

12 C.F.R. § 563.81 governs the issuance by savings institutions of qualifying subordinated debt securities and mandatorily redeemable preferred stock (MRPS), collectively referred to as qualifying debt securities. The regulation provides a mechanism for institutions to increase their regulatory capital under certain circumstances in view of OTS's capital rules at 12 C.F.R. Part 567 by including the proceeds from the sale of qualifying debt securities in their supplementary capital. 12 C.F.R. § 563.81 sets numerous requirements for the securities (e.g., debt security period to maturity of at least seven years) in order for the securities to be treated as "maturing capital instruments" that are includable in supplementary capital pursuant to 12 C.F.R. § 567.5(b)(2).

Qualifying debt securities reduce the risk to FDIC by transferring a portion of the risk to the holders of the qualifying debt securities. In the event of an involuntary liquidation of the institution, the holders of the qualifying securities are subordinate to the claims of FDIC.

Qualifying debt securities are a limited, short-term and often high cost source of capital. OTS will carefully analyze the financial condition of the applicant and the return on debt securities to determine whether the institution will benefit from the issuance of qualifying debt securities or create a greater risk to FDIC.

FILING REQUIREMENTS

Delegated Authority

Generally, applications and notices filed under this section may be processed by the Regional Office under delegated authority. However, certain situations may cause a filing to be nondelegated, including applications that raise a significant issue of law or policy. See Delegation Section 040 of the handbook for further information on the delegation process.

Expedited and Standard Processing Procedures

OTS processes applications using two procedures, expedited treatment and standard treatment. Applications filed under this section may qualify for either expedited or standard treatment, based on the criteria below.

Expedited Processing

The institution is eligible for expedited treatment if it satisfies all of the following criteria:

- Has a composite CAMELS rating of "1" or "2;"
- Has a CRA rating of "Satisfactory" or better;
- Has a Compliance rating of "1" or "2;"
- Meets or exceeds the minimum capital requirements set forth in 12 C.F.R. Part 567; and
- Has not been notified that it is in troubled condition.

If the institution qualifies for expedited processing, a notice is filed with the appropriate Regional Office. OTS considers a filing to be appropriately filed when sufficient information to evaluate the proposal is received from the applicant in its notice. Please refer to the “Processing Procedures and Time Frames” discussion of this section for more information on processing procedures and applicable time frames for notices.

Notices submitted by institutions eligible for expedited treatment are deemed “applications” for purposes of statutory and regulatory requirements referring to applications.

Standard Processing

If the applicant does not qualify for expedited processing, it must file an application subject to standard application processing time frames. Specifically, the institution is subject to standard processing if any of the following conditions exist regarding the institution:

- Has a composite CAMELS rating of “3,” “4” or “5;”
- Has a less than “Satisfactory” CRA rating;
- Has a Compliance rating of “3,” “4” or “5;”
- Has inadequate capital or fails at least one of its capital requirements;
- Has been notified that it is in troubled condition;
- The applicant is not a savings institution; or
- The applicant has not received a composite CAMELS rating, a CRA rating, or a compliance rating from any federal banking regulator.

Please refer to the “Processing Procedures and Time Frames” discussion of this section for more information on applicable time frames for applications.

Prefiling Meeting Requirements

Prefiling meetings are not required for this filing. However, applicants are encouraged to contact the Regional Office, particularly in the event the transaction involves unique or novel issues, to determine if a prefiling meeting will expedite the application review process.

Information and Form Requirements

All savings institutions must file either a notice or an application with OTS when issuing subordinated debt securities or mandatorily redeemable preferred stock to be included in regulatory capital. An institution may make the appropriate filing either before or after the securities are issued but may not include the securities in regulatory capital until after OTS issues an approval or nonobjection.

If delegated, all applications and notices should be filed with the appropriate Regional Office in accordance with 12 C.F.R. Part 516. The applicant should file the original and two copies of the application or notice with the appropriate Regional Office. The original filing, all copies, and all exhibits and other pertinent documents must be clearly marked and captioned as to the type of filing. One copy must contain original signatures on all executed documents. For applications that are not delegated to the Regional Office, an additional three copies of the application should be filed with the Applications Filing Room in OTS-Washington.

A savings institution eligible for expedited treatment should file OTS Form 1561 prior to including subordinated debt securities or mandatorily redeemable preferred stock in regulatory capital or prior to amending the terms of such securities. The institution must also comply with OTS securities offering rules at 12 C.F.R. Part 563g by filing an Offering Circular concerning the proposed issuance and sale of securities unless the securities offering qualifies for an exemption under 12 C.F.R. § 563g.3 (discussed further below). In addition to the notice, the institution should certify in writing to OTS that all regulatory requirements have been met.

OTS reserves the right to determine, after the 30 day notice period has expired, that the issuance does not comply with the requirements of 12 C.F.R. § 563.81 and Part 567. Refer to 12 C.F.R. § 563.81 for the eligibility requirements, limitation as to term, limitation on offering period and form of certificate, to determine whether an issuance of debt securities will be includable in the regulatory capital of an institution.

A savings institution required to file an application subject to standard processing procedures must file a completed OTS Form 1344 and receive OTS approval prior to including subordinated debt securities or mandatorily redeemable preferred stock in regulatory capital or prior to amending the terms of such securities. The institution should prepare the application in accordance with the instructions set forth in OTS Form 1344 and should provide meaningful and sufficient information in response to each of the items in the form. The institution must also comply with OTS securities offering rules at 12 C.F.R. Part 563g by filing an Offering Circular concerning the proposed issuance and sale of securities unless the securities offering qualifies for an exemption under 12 C.F.R. § 563g.3 (discussed further below). In addition to the application, the institution should certify in writing to OTS that all regulatory requirements have been met.

The information listed below will be required for all applications subject to standard processing procedures prior to including debt securities in regulatory capital:

- Charter. A copy of the applicant's charter, currently in effect, certified by the secretary of the applicant institution. However, if the applicant is a federal institution, the applicant need only specify its charter type, *e.g.*, federal mutual savings and loan institution, federal stock savings bank, etc.;
- Bylaws. A copy of the applicant's bylaws, currently in effect, certified by the secretary of the applicant institution;
- Resolutions. A certified copy of the resolutions duly adopted by the applicant's board of directors authorizing the issuance of the debt securities or the mandatorily redeemable preferred stock in accordance with the terms set forth in the application;

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- A cross-reference sheet specifying, by page number and section or paragraph, the location of the document provisions (form of the debt securities, related purchase agreement, or indenture) that are intended to satisfy the requirements-as-to-securities provisions of 12 C.F.R. § 563.81(d);
 - Form of debt securities. A copy of the form of the debt securities or the mandatorily redeemable preferred stock covered by the application and a copy of the related purchase agreement. (If the debt securities covered by the application are being issued pursuant to an indenture, the applicant's counsel must submit a letter stating whether the indenture would qualify under the Trust Indenture Act of 1939, and if not, indicate what provisions of the indenture would not qualify under the Trust Indenture Act of 1939.);
 - Any guarantee or insurance agreement;
 - Any distribution agreement, including any underwriting agreements;
 - Any compensating balance agreement or other arrangement;
 - Any state approval (when the institution is state-chartered);
 - Any offering circular or private placement memorandum to be furnished to prospective investors;
 - A copy of the applicant's most recent annual report;
 - An opinion from qualified independent counsel for the applicant opining as follows: (i) the issuance of the debt securities covered by the application is authorized by applicable law or regulation and is not inconsistent with any provision of the applicant's charter or bylaws (required only if the applicant is state chartered), or any other agreement known to such counsel to which the applicant, one of its service corporations, or holding company, is a party; (ii) the issuance of the debt securities has been duly authorized by the board of directors of the applicant, and upon issuance of the debt securities will be validly issued and constitute binding obligations of the applicant in accordance with their terms; (iii) the form of the debt securities and related purchase agreement comply with requirements as to debt securities set forth in 12 C.F.R. § 563.81(d)(1); (iv) with regard to any part of the offering circular or private placement memorandum, counsel has made reasonable investigation and on the basis of that investigation, believes the statements are true and not misleading. Such an opinion need not cover financial statements; and (v) the debt securities were offered and sold in compliance with 12 C.F.R. Part 563g;
 - Use of proceeds and reasons for issuance;
 - Capitalization plan;
 - Discussion of fees, commissions and other expenses;
 - Debt service requirements;
 - Statement of method used to amortize any debt discount and other expenses related to the issuance of the debt;
 - Written evidence of compliance with 12 C.F.R. § 563.81(b)(2);
 - Discussion of sinking-fund payments, other prepayments or reserve requirements; and

- Applicable financial statements as outlined in the last portion of the subordinated debt or mandatorily redeemable preferred stock application.

In some instances institutions do not seek to include the proceeds from otherwise qualifying debt securities in regulatory capital. Although 12 C.F.R. § 563.81 is inapplicable in such instances, the requirements of 12 C.F.R. § 563.80 apply in connection with the issuance of debt securities. For issuances of debt securities not involving a request for inclusion in regulatory capital and in excess of one year to maturity, no filings are necessary unless the institution does not meet its regulatory capital requirements under 12 C.F.R. § 567.2 or § 567.3. If the institution does not meet its regulatory capital requirements then, at least 10 business days prior to issuance, it must file with the Regional Director a notice of intent to issue debt securities containing the information required by 12 C.F.R. § 563.80(e)(1).

Confidentiality

The applicant must submit in writing, concurrently with the submission of the application, any requests to keep specific portions of the application confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information. OTS will not treat as confidential the portion of an application describing the plan to meet the Community Reinvestment Act objectives.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the application by reference to the confidential section; (ii) separately bound; and (iii) labeled “confidential.” The applicant should follow these same procedures when filing supplemental information to the application. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

REVIEW GUIDELINES

Processing Procedures and Time Frames

As noted in the Delegated Authority section, certain applications are not subject to delegated authority and are processed concurrently with OTS-Washington staff. As a general matter, correspondence from OTS regarding applications that are nondelegated will be transmitted from OTS-Washington. Correspondence on delegated applications will generally come from the Regional Office.

Within five business days of receipt of the application and the application fee, the Regional Office must notify the applicant of the application's receipt. The appropriate application fee must accompany each application in order for it to be considered filed. For nondelegated applications, the application will not be considered filed until received by both OTS-Washington and the Regional Office.

Section: Subordinated Debt and Mandatorily Redeemable Preferred Stock

Section 610

Within 30 calendar days of receipt of a properly submitted application, OTS shall take the following actions.

- Deem the application complete;
- Request, in writing, any additional information necessary to deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

Failure by OTS to act within 30 calendar days of receipt of the application for processing shall result in the application being deemed complete, commencing the period for review.

OTS must review requests for a waiver of an application requirement that certain information be supplied, in a timely manner. Unless OTS requests, in writing, additional information about the waiver request, or denies the waiver request, the waiver request shall be deemed granted.

If additional information is requested, a response must be submitted within 30 calendar days of the letter requesting such information. The applicant may, in writing, request a brief extension of the 30-calendar day period for responding to a request for additional information, prior to the expiration of the 30-calendar day time period. OTS, at its option, may grant the applicant a limited extension of time in writing. Failure to respond to a written request for additional information within 30 calendar days of such request may be deemed to constitute withdrawal of the application or may be treated as grounds for denial or disapproval of the application.

After the timely filing of additional information in response to an initial or subsequent request by OTS for additional information, OTS has 15 calendar days to review the additional information for completeness or appropriateness and take the one of the following actions.

- Request, in writing, any additional information necessary to deem the application complete;
- Deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

The 15-day review period commences when OTS receives a response that purports to respond to all questions in the information request. OTS may extend the 15-day review period for an additional 15 calendar days, if OTS requires the additional time to review the response. OTS will notify the applicant that it has extended the period before the end of the initial 15-day period.

Failure by OTS to act within 15 calendar days of receipt of the additional information shall result in the filed application being deemed complete, commencing the period for review.

Once the application has been deemed complete, there is a 60-calendar day review period during which time OTS will take into consideration all factors present in the application and render a decision thereon. If, upon expiration of the 60-day review period (assuming no extension has been

granted) OTS has failed to act, the application is deemed approved automatically, and the applicant may thereafter consummate the transaction.

