

## OFFICE OF THRIFT SUPERVISION

### Approval of a Notice for Inclusion of Subordinated Debt in Regulatory Capital And Related Waiver Requests

Order No.: 2002-67  
Date: December 20, 2002  
OTS No. 07302

Webster Bank, Waterbury, Connecticut (Savings Bank), seeks approval of the Office of Thrift Supervision (OTS) pursuant to 12 C.F.R. § 563.81 (the Sub Debt Regulation) to include an issuance of subordinated debt in its regulatory capital computation (the Notice). The Savings Bank has requested waivers of: (i) the requirement of 12 C.F.R. § 563.81(d)(1)(iii) to include as a term that the notes may be prepaid during the 15 months prior to maturity; and (ii) the indenture and trustee requirements in 12 C.F.R. § 563.81(d)(4). The indenture would be replaced by a Fiscal and Paying Agent Agreement (Agreement).

The Savings Bank proposes to issue \$250 million of unsecured, subordinated debt in an offering registered pursuant to 12 C.F.R. Part 563g, OTS' Securities Offering regulation. The offering is expected to receive an "investment grade" rating and will be offered through an underwriter in minimum denominations of \$250,000. The offering will be only to institutional investors that would qualify as "accredited investors" pursuant to Rule 501(a)(1), (2), (3), or (7) of the Securities and Exchange Commission's Regulation D, 17 C.F.R. § 230.501(a)(1), (2), (3), or (7). The subordinated debt would be issued pursuant to a form of note and administered pursuant to the Agreement. The Agreement would set the terms for administrative duties and functions of the Fiscal and Paying Agent (Paying Agent), such as recordkeeping, and payment of principal and interest.

The Sub Debt Regulation requires OTS, in evaluating a savings association's application for subordinated debt to be eligible for inclusion in regulatory capital, to consider whether: (i) the issuance is authorized by applicable law and not inconsistent with any provision of the savings association's charter or bylaws, (ii) in the opinion of OTS, the overall policies, condition and operations of the savings association afford a supervisory basis for objection for inclusion in regulatory capital; and (iii) the issuance will result in a transfer of risk from the Bank Insurance Fund (BIF) or Savings Association Insurance Fund (SAIF) to parties other than savings associations.<sup>1</sup>

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<sup>1</sup> See 12 C.F.R. § 563.81(b)(1)-(3) (2002).

In addition, the Sub Debt Regulation requires that the form of certificate of the note include certain legends.<sup>2</sup> The maturity or required redemption of the instrument may not be less than seven years.<sup>3</sup> The instrument may not be sold to: (i) a Federal Home Loan Bank or, except with the prior approval of OTS in a supervisory case, to the Federal Deposit Insurance Corporation; and (ii) without the prior written approval of OTS, to another savings association or any corporate affiliate thereof, with certain exceptions.<sup>4</sup> The Sub Debt Regulation provides that the issuer must use an indenture that provides for the appointment of a trustee other than the issuer or an affiliate of the issuer and provide for certain collective enforcement rights and remedies for the security holders.<sup>5</sup> Section 563.81(k) imposes certain conditions of approval.

The issuance of subordinated debt is authorized by section 5(b)(2) of the Home Owners' Loan Act, and is not inconsistent with the Savings Bank's charter or bylaws. Further, there is a sufficient transfer of risk from the SAIF or BIF to other parties because the Savings Bank has stated, and the offering materials for the subordinated debt provide, that the subordinated debt will be placed with parties that are not insured depository institutions or corporate affiliates thereof. Based on the terms of the subordinated note and representations made in connection with the Notice, OTS has concluded that the other requirements of the Sub Debt Regulation are met, with the exception of the provisions for which waivers have been requested.

OTS may waive the applicability of any regulation for good cause, to the extent permitted by statute.<sup>6</sup> Neither of the regulatory provisions in question is set forth in any statute.

The Savings Bank requests that the prepayment requirement in section 563.81(d)(1)(iii) be waived. This section requires that the certificate evidencing the subordinated note state, or refer to a document stating, the terms under which the Savings Bank may prepay the obligation, which must include at least the right to prepay without premium or other penalty during the 15 months immediately prior to the maturity date.

One of the general purposes of the Sub Debt Regulation is to ensure that the debt stays outstanding long enough that it functions as a "permanent" part of the association's capital.<sup>7</sup> It appears the requirement is intended to permit the issuing savings association the flexibility to prepay the debt because, among other reasons, the savings association may be able to refinance the debt on more favorable terms, or, because only a minimal portion of the debt is includable for regulatory capital purposes, the savings association may wish to refinance the debt. Waiver of the prepayment provision helps ensure that the notes will remain outstanding until maturity. The lack of a prepayment option will cause

<sup>2</sup> See 12 C.F.R. § 563.81(d)(1) (2002).

<sup>3</sup> See 12 C.F.R. § 563.81(d)(2) (2002).

<sup>4</sup> See 12 C.F.R. § 563.81(d)(3) (2002).

<sup>5</sup> See 12 C.F.R. § 563.81(d)(4) (2002).

<sup>6</sup> 12 C.F.R. § 500.30(a) (2002).

<sup>7</sup> See 12 C.F.R. § 563.81(d)(2) (2002).

the debt to be outstanding for its stated duration, and thus a more "permanent" part of the resources available to the Savings Bank. The waiver of the requirement removes the refinancing flexibility from the issuing savings association, but the savings association gains the ability to participate in debt issuances that it may not otherwise be able to be involved, or not be able to sell on as favorable terms. Therefore, there is good cause to waive the requirement to permit the Savings Bank to engage in the proposed transaction and/or to obtain more favorable terms than it might otherwise obtain.

Based on the foregoing, OTS concludes that there is good cause to waive the prepayment provision in 12 C.F.R. § 563.81(d)(1)(iii), and hereby waives the prepayment provision.

With respect to the waiver of 12 C.F.R. § 563.81(d)(4), the Savings Bank has requested that, in lieu of an indenture that provides for the appointment of a trustee (who must be a party other than the obligor or an affiliate of the obligor) and provides for the collective enforcement rights and remedies of security holders, that Savings Bank be permitted to use the Agreement. The Savings Bank asserts that an indenture is not necessary with respect to the proposed debt offering, because the debt will be acquired solely by sophisticated institutional investors, who do not need the protections provided by an indenture.

OTS concludes that there is good cause for the waiver of section 563.81(d)(4) in this case. The offering will be sold solely to accredited investors as defined in certain sections of the Securities Act of 1933 ("Securities Act").<sup>8</sup> The Trust Indenture Act of 1939 ("TIA"),<sup>9</sup> which generally requires indentures for debt issuances, does not require an indenture (and qualification of an indenture) where an exemption from registration of the underlying securities under the Securities Act ("Securities Act") is available.<sup>10</sup> One such exemption under the Securities Act is for offerings made solely to accredited investors.<sup>11</sup> Offerings made solely to accredited investors are exempt from registration under the Securities Act and the indenture provisions of the TIA because accredited investors are considered to have sufficient financial and professional resources and sophistication to analyze the offering, to make informed decisions, and, should it be

<sup>8</sup> 15 U.S.C. § 77b(a)(15).

<sup>9</sup> 15 U.S.C. § 77aaa-77bbbb.

<sup>10</sup> 15 U.S.C. § 77ddd (section 304 of the TIA).

<sup>11</sup> See, for example, the ability to conduct an unregistered offering of securities for an unlimited dollar amount to no more than 35 accredited investors pursuant to SEC Regulation D, Rule 506, 17 C.F.R. § 230.506. Accredited investor is defined in SEC Regulation D, Rule 501, 17 C.F.R. § 230.501 to include: (i) a broker or dealer registered with the SEC, an insurance company, an investment company, or a business development company (under section 501(a)(1)); (ii) a private business development company (under section 501(a)(2)); (iii) an organization described in section 501(c)(3) of the Internal Revenue Code, with total assets in excess of \$5 million (under section 501(a)(3)); (iv) or any trust, with total assets in excess \$5 million, not formed for the specific purpose of acquiring the security offered, and whose purchase is directed by a sophisticated person as defined in SEC Regulation D, Rule 506(b)(2)(ii) (under section 501(a)(7)). The notice states that the debt will be sold only to parties that fit within one or more of these categories. See also, 15 U.S.C. § 77ddd(a)(4)(A) and § 77ddd(b) (section 304(a)(4)(A) and (b) of the TIA) for exempted securities and transaction to which the TIA provisions do not apply.

necessary, to defend and to exercise their rights. Moreover, OTS has reviewed the waiver request in light of the purpose of the various requirements of the subordinated debt regulations, and finds no basis to conclude that the requested waiver would be contrary to the purposes underlying the regulations.

Based on the foregoing, OTS concludes that there is good cause to grant the requested waiver of 12 C.F.R. § 563.81(d)(4), and hereby waives section 563.81(d)(4).

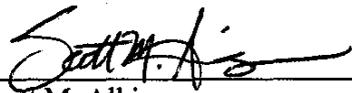
For the reasons set forth above, OTS finds that the Notice satisfies the applicable standards, with the exception of the provisions for which a waiver has been granted, and the Notice is hereby approved, provided that the following conditions are complied with in a manner satisfactory to the Northeast Regional Director, or his designee (Regional Director) :

1. The offering circular in its final form must not disclose any material adverse information concerning the Savings Bank's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular filed as an exhibit to the Notice.
2. The Savings Bank must submit to OTS no later than 30 calendar 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.
3. The Savings Bank must submit to OTS no later than 30 calendar 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 Notice and a copy of the Agreement governing the issuance of securities; and (ii) a certificate from the principal executive officer of the Savings Bank that states that to the best of his or her knowledge, none of the securities issued pursuant to the Notice were sold to any institution whose accounts are insured by the SAIF or the BIF, except as permitted by 12 C.F.R. § 563.81.
4. The Savings Bank receives prior written approval from OTS for any post-approval amendment to the securities or the Agreement if: (i) the proposed amendment modifies or is inconsistent with any provision of the securities, or the Agreement 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 Bank 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 Bank following adoption of the amendment.

5. The Savings Bank must submit to OTS promptly after execution, one copy of each amendment to the securities or the Agreement, made after approval, and if prior approval to such amendment was not obtained, must also state the reason(s) such prior approval was not required; and
6. The Savings Bank must not offer or sell the securities at any of its offices.

Any time period specified herein may be extended by the Regional Director, for good cause, for up to 120 calendar days.

By order of the Director of the Office of Thrift Supervision, or his designee,  
effective December 20, 2002.

  
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Scott M. Albinson  
Managing Director  
Office of Supervision