

June 27, 2005

TO: The Board of Directors

FROM: Michael J. Zamorski
Director, Division of Supervision and Consumer Protection

SUBJECT: Final Rule Amending Part 335
to Conform with the Requirements of the Securities Exchange Act

SUMMARY

The FDIC administers the provisions of Section 12(i) of the Securities Exchange Act of 1934 (Exchange Act) through Part 335, the Corporation's securities regulations for insured state nonmember banks. The FDIC's securities regulations must be substantially similar to those of the Securities and Exchange Commission (SEC), unless the FDIC publishes its reasons for deviating from the SEC's rules.

On March 31, 2005, the FDIC published in the Federal Register an interim final rule amending Part 335 with a request for comment. The rule incorporated amendments to Section 12(i) of the Exchange Act enacted by the Sarbanes-Oxley Act and changes in the SEC's regulations as they affect state nonmember banks subject to the Exchange Act. The rule also revised the delegations of authority in Part 335 to reflect organizational changes within the FDIC. One comment letter was received during the comment period. Staff has prepared a final rule with one nonsubstantive change. The final rule will be effective upon publication in the Federal Register.

Concur:

William F. Kroener, III
General Counsel

DISCUSSION

The FDIC published an interim final rule amending Part 335 in the Federal Register on March 31, 2005 (70 FR 16398). The rule:

- Reflected the addition of Section 10(A)(m) to the Exchange Act and the sections of the Sarbanes-Oxley Act that the FDIC is required to administer and enforce with respect to state nonmember banks,
- Incorporated through cross reference the regulations of the SEC as these regulations are issued, revised, or updated from time to time by the SEC under specified sections of the Exchange Act and the Sarbanes-Oxley Act. For example, the rule:
 - Incorporated the SEC's Regulation FD (Fair Disclosure), which is designed to address matters of selective disclosure of material information by public companies, and
 - Added new Section 335.121 (Listing standards relating to audit committees), which cross references SEC Rule 10A-3, prohibiting any national securities exchange and national securities association from listing the securities of an issuer that fails to comply with specific audit committee requirements including member independence, oversight, complaint procedures, engagement of counsel and other advisors, and funding, and
- Amended Section 335.901 to update, in response to organizational changes, the listing of persons within DSC to whom authority is delegated to act on certain securities disclosure matters.

Although the FDIC found that notice and comment under the Administrative Procedure Act, 5 U.S.C. 553(b), were not required, the FDIC solicited public comment on the interim final rule, and considered the two comments contained in the one comment letter that was filed. The first comment questioned the FDIC's addition of Section 335.121 (Listing standards related to audit committees), which incorporates the SEC's regulations relating to the requirements for audit committees of listed public companies. The staff considered the comment, and determined that cross referencing the SEC's regulations simplifies administration, consistency and enforcement of its Section 12(i) jurisdiction. Therefore, the staff has determined that the FDIC should retain the direct cross reference to 17 CFR 240.10A-3 in Section 335.121.

The second comment suggested that adding the cross reference to the SEC's Regulation FD (Fair Disclosure) in Section 335.221(d) under the heading "Forms for registration of securities and similar matters" may not be the most appropriate place for this reference. The commenter suggested that the FDIC give Regulation FD cross reference its own section within Part 335 to make it more prominent and easily recognizable to bankers and their counsel. After considering this comment, the staff made one nonsubstantive change in the final rule from the interim final rule by revising the heading of Section 335.221 from its current heading to "Forms for registration of securities; optional forms for small business issuers; and incorporation of Regulation FD (Fair Disclosure)" in order to make the cross reference to the SEC's Regulation FD more prominent.

RECOMMENDATION

DSC recommends that the Board approve the final rule, to be effective upon publication in the Federal Register.

Concur:

Jodey C. Arrington
Chief of Staff