

[6714-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 335

RIN 3064-AD67

Securities of Nonmember Insured Banks

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final Rule.

SUMMARY: The FDIC is adopting a Final Rule amending Part 335 of its regulations that was issued as an Interim Final Rule published in the Federal Register (see 75 FR 73947) on November 30, 2010. The final rule adopts amendments to the FDIC's securities disclosure regulations applicable to state nonmember banks with securities required to be registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act) and cross references to regulations issued by the Securities Exchange Commission (SEC). The FDIC received no comments in response to the Interim Final Rule concerning these revisions. Accordingly, the Final Rule makes no changes from the Interim Final Rule that preceded it.

The Final Rule incorporates, through cross references, changes in regulations adopted by the SEC into the provisions of the FDIC's securities regulations. Cross referencing will ensure that the FDIC's regulations remain substantially similar to the SEC's regulations, as required by law.

DATES: These amendments are effective on [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dennis Chapman, Senior Staff Accountant, Division of Risk Management Supervision, (202) 898-8922 or dchapman@fdic.gov; Maureen Loviglio, Senior Staff Accountant, Division of Risk Management Supervision, (202) 898-6777 or mloviglio@fdic.gov; or Mark G. Flanigan, Counsel, Legal Division, (202) 898-7426 or mflanigan@fdic.gov, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTAL INFORMATION:

I. Background

Section 12(i) of the Exchange Act, as amended (15 U.S.C. 78l(i)), authorizes the FDIC to issue regulations applicable to the securities of state nonmember banks that are substantially similar to those of the SEC with respect to its powers, functions, and duties to administer and enforce sections 10A(m) (standards relating to audit committees), 12 (securities registration), 13 (periodic reporting), 14(a) (proxies and proxy solicitation), 14(c) (information statements), 14(d) (tender offers), 14(f) (arrangements for changes in

directors), and 16 (beneficial ownership and reporting) of the Exchange Act, and sections 302 (corporate responsibility for financial reports), 303 (improper influence on conduct of audits), 304 (forfeiture of certain bonuses and profits), 306 (insider trades during blackout periods), 401(b) (disclosure of *pro forma* financial information), 404 (management assessment of internal controls), 406 (code of ethics for senior financial officers), and 407 (disclosure of audit committee financial experts) of the Sarbanes-Oxley Act (codified at 15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) in regard to the depository institutions for which the FDIC is the appropriate Federal banking agency. These regulations must be substantially similar to the regulations of the SEC under the listed sections of the Exchange Act and the Sarbanes-Oxley Act, unless the FDIC publishes its reasons for deviating from the SEC's rules.¹ The FDIC's regulations governing state nonmember banks with securities subject to the provisions of the Exchange Act are contained in part 335 of title 12 of the Code of Federal Regulations (CFR).

II. Interim Final Rule and Request for Comments

In November 2010, the FDIC's Board of Directors authorized publication of an Interim Final Rule in the Federal Register which revised Part 335 by cross referencing changes in regulations adopted by the SEC into the provisions of the FDIC's securities regulations. The Interim Final Rule also modified Part 335 by eliminating references to specific CFR sections and subparts of the SEC's rules, and by replacing them with references to titles and parts of the CFR instead. Further, these changes reflect changes to SEC regulations with respect to small business issuers and provide general guidance

¹ 15 U.S.C. 78l(i).

to FDIC filers regarding the electronic filing of certain documents.

Finally, the Interim Final Rule made certain nonsubstantive changes to part 335 to improve clarity and readability, and to correct outdated terms. The new part 335 cross referencing provisions are an efficient way to apply SEC Exchange Act rules to state nonmember banks that have securities registered pursuant to the Exchange Act. The part 335 cross referencing revisions will also minimize the need to amend part 335 each time the SEC revises its Exchange Act regulations resulting in amendments to a CFR section or subpart. The FDIC believes that cross referencing to the regulations of the SEC simplifies the administration and enforcement of the Exchange Act and also helps promote uniformity and consistency of administration.

The FDIC requested comments on all aspects of the rule changes, with comments due by January 31, 2011. Commenters were asked to support any suggestions that the FDIC modify the requirements of the SEC rules, regulations, and forms for state nonmember banks by demonstrating how such modification would satisfy the requirements of section 12(i) of the Exchange Act. The FDIC also welcomed comments on the general organization of Part 335. No comments were received on the Interim Final Rule.

III. Final Rule

As explained above, the FDIC requested comments on the Interim Final Rule that was issued on November 30, 2010, and received no comments during the comment period that ended on January 31, 2011. Accordingly, the FDIC is issuing the Final Rule

with no modifications.

IV. Regulatory Analysis and Procedure

A. *Administrative Procedure Act*

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), the FDIC found good cause to issue the Interim Final Rule without first seeking public comment. The Exchange Act requires that the FDIC issue regulations substantially similar to those of the SEC or publish its reasons for not doing so. Certain portions of Part 335 that are being amended are organizational; other portions result from the amendment or adoption of SEC Exchange Act regulations that were published with notice and opportunity for the public to comment. Nonetheless, the FDIC solicited public comment and received no comments on the Interim Final Rule. For these reasons, the FDIC confirms its finding that the good cause exception provided for in section 553(b)(B) of the APA applies to the Final Rule.

Section 553(d)(3) of the APA provides that the publication of a rule shall be made not less than 30 days before its effective date, except “***(3) as otherwise provided by the agency for good cause found and published with the rule.” For reasons that supported its invocation of the good cause exception to section 553(b)(B) of the APA, the FDIC relied upon the good cause exception to section 553(d)(3) and published the Interim Final Rule with an immediate effective date. For the same reasons, the FDIC finds that there is good cause for this Final Rule to take effect immediately upon publication in the Federal Register. The Final Rule is identical to the Interim Final Rule that became effective on

November 30, 2010. No purpose would be served by delaying the Final Rule's effective date.

B. *Riegle Community Development and Regulatory Improvement Act*

The Riegle Community Development and Regulatory Improvement Act provides that any new regulations or amendments to regulations prescribed by a Federal banking agency that impose additional reporting, disclosures, or other new requirements on insured depository institutions shall take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form, unless the agency determines, for good cause published with the rule, that the rule should become effective before such time.² For the same reasons discussed above, the FDIC finds that good cause exists for an immediate effective date for the Final Rule.

C. *Paperwork Reduction Act*

The Final Rule contains no new collections of information as defined by the Paperwork Reduction Act.

D. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (RFA), a regulatory flexibility analysis is required only when the agency must publish a notice of proposed rulemaking.³ As discussed in the Interim Final Rule and above, the FDIC has determined for good cause that general notice and opportunity for comment is unnecessary. Therefore, the RFA, pursuant to 5 U.S.C. § 601(2), does not apply.

² 12 U.S.C. § 4802.

³ 5 U.S.C. §§ 603, 604.

E. *Small Business Regulatory Enforcement Fairness Act*

The Office of Management and Budget (OMB) has determined that the Final Rule is not a “major rule” within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) (5 U.S.C. § 801, *et seq.*).

As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.

F. *The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

The FDIC has determined that the Final Rule will not affect family well-being within the measure of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. No.105-277, 112 Stat. 2681).

G. *Plain Language*

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1471 (November 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the revisions to Part 335 in a simple and straightforward manner. It requested comments on all aspects of the Interim Final Rule and received none.

List of Subjects in 12 CFR 335

Accounting, Banks, Banking, Confidential business information, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board of Directors of the Federal

Deposit Insurance Corporation hereby amends part 335 of title 12 of the Code of Federal Regulations as follows:

1. The authority citation for part 335 continues to read as follows:

Authority: 12 U.S.C. § 1819; 15 U.S.C. 78l(i), 78m, 78n, 78p, 78w, 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

2. Section 335.111 is revised to read as follows:

§ 335.111 Forms and schedules.

The Exchange Act regulations of the SEC, which are cross referenced under this part, require the filing of forms and schedules as applicable. Reference is made to SEC Exchange Act regulation 17 CFR part 249 regarding the availability of all applicable SEC Exchange Act forms. Required schedules are codified and are found within the context of the SEC's regulations. All forms and schedules shall be titled with the name of the FDIC in substitution for the name of the SEC. The filing of forms and schedules shall be made with the FDIC at the address in section 335.701 or may be filed electronically at *FDICconnect* at <https://www2.fdicconnect.gov/index.asp>. However, electronic filing of Beneficial Ownership Forms 3, 4 and 5 is required. Copies of Forms 3 (§ 335.611), 4 (§ 335.612) and 5 (§ 335.613) and the instructions thereto may be printed and downloaded from <https://www.fdic.gov/regulations/laws/forms>.

3. Section 335.121 is revised to read as follows:

§ 335.121 Listing standards related to audit committees.

The provisions of the applicable SEC regulation under section 10(A)(m) of the Exchange Act shall be followed as codified at 17 CFR part 240.

4. Section 335.201 is revised to read as follows:

§ 335.201 Securities exempted from registration.

Persons subject to registration requirements under Exchange Act section 12 and subject to this part shall follow the applicable and currently effective SEC regulations relative to exemptions from registration issued under sections 3 and 12 of the Exchange Act as codified at 17 CFR part 240.

5. Section 335.211 is revised to read as follows:

§ 335.211 Registration and reporting.

Persons with securities subject to registration under Exchange Act sections 12(b) and 12(g), required to report under Exchange Act section 13, and subject to this part shall follow the applicable and currently effective SEC regulations issued under section 12(b) of the Exchange Act as codified at 17 CFR part 240.

6. Section 335.221 is revised to read as follows:

§ 335.221 Forms for registration of securities and cross reference to Regulation FD (Fair Disclosure).

(a) The applicable forms for registration of securities and similar matters are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S-X (17 CFR part 210). Banks may also refer to the instructions for Federal Financial Institutions Examination Council (FFIEC) Consolidated Reports of Condition and Income when preparing unaudited interim statements. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are provided at Industry

Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

(c) The provisions of the applicable and currently effective SEC regulation FD shall be followed as codified at 17 CFR part 243.

7. Section 335.231 is revised to read as follows:

§ 335.231 Certification, suspension of trading, and removal from listing by exchanges.

The provisions of the applicable and currently effective SEC regulations under section 12(d) of the Exchange Act shall be followed as codified at 17 part CFR 240.

8. Section 335.241 is revised to read as follows:

§ 335.241 Unlisted trading.

The provisions of the applicable and currently effective SEC regulations under section 12(f) of the Exchange Act shall be followed as codified at 17 CFR part 240.

9. Section 335.251 is revised to read as follows:

§ 335.251 Forms for notification of action taken by national securities exchanges.

The applicable forms for notification of action taken by national securities exchanges are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

10. Section 335.261 is revised to read as follows:

§ 335.261 Exemptions, terminations, and definitions.

The provisions of the applicable and currently effective SEC regulations under sections 12(g) and 12(h) of the Exchange Act shall be followed as codified in 17 CFR part 240.

11. Section 335.301 is revised to read as follows:

§ 335.301 Reports of issuers of securities registered pursuant to section 12.

The provisions of the applicable and currently effective SEC regulations under section 13(a) of the Exchange Act shall be followed as codified at 17 CFR part 240.

12. Section 335.311 is revised to read as follows:

§ 335.311 Forms for annual, quarterly, current, and other reports of issuers.

(a) The applicable forms for annual, quarterly, current, and other reports are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S-X (17 CFR part 210). Banks may also refer to the instructions for FFIEC Consolidated Reports of Condition and Income when preparing unaudited interim reports. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are included in Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

13. Section 335.321 is revised to read as follows:

§ 335.321 Maintenance of records and issuer's representations in connection with required reports.

The provisions of the applicable and currently effective SEC regulations under 13(b) of the Exchange Act shall be followed as codified at 17 CFR part 240.

14. Section 335.331 is revised to read as follows:

§ 335.331 Acquisition statements, acquisