in 12 CFR part 3, appendix A, section (2)(b).

(e) Qualification as regulatory capital. (1) A national bank's subordinated debt qualifies as tier 2 capital if the subordinated debt meets the requirements in 12 CFR part 3, appendix A, section 2(b)(4), and complies with the “OCC Guidelines for Subordinated Debt” (see Comptroller’s Licensing Manual, Subordinated Debt booklet, Appendix A).

(2) [Reserved](3) If the OCC notifies a national bank that it must obtain OCC approval before issuing subordinated debt, the subordinated debt will not qualify as tier 2 until the bank obtains OCC approval for its inclusion in capital.

(f) Prior approval procedure. (1) Application. A national bank required to obtain OCC approval before issuing or prepaying subordinated debt shall submit an application to the appropriate district office. The application must include:

- (i) A description of the terms and amount of the proposed issuance or prepayment;
- (ii) A statement of whether the 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;
- (iii) A copy of the proposed subordinated note format and note agreement; and
- (iv) A statement of whether the subordinated debt issue complies with all laws, regulations, and the “OCC Guidelines for Subordinated Debt” (see Comptroller’s Licensing Manual, Subordinated Debt booklet, Appendix A).

(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 bank prior to that date

that the filing presents a significant supervisory, or compliance concern, or raises a significant legal or policy issue.

(ii) Tier 2. When the OCC notifies the bank that the OCC approves the bank's application to issue or prepay the subordinated debt, it also notifies the bank whether the subordinated debt qualifies as tier 2.

(iii) Expiration of approval. Approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval.

(g) Notice procedure. If a national bank is not required to obtain approval before issuing subordinated debt, the bank shall notify the appropriate district office in writing within ten days after issuing subordinated debt that is to be counted as tier 2. The notice must include:

- (1) The terms of the issuance;
- (2) The amount and date of receipt of funds;
- (3) A copy of the final subordinated note format and note agreement; and
- (4) A statement that the issue complies with all laws, regulations, and the “OCC Guidelines for Subordinated Debt Instruments” (see Comptroller’s Licensing Manual, Subordinated Debt booklet, Appendix A).

(h) Exceptions to rules of general applicability. Sections 5.8, 5.10, and 5.11 do not apply to the issuance of subordinated debt.

(i) Issuance of subordinated debt. A national bank shall comply with the Securities Offering Disclosure Rules in 12 CFR part 16 when issuing subordinated debt even if the bank is not required to obtain prior approval to issue subordinated debt.

(j) Scope. For advanced approaches banks beginning [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER] and non-advanced approaches banks beginning January 1, 2015, paragraphs (j) through (p) of this section set forth the procedures for

OCC review and approval of an application to issue or prepay subordinated debt and a notice to include subordinated debt in tier 2 capital.

(k) Definitions.

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.

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

(l) Requirements applicable to subordinated debt for advanced approaches banks beginning [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER] and non-advanced approaches banks beginning January 1, 2015. (1) All subordinated debt 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;
- (iii) Be subordinated to the claims of depositors;
- (iv) Be unsecured;
- (v) Be ineligible as collateral for a loan by the issuing 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;
- (vii) Where applicable, provide that no prepayment (including payment pursuant to an acceleration clause, redemption prior to maturity, repurchase, or exercising a call option) shall be made without prior OCC approval; and
- (viii) Comply with the Securities Offering Disclosure Rules in 12 CFR part 16.

(2) 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) and must comply with applicable OCC guidance for subordinated debt.

(m) Licensing requirements for advanced approaches banks beginning [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER] and non-advanced approaches banks beginning January 1, 2015. (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 (n) of this section, if:

- (1) The bank will not continue to be an eligible bank after the transaction;
- (2) The OCC has previously notified the bank that prior approval is required; or
- (3) Prior approval is required by law.

(B) Bank not an eligible bank. A bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (n) of this section.

(ii) Notice to include subordinated debt in tier 2 capital. All national banks must notify the OCC, in accordance with paragraph (o) of this section, within ten days after issuing subordinated debt that is to be counted as tier 2 capital. Where a bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (n)(2)(i) of this section, the bank must notify the OCC, pursuant to paragraph (o) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt as tier 2 capital unless the bank has filed the notice with the OCC and received notification from the OCC that the subordinated debt issued by the 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 (n)(1)(i) of this section, only if:

- (1) The bank will not be an eligible bank after the transaction;
- (2) The OCC has previously notified the 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

bank's total capital, as defined in 12 CFR 3.2.

(B) Bank not an eligible bank. A 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 (n)(1)(i) of this section.

(ii) Subordinated debt included in tier 2 capital.

(A) General. Notwithstanding paragraph (m)(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 (n)(1)(ii)(A) of this section.

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

(n) 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 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 laws, regulations, and applicable OCC guidance for subordinated debt.

(ii) Prepayment of subordinated debt. (A) General. A national bank required to obtain OCC approval before prepaying subordinated debt, pursuant to paragraph (m)(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 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 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 (n)(2)(ii), by submitting an application to the appropriate OCC Licensing office.

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

(i) A statement explaining why the bank believes that following the proposed prepayment the 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 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 (n)(2)(i), if the application for prior approval is for prepayment in the form of a call option, the bank must receive affirmative approval to exercise the call option. If the OCC requires the bank to replace the subordinated debt, the 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.<sup>2</sup>

(iii) Tier 2 capital. Following notification to the OCC pursuant to paragraph (m)(1)(ii) that the bank has issued the subordinated debt, the OCC will notify the 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.

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

(2) The notice must include:

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<sup>2</sup> A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

- (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 laws, regulations, and applicable OCC guidance for subordinated debt.

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

## **PART 16—SECURITIES OFFERING DISCLOSURE RULES**

12. The authority citation for part 16 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq. and 93a.

### **§ 16.15 [Amended]**

13. Section 16.15(d) is amended by removing the phrase “part 3 of this chapter” and adding the phrase “12 CFR part 3, as applicable” in its place.

## **PART 23—LEASING**

14. The authority citation for part 23 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 24(Seventh), 24(Tenth), and 93a.

15. Section 23.2(b)(1) is revised to read as follows:

### **§ 23.2 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(1) A bank’s tier 1 and tier 2 capital calculated under the OCC’s risk-based capital standards set forth in 12 CFR part 3, as applicable, as reported in the bank’s Consolidated Reports of Condition and Income (Call Report) filed under 12 U.S.C. 161; plus

\* \* \* \* \*

**PART 24—COMMUNITY AND ECONOMIC DEVELOPMENT ENTITIES,  
COMMUNITY DEVELOPMENT PROJECTS, AND OTHER PUBLIC WELFARE  
INVESTMENTS**

16. The authority citation for part 24 continues to read as follows:

**Authority:** 12 U.S.C. 24(Eleventh), 93a, 481 and 1818.

17. Section 24.2 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

**§ 24.2 Definitions.**

(b) \* \* \*

(1) A bank's tier 1 and tier 2 capital calculated under the OCC's risk-based capital standards set forth in 12 CFR part 3, as applicable, as reported in the bank's Consolidated Reports of Condition and Income (Call Report) as filed under 12 U.S.C. 161; plus

(2) The balance of a bank's allowance for loan and lease losses not included in the bank's tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (b)(1) of this section, as reported in the bank's Call Report as filed under 12 U.S.C. 161.

\* \* \* \* \*

**PART 28—INTERNATIONAL BANKING ACTIVITIES**

18. The authority citation for part 28 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 24(Seventh), 93a, 161, 602, 1818, 3101 et seq., and 3901 et seq.

**§ 28.14 [Amended]**

19. Section 28.14(b) is amended by adding the phrase “subpart C,” after the phrase “12 CFR part 3,”.

**PART 32—LENDING LIMITS**

20. The authority citation for part 32 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 84, 93a, 1462a, 1463, 1464(u), and 5412(b)(2)(B).

**§ 32.2 [Amended]**

21. Sections 32.2 is amended by:

i. In paragraphs (i), (s), and (u), by removing the phrase “12 CFR part 3, appendix C, section 2” and adding the phrase “12 CFR 3.2” in its place;

ii. In paragraph (m)(1), by removing the phrase “12 CFR part 3, appendix C,” and adding “12 CFR 3.2,” in its place;

**§ 32.3 [Amended]**

22. Section 32.3(d)(2)(i)(A) is amended by removing the phrase “part 167 of this chapter.” and adding the phrase “12 CFR part 3, part 167, part 390, subpart Z, or part 324, as applicable.” in its place.

**§ 32.4 [Amended]**

23. Section 32.4(a)(2) is amended by removing the phrase “12 CFR 165.3” and adding the phrase “12 CFR 324.402” in its place.

**§ 32.9 [Amended]**

24. Section 32.9 is amended:

i. In paragraph (b)(1)(i)(C)(1)(i), by removing the phrase “12 CFR part 3, Appendix C, Section 32(d), 12 CFR Part 167, Appendix C, Section 32(d), or 12 CFR Part 390, subpart Z, Appendix A, Section 32(d)” and adding “12 CFR 3.132(d) or 324.132(d)” in its place;

ii. In paragraph (b)(1)(iii), by removing the phrase “12 CFR Part 3, Appendix C, Sections 32(c)(5), (6) and (7); 12 CFR Part 167, Appendix C, Sections 32(c)(5), (6), and (7); or 12 CFR Part 390, subpart Z, Appendix A, Sections 32(c)(5), (6) and (7)” and adding the phrase “12 CFR 3.132(c)(5), (6), and (7) or 324.132(c)(5), (6), and (7)” in its place;

iii. In paragraph (c)(1)(i)(A)(1), by removing the phrase “12 CFR Part 3, Appendix C, Section 32(b); 12 CFR Part 167, Appendix C, Section 32(b); or 12 CFR Part 390, subpart Z, Appendix A, Section 32(b)” and adding the phrase “12 CFR 3.132(b) or 324.132(b)” in its place; and

iv. In paragraph (c)(1)(iii), by removing “12 CFR Part 3, Appendix C, Sections 32(b)(2)(i) and (ii); 12 CFR Part 167, Appendix C, Sections 32(b)(2)(i) and (ii); or 12 CFR Part 390, subpart Z, Appendix A, Sections 32(b)(2)(i) and (ii)” and adding “12 CFR 3.132(b)(2)(i) and (ii) or 324.132(b)(2)(i) and (ii)” in its place.

#### **PART 34—REAL ESTATE LENDING AND APPRAISALS**

25. The authority citation for part 34 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 25b, 29, 93a, 371, 1465, 1701j-3, 1828(o), 3331 et seq., 5101 et seq., and 5412(b)(2)(B).

26. Appendix A to subpart D of part 34 is amended by revising footnote 2 to read as follows:

#### **Appendix A to Subpart D of Part 34 – Interagency Guidelines for Real Estate Lending**

\* \* \* \* \*

<sup>2</sup> For the state member banks, the term “total capital” means “total risk-based capital” as defined in appendix A to 12 CFR part 208. For insured state non-member banks, “total capital” refers to that term described in table I of appendix A to 12 CFR part 325. For national banks, the term “total capital” is defined at 12 CFR 3.2(e). For savings associations, the term “total capital” is defined at 12 CFR 567.5(c).

The cross-references in the first paragraph of this footnote were originally adopted in an interagency rulemaking and are out of date as a result of revisions to capital rules implementing

the Basel III Capital Framework. See 57 FR 63889 (December 31, 1992). For national banks and Federal savings associations, the term “total capital” is defined at 12 CFR 3.2, 3.2(e), or 167.5, as applicable. See 78 FR 62018 (October 11, 2013).

\* \* \* \* \*

27. Section 34.81 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

**§ 34.81 Definitions.**

(a) \* \* \*

(1) A bank’s tier 1 and tier 2 capital calculated under the OCC’s risk-based capital standards set forth in 12 CFR part 3, as applicable, as reported in the bank’s Consolidated Reports of Condition and Income (Call Report) as filed under 12 U.S.C. 161; plus

(2) The balance of a bank’s allowance for loan and lease losses not included in the bank’s tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (a)(1) of this section, as reported in the bank’s Call Report.

\* \* \* \* \*

**PART 46—ANNUAL STRESS TEST**

28. The authority citation for part 46 continues to read as follows:

**Authority:** 12 U.S.C. 93a; 12 U.S.C. 1463(a)(2); 12 U.S.C. 5365(i)(2); 12 U.S.C. 5412(b)(2)(B).

**§ 46.4 [Amended]**

29. Section 46.4(c) is amended by removing the phrase “3.12, as appropriate” and adding “3.404” in its place.

**PART 116—APPLICATION PROCESSING PROCEDURES**

30. The authority citation for part 116 continues to read as follows:

**Authority:** 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464, 2901 et seq.,  
5412(b)(2)(B).

**§ 116.5 [Amended]**

31. Section 116.5(f) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

**PART 143—FEDERAL MUTUAL SAVINGS ASSOCIATIONS – INCORPORATION,  
ORGANIZATION, AND CONVERSION**

32. The authority citation for part 143 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 et seq., 5412(b)(2)(B).

**§ 143.3 [Amended]**

33. Section 143.3(c)(2)(iii) is amended by removing the phrase “12 CFR parts 165 and 167” and adding the phrase “12 CFR parts 3, 6, 165, and 167, as applicable” in its place.

**PART 145—FEDERAL SAVINGS MUTUAL SAVINGS ASSOCIATIONS – CHARTER  
AND BYLAWS**

34. The authority citation for part 145 continues to read as follows:

**Authority:** 12 U.S.C. 1462a, 1463, 1464, 1828, 5412(b)(2)(B).

**§ 145.93 [Amended]**

35. Section 145.93(b)(3)(i) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

**§ 145.95 [Amended]**

36. Section 145.95(b)(1)(i) is amended by:

i. Removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place;

ii. Removing the phrase “§ 165.4(b)(2) of this chapter,” and adding the phrase “12 CFR 6.4,” in its place; and

iii. Removing the phrase “§ 165.4(b)(3) of this chapter,” and adding the phrase “12 CFR 6.4,” in its place.

## **PART 159—SUBORDINATE ORGANIZATIONS**

37. The authority citation for part 159 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1828, 5412(b)(2)(B).

### **§ 159.3 [Amended]**

38. Section 159.3 is amended by:

i. In paragraph 159.3(j) removing the phrase “(part 167 of this chapter)” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place; and

ii. In paragraph 159.3(j)(2) removing the phrase “(part 167 of this chapter)” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

### **§ 159.13 [Amended]**

39. Section 159.13(c) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

## **PART 160—LENDING AND INVESTMENT**

40. The authority citation for part 160 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1701j-3, 1828, 3803, 3806, 5412(b)(2)(B); 42 U.S.C. 4106.

### **§ 160.100 [Amended]**

41. Section 160.100 is amended by removing the phrase “12 CFR 167.1” and adding the phrase “12 CFR 3.22(a)(8)(iv) or 167.1, as applicable” in its place.

42. Section 160.101 is amended by revising footnote 2 to read as follows:

## **Appendix to § 160.101 —Interagency Guidelines for Real Estate Lending Policies**

\* \* \* \* \*

<sup>2</sup> For the state member banks, the term “total capital” means “total risk-based capital” as defined in Appendix A to 12 CFR part 208. For insured state non-member banks, “total capital” refers to that term described in table I of Appendix A to 12 CFR part 325. For national banks, the term “total capital” is defined at 12 CFR 3.2(e). For savings associations, the term “total capital” as described in part 167 of this chapter.

The cross-references in the first paragraph of this footnote were originally adopted in an interagency rulemaking and are out of date as a result of revisions to capital rules implementing the Basel III Capital Framework. See 57 FR 63889 (December 31, 1992). For national banks and Federal savings associations, the term “total capital” is defined at 12 CFR 3.2, 3.2(e), or 167.5, as applicable. See 78 FR 62018 (October 11, 2013).

\* \* \* \* \*

## **PART 161—DEFINITION FOR REGULATIONS AFFECTING ALL SAVINGS ASSOCIATIONS**

43. The authority citation for part 161 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 5412(b)(2)(B).

### **§ 161.55 [Amended]**

44. Section 161.55(c) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

## **PART 163—SAVINGS ASSOCIATION OPERATIONS**

45. The authority citation for part 163 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1817, 1820, 1828, 1831o, 3806, 5101 et seq., 5412(b)(2)(B); 31 U.S.C. 5318; 42 U.S.C. 4106.

**§ 163.74 [Amended]**

46. Section 163.74 is amended by:

i. In paragraph (i)(2)(iv) removing the phrase “part 167 of this chapter if a Federal savings association or 12 CFR part 390, subpart Z if a state savings association” and adding the phrase “12 CFR part 3 or part 167, as applicable, if a Federal savings association, or 12 CFR part 324 or part 390, subpart Z, as applicable, if a state savings association” in its place; and

ii. In paragraph (i)(2)(v) removing the phrase “part 167 of this chapter if a Federal savings association or 12 CFR part 390, subpart Z if a state savings association” and adding the phrase “12 CFR part 3 or part 167, as applicable, if a Federal savings association, or 12 CFR part 324 or part 390, subpart Z, as applicable, if a state savings association” in its place.

**§ 163.80 [Amended]**

47. Section 163.80(e)(1) is amended by:

i. Removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place; and

ii. Removing the phrase “12 CFR part 390, subpart Z” and adding the phrase “12 CFR part 324 or part 390, subpart Z, as applicable,”.

48. Section 163.81 is revised to read as follows:

**§ 163.81 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary (tier 2) capital.**

(a) Applicability and scope. (1) Applicability. (i) For purposes of this section, an advanced approaches savings association means a Federal savings association that is subject to 12 CFR part 3, subpart E, and a non-advanced approaches savings association means a Federal savings association that is not subject to 12 CFR part 3, subpart E.

(ii) An advanced approaches savings association, beginning on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER], must comply with paragraphs (h) through (q) of this section.

(iii) A non-advanced approaches savings association, prior to January 1, 2015, must comply with paragraphs (a) through (g) of this section. Beginning on January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (h) through (q) of this section.

(2) Scope. Prior to January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (a) through (g) of this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (“covered securities”) in supplementary capital (tier 2 capital) under part 167 of this chapter. If a savings association does not include covered securities in supplementary capital, it is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of § 163.80.

(b) Application and notice procedures. (1) A Federal savings association must file an application or notice under 12 CFR part 116, subpart A seeking the OCC's approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the OCC approves the application or does not object to the notice.

(2) A savings association must also comply with the securities offering rules at 12 CFR part 197 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(c) Securities requirements. To be included in supplementary capital, covered securities must meet the following requirements:

(1) Form. (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: “This security is not a savings account or deposit and it is not insured by the United States or any agency or fund of the United States;”

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association. An affiliate means any person or company which controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h), 12 CFR 3.11, and any other relevant restrictions;

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) State or refer to a document stating that the savings association must obtain OCC's approval before the voluntary prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntary redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in § 6.4 of this chapter, fails to meet the regulatory capital requirements at 12 CFR part 167, or would fail to meet any of these standards following the payment.

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) Maturity requirements. Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) Mandatory prepayment. Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the Federal savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) Indenture. (i) Except as provided in paragraph (c)(4)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 197.4) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in subsection (c)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6).

A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) Review by the OCC. (1) The OCC will review notices and applications under 12 CFR part 116, subpart E.

(2) In reviewing notices and applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the savings association's charter and bylaws.

(ii) The savings association is at least adequately capitalized under § 6.4 of this chapter and meets the regulatory capital requirements at part 167 of this chapter.

(iii) The savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) The OCC's approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(e) Amendments. If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) Sale of covered securities. The Federal savings association must complete the sale of covered securities within one year after the OCC's approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) Reports. A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as supplementary capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

(h) Scope. (1) Beginning [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER], an advanced approaches savings association must comply with paragraphs (h) through (q) of this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (“covered securities”) in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital.

(2) Beginning January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (h) through (q) of this section in order to include covered securities in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital. A Federal savings association that does not include covered securities in tier 2 capital is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of § 163.80.

(3) For purposes of this section, mandatorily redeemable preferred stock means mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Federal Home Loan Bank Board and approved in writing by the Federal Savings and Loan Insurance Corporation for inclusion as regulatory capital before or after issuance.

(i) Prior approval required for prepayment of covered securities included in tier 2 capital. A Federal savings association must obtain prior OCC approval to prepay covered securities included in tier 2 capital. For purposes of this requirement, prepayment includes acceleration of a covered security, repurchase of a covered security, redemption of a covered security prior to maturity, and exercising a call option in connection with a covered security.

(j) Application and notice procedures. (1) Application or notice to include covered securities in tier 2 capital. (i) A Federal savings association must file an application or notice under 12 CFR part 116, subpart A seeking the OCC's approval of, or non-objection to, the

inclusion of covered securities in tier 2 capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application or does not object to the notice.

(ii) A savings association also must comply with the securities offering rules at 12 CFR part 197 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(2) Application to prepay covered securities included in tier 2 capital. (i) General. A Federal savings association must file an application under 12 CFR part 116, subpart A seeking the OCC's prior approval to prepay covered securities included in tier 2 capital. The filing is subject to standard treatment under 12 CFR part 116, subpart E.

(ii) Prepayment in the form of a call option. (A) In addition to the information required by paragraph (j)(2) of this section, the application must include:

(1) A statement explaining why the Federal savings association believes that following the proposed prepayment the savings association 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.

(B) Notwithstanding paragraph (j)(1)(i) of this section, if the OCC conditions approval of prepayment in the form of a call option on a requirement that a Federal savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for a tier 1 or tier 2 instrument, the savings association must file an application to issue the replacement covered security and must receive prior OCC approval.

(k) General requirements. A covered security issued under this section must satisfy the requirements for tier 2 capital in 12 CFR 3.20(d).

(l) Securities requirements for inclusion in tier 2 capital. To be included in tier 2 capital, covered securities must satisfy the requirements in 12 CFR 3.20(d). In addition, such covered securities must meet the following requirements:

(1) Form. (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: “This security is not a savings account or deposit and it is not insured by the United States or any agency or fund of the United States;”

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association. An affiliate means any person or company which controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h), 12 CFR 3.11, and any other relevant restrictions;

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) Where applicable, state or refer to a document stating that the savings association must obtain OCC's prior approval before the acceleration of payment of principal or interest on subordinated debt securities, redemption of subordinated debt securities prior to maturity,

repurchase of subordinated debt securities, or exercising a call option in connection with a subordinated debt security.

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) Indenture. (i) Except as provided in paragraph (c)(4)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 197.4) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in subsection (c)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(m) Review by the OCC. (1) The OCC will review notices and applications under 12 CFR part 116, subpart E.

(2) In reviewing notices and applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the savings association's charter and bylaws;

(ii) The savings association is at least adequately capitalized under § 6.4 of this chapter and meets the regulatory capital requirements at 12 CFR 3.10;

(iii) The savings association is or will be able to service the covered securities;

(iv) The covered securities are consistent with the requirements of this section;

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund; and

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) The OCC's approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(n) Amendments. If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval or non-objection under this section before it may include the amended securities in tier 2 capital.

(o) Sale of covered securities. The Federal savings association must complete the sale of covered securities within one year after the OCC's approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file

the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(p) Issuance of a replacement regulatory capital instrument in connection with exercising a call option. Pursuant to 12 CFR 3.20(d)(1)(v)(C), the OCC may require a Federal savings association seeking prior approval to exercise a call option in connection with a covered security included in tier 2 capital to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes such a requirement, the savings association must complete the sale of such covered security prior to, or immediately after, the prepayment.<sup>1</sup>

(q) Reports. A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as tier 2 capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as tier 2 capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

### **§ 163.141 [Amended]**

49. Section 163.141 is amended by:

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<sup>1</sup> A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

i. In paragraph (b) removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place; and

ii. In paragraph (d) removing the phrase “§ 165.4(b)(1) of this chapter” and adding the phrase “12 CFR 6.4” in its place.

**§ 163.142 [Amended]**

50. Section 163.142 is amended by:

i. In the definition of “Affiliate”, removing the phrase “§ 563.41(b) until superseded by” and adding after the phrase “with affiliates”, the phrase “, 12 CFR part 223 (Regulation W)”.

ii. In the definition for “Capital”, removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

**§ 163.143 [Amended]**

51. Section 163.143 is amended by:

i. In paragraph (a)(3) by removing the phrase “§ 165.4(b)(2) of this chapter,” and adding the phrase “12 CFR 6.4” in its place; and

ii. In paragraph (b)(1) removing the phrase “§ 165.4(b)(1),” and adding the phrase “12 CFR 6.4,” in its place; and

iii. In paragraph (b)(2) removing the phrase “under part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

**§ 163.146 [Amended]**

52. Section 163.146 (a) is amended by removing the phrase “§ 165.4(b) of this chapter,” and adding the phrase “12 CFR 6.4” in its place.

**§ 163.560 [Amended]**

53. Section 163.560 is amended by:

i. In paragraph (a)(1) removing the phrase “part 167 of this chapter,” and adding the phrase “12 CFR part 3 or part 167, as applicable,” in its place; and

ii. In paragraph (a)(3) removing the phrase “part 165 of this chapter” and adding the phrase “12 CFR part 6” in its place.

## **PART 192—CONVERSIONS FROM MUTUAL TO STOCK FORM**

54. The authority citation for part 192 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901, 5412(b)(2)(B); 15 U.S.C. 78c, 78l, 78m, 78n, 78w.

### **§ 192.200 [Amended]**

55. Section 192.200(a)(2) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3, part 324, or part 390, subpart Z, as applicable” in its place.

### **§ 192.500 [Amended]**

56. Section 192.500 is amended by:

i. In paragraph (a)(12), removing the phrase “§ 165.4 of this chapter” and adding the phrase “12 CFR 6.4 or 324.403, as applicable” in its place.

ii. In paragraph (a)(12), removing the phrase “§ 165.7 of this chapter” and adding the phrase “12 CFR part 6, subpart B or 12 CFR 308.201, as applicable” in its place.

### **§ 192.520 [Amended]**

57. Section 192.520(b) is amended by removing the phrase “part 167 of this chapter” and adding the phrase “12 CFR part 3 or part 167, as applicable” in its place.

Date: February 24, 2014.

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Thomas J. Curry  
Comptroller of the Currency

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