During the review period, OTS may request additional information if the information is necessary to resolve or clarify the issues presented in the application. OTS may also notify the applicant that the application is incomplete and require that the applicant submit additional information to complete the application. The review period can be extended an additional 30 calendar days if OTS determines that additional time will be required to analyze the proposed transaction. In such cases, OTS must notify an applicant prior to the expiration of the period for review. In situations in which an application presents a significant issue of law or policy, OTS may extend the applicable period for review of such application beyond the time period for review. In these cases, written notice must be provided to an applicant no later than the expiration of the time period.

For purposes of calculating processing time frames, OTS does not include the day of the act or event, in determining the date the time period commences. In determining the conclusion of a time period, when the last day of the time period is a Saturday, Sunday, or a Federal holiday, the last day will become the next day that is not a Saturday, Sunday, or Federal holiday.

Under 12 C.F.R. § 516.290, if OTS has not acted on a pending application within two calendar years after the filing date, OTS may deem the application withdrawn unless OTS determines that the applicant is actively pursuing a final determination on the application. Applications that are subject to this withdrawal provision are those that have failed to timely take action such as filing required additional information, or OTS has suspended processing of an application based on circumstances that are, in whole or in part, within the applicant's control and have failed to take reasonable steps to resolve these circumstances.

Notices under Expedited Treatment

Within five business days of receipt of the notice and fee, OTS must notify the applicant of the notice's receipt. The appropriate fee must accompany each notice in order for the filing to be considered filed.

The applicant may engage in the proposed activities upon the expiration of 30 calendar days after the filing date of its notice, unless OTS takes one of the following actions before expiration of that time period:

- Requests, in writing, any additional information necessary to supplement the notification;
- Notifies the applicant that the notice is subject to standard treatment as it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information; or
- Disapproves of the notice.

Failure by OTS to act within 30 calendar days of receipt of the notice for processing shall result in the filed notice being accepted. If supplemental information is requested, the applicant will have 30 days

to provide such information. The 30-day time frame will begin anew upon receipt of such information.

For purposes of calculating processing time frames, OTS does not include the day of the act or event, in determining the date the time period commences. In determining the conclusion of a time period, when the last day of the time period is a Saturday, Sunday, or a Federal holiday, the last day will become the next day that is not a Saturday, Sunday, or Federal holiday.

Regulatory Criteria

Eligibility Requirements

12 C.F.R. § 563.81(b) sets out “eligibility requirements” that an institution must satisfy before OTS will approve an application for inclusion of the qualifying debt securities as regulatory capital. OTS may find that an institution has failed to satisfy the eligibility requirement of 12 C.F.R. § 563.81(b)(2) when OTS is of the opinion that “the overall policies, condition and operation” of the institution provide a basis for supervisory objection. The following are guidelines that OTS follows when evaluating whether there is a basis for supervisory objection:

- The institution's board of directors has not properly authorized the issuance of the securities;
- The institution is “undercapitalized” within the meaning of 12 C.F.R. § 565.4(b) (PCA) or otherwise fails to satisfy the regulatory capital requirements set out at 12 C.F.R. § 567.2;
- The institution has either a “4” or a “5” composite CAMELS rating;
- The institution has submitted a capital plan that is unrealistic or otherwise unacceptable;
- Information submitted in connection with the application or otherwise made available to the Regional Director indicates that the institution may be unable to service the proposed debt securities. Evaluation of the issuer's ability to service debt securities should be prospective, based upon the issuer's business plan;
- The institution has failed to comply with the terms and conditions imposed upon previous securities issuances included as regulatory capital;
- The institution’s proposed deployment of the proceeds from the securities issuance is contrary to the institution's business plan, is unrealistic in its assumptions or is inconsistent with principles of safety and soundness;
- The proposed issuance of debt securities fails to transfer risk from FDIC to the securities holders. An FDIC-insured institution's purchase of debt securities issued by another FDIC-insured institution would be one example of a transaction that fails to transfer risk from the deposit insurance fund; and
- The institution has failed to comply with any outstanding enforcement action or written agreement to the satisfaction of the Regional Director.

In addition, OTS should carefully review the securities-related covenants of the issuing institution to determine whether there are any provisions that are objectionable from a supervisory viewpoint.

General Criteria

- The institution should furnish evidence that the proposed issuance is authorized by applicable law and is not inconsistent with any provisions of the institution's charter or bylaws.
- The institution's actual and anticipated income from operations must be sufficient for payment of interest and amortization of debt, discount, and related expenses of the proposed issuance.
- The institution may not issue and sell the debt securities to another FDIC-insured institution or to a corporate affiliate (except the institution's holding company or a diversified savings and loan holding company of another institution).
- The institution may not sell its debt securities at its offices. See 12 C.F.R. § 563.76(a).

Inclusion in Capital

There are two inclusion-in-regulatory-capital issues: (1) Has the applicant demonstrated that it has satisfied the regulatory requirements of 12 C.F.R. § 563.81 (including the eligibility requirements thereof); and if so (2) What amount from the proceeds of the qualifying debt securities may the institution properly include in its regulatory capital? To address the second issue, refer to 12 C.F.R. § 567.5(b). Partial inclusions in regulatory capital are permissible. Section 567.5(b) refers to qualifying debt securities as "maturing capital instruments."

There are two tests for determining the amount the institution may include in the supplementary capital component of its regulatory capital. The first test is at 12 C.F.R. § 567.5(b)(3)(ii). The regulation provides that:

A savings institution issuing maturing capital instruments after November 7, 1989, may choose, subject to paragraph (b)(3)(ii)(C) of this section, to include such instruments pursuant to either paragraph (b)(3)(ii)(A) or (b)(3)(ii)(B) of this section:

- A. At the beginning of each of the last five years of the life of the maturing capital instrument, the amount that is eligible to be included as supplementary capital is reduced by 20% of the original amount of that instrument (net of redemption).
- B. Only the aggregate amount of maturing capital instruments that mature in any one year during the seven years immediately prior to an instrument's maturity that does not exceed 20% of an institution's capital will qualify as supplementary capital.

The institution's notice or application must include an election of either of the two methodologies contained in 12 C.F.R. § 567.5(b)(3)(ii)(A) or (B).

The second test, set out at the beginning of 12 C.F.R. § 567.5(b), limits the amount of supplementary capital to a maximum of 100 percent of the institution's core capital. The amount of the institution's core capital is determined by reference to 12 C.F.R. § 567.5(a), and the calculation is set out in the institution's Thrift Financial Report. The 100 percent-of-core test is continuous. If an institution's

core capital declines to zero at any time during the period in which the qualifying debt securities are outstanding, the amount of such securities permitted to count as regulatory capital immediately declines to zero. This exclusion from regulatory capital occurs notwithstanding the amount of qualifying debt securities includable at the time the application was approved or notice accepted.

Securities Offering Filings

The institution must comply with the securities offering regulations at 12 C.F.R. Part 563g in connection with its offer and sale of the qualifying debt securities. Each OTS-regulated savings institution is prohibited from offering or selling, directly or indirectly, any debt security issued by it unless the offer or sale is accompanied or preceded by an Offering Circular (OC) that has been filed, reviewed and declared effective by the Business Transactions Division of OTS's Chief Counsel's Office) (unless the offering qualifies for an exemption pursuant to 12 C.F.R. § 563g.3).

In addition, 12 C.F.R. § 563.81(g) sets out a limitation on the offering period for qualifying debt securities. OTS may extend the offering period if a written request is filed with the Regional Office no later than 30 days before the expiration of the offering period. The Regional Office has the authority to extend the offering period, provided the applicant complies with 12 C.F.R. § 563.81. If the applicant does not comply with the extension of time requirements, the Regional Office will notify the applicant that it must forward its request to OTS-Washington. The institution then must submit its request to the attention of the Applications Filing Room, OTS-Washington

Within five (5) days after the effective date of an OC or the commencement of a public offering (whichever occurs later), the institution must file three (3) copies of the OC with the appropriate Regional Office. Any OC, amendment, or consent filed should include an attached manually signed signature page that authorizes the filing and is signed by the appropriate representatives of the institution. See 12 C.F.R. § 563g.5(c).

Within 30 days of the first sale of securities, the institution issuing the securities must file a Form G-12 with the OTS securities filing desk in Washington, D.C. including the required information about the securities sold (See 12 C.F.R. § 563g.12 and § 563g.20)

Waivers

Debt securities issued pursuant to 12 C.F.R. § 563.81 must meet all the requirements set forth in 12 C.F.R. §§ 563.81(d)(1) – (4), unless OTS grants a written waiver request. OTS will not allow waiver of the requirements of paragraphs (d)(1)(i)(A) and (d)(1)(ii) of § 563.81.

Misc.

If securities involved in the issuance have terms providing for convertibility or warrants for voting stock, under certain circumstances, the purchaser of the qualifying debt securities may have to file a control related application or notice under 12 C.F.R. Part 574. See Sections 574.3 and 574.2(u)(3).

Decision Guidelines

The criteria for inclusion of debt securities in regulatory capital are intended to ensure, among other things, that the issuance of the securities is not detrimental to the interests of the institution's accountholders or to FDIC. A review of these filings should include an evaluation of present and future operations; the risk profile of the institution; an analysis of whether sufficient income will be generated to service the debt; and for what purpose the additional capital would be used. In conducting an evaluation, OTS should consider the following factors:

- Has the institution adequately addressed the eligibility requirements of § 563.81(b)?
- Did the institution submit a proper application or notice with required supporting information in conformity with § 563.81(c)?
- Did the institution satisfy all of the requirements-as-to-securities provisions of § 563.81(d), including the provisions concerning – (1) Form of Certificate; (2) Limitation as to Term; (3) Limitations on Sale to Certain Institutions; and (4) Indenture? Generally an institution must use an indenture for subordinated debt securities.
- Is the income from operations sufficient to service the debt securities?
- If the purchase price or interest rate has not been determined, did the applicant provide a minimum and maximum purchase price and interest rate?
- What is the current financial condition of the institution? What is the applicant's interest rate exposure and trend?
- Are the institution's lending and investment practices prudent?
- Does the institution have a high-risk profile such as a subprime lending or speculative construction lending?
- What are the economic benefits of the proposed debt securities issuance (other than inclusion as regulatory capital) that make this proposal attractive?
- Will the payment of interest or dividends on the proposed issuance jeopardize the institution's financial condition? Do the interest or dividend costs of the debt securities exceed the market rate and the institution's cost of money?
- Are the applicant's assumptions about the spread between the investment yield on assets and the interest or dividend costs of the debt securities reasonable?
- Are the projected yields on the proposed investment portfolio unreasonably high?
- What will the proceeds be invested in and could this investment have a detrimental effect on the institution's overall financial condition and operations?
- What risk is inherent in the proposed reinvestment of the proceeds? Is that risk acceptable? Does the institution have the necessary expertise to manage the investment?
- How does the maturity of the liability portfolio compare with the asset portfolio after the proceeds have been invested and after proposed liability growth has been incorporated?

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- Has the institution considered how it will replace capital over the last seven years of the term of the debt securities as its percentage of inclusion in regulatory capital percentage decreases?
 - Will the earnings generated from leveraging this temporary source of capital be sufficient to sustain the institution's increased growth upon the phase-out of the debt securities?
 - Will the institution issue its debt securities to its holding company?
 - If a holding company is purchasing debt from its insured subsidiary, what is the company's source of funds? Is leveraging involved?
 - Does the institution have outstanding subordinated debt? Is the total amount of debt securities currently in excess of the amount allowable by current OTS regulation?
 - Does the applicant have other applications pending or recently processed that affect its capital base (e.g., dividend notice, branch purchase)?
 - If a guarantee of the debt securities is by a third party or a stockholder, does any related agreement between the issuing institution (or its affiliate) and the third party guarantor involve a pledge of the institution's assets in consideration of that guarantee?
 - If the issuing institution purchases insurance for repayment of part or all of the debt securities, has the cost of this insurance been considered as an increase in the effective yield or cost of the debt securities?
 - Are there any outstanding conditions and/or agreements that the OTS may have with the institution that might limit the institution's ability to issue the debt securities?

Conditions

Listed below are the standard conditions of approval for this application type as set forth in 12 C.F.R. § 563.81:

- Where securities are to be sold pursuant to an offering circular required to be filed with OTS pursuant to 12 C.F.R. § 563g.2, and where such offering circular has not yet been declared effective prior to the date of approval or nonobjection to the subordinated debt or preferred stock application or notice, the offering circular in the form declared effective shall not disclose any material adverse information concerning the savings institution's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular filed as an exhibit to the application or notice.
- The savings institution shall submit to OTS no later than 30 days from the completion of the sale of the securities, certification of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.
- The savings institution shall submit to OTS no later than 30 days from the completion of the sale of the securities, the report(s) required by 12 C.F.R. § 563.81(h) and the following additional items: (i) three copies of an executed form of the securities issued pursuant to the subject application or notice and a copy of any related agreement or indenture governing the issuance of securities; and (ii) a certificate from the principal executive officer of the savings institution that states that to the best of his or her knowledge, none of the securities issued

pursuant to the subject application or notice were sold to any institution whose accounts are insured by the SAIF or a corporate affiliate thereof, except as permitted by 12 C.F.R. § 563.81.

- That, as of the date of approval or nonobjection, there have been no material changes with respect to the information disclosed in the application or notice as submitted to OTS.
- The savings institution receives prior written approval or nonobjection from OTS for any post-approval amendment to the securities or any related indenture if: (i) the proposed amendment modifies or is inconsistent with any provision of the securities, or the indenture that is required to be included therein by OTS's regulations as may then be in effect or would result in a transfer of risk to the savings institution or the SAIF or the BIF, as appropriate; and (ii) all or a portion of the proceeds from the issuance and sale of the securities would continue to be included in the regulatory capital of the savings institution following adoption of the amendment.
- The savings institution shall submit to OTS promptly after execution, one copy of each amendment to the securities or the related indenture, made after approval or nonobjection, and if prior approval of or nonobjection to such amendment was not obtained, shall also state the reason(s) such prior approval or nonobjection was not required;
- The savings institution shall not offer or sell the securities at any of its offices.

OTS may impose certain nonstandard conditions in connection with these filings. Any nonstandard conditions imposed will be based on the individual circumstances surrounding the application. In circumstances where nonstandard conditions will be imposed, they must be supported with justification in the recommendation memorandum related to approval of the application. Any nonstandard conditions incorporated into the approval letter or order must be summarized in the National Applications Tracking System record for the application.

RECORDKEEPING REQUIREMENTS

OTS is required to consolidate all correspondence related to the processing of the notice or application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

MONITORING AND CONTROL

The approval order or letter may include conditions of approval. The Regional Office will monitor compliance with any conditions imposed in connection with an application's approval. The applicant must submit evidence of satisfaction of the conditions included in the approval order or letter to the Regional Office within the stated time frames.

The Regional Office should notify the appropriate staff responsible for the supervision and examination of the institution regarding the action taken on an application. In addition, the Regional Office should provide the appropriate staff with copies of the approval order or letter. If an application is approved, the first examination of the institution following the approval should include a review of compliance with all conditions of approval and any changes in operations as a result of the transaction.

A review of the application file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the application in the Regional Office, including a review of the documentation maintained in the application file.

INFORMATION SOURCES

Statutes

12 USC § 1463(h)

Regulations & Other Guidance – Specific to Qualifying Debt Securities

12 C.F.R. § 563.81	Issuance of Subordinated Debt Securities and Mandatorily Redeemable Preferred Stock
12 C.F.R. § 563.76	Offers and Sales of Securities at an Office of a Savings Institution
12 C.F.R. § 567.5 Thrift Activities Handbook Section 110.5	Regulatory Capital Capital Stock and Ownership

Regulations Concerning Securities and Securities Offerings

12 C.F.R. § 561.44	Definition of the term “Security”
12 C.F.R. § 563.5	Securities: Statements of Noninsurance
12 C.F.R. Part 563d	Securities of Savings Institutions
12 C.F.R. Part 563g	Securities Offerings

OTS Forms

Form 1344
Form 1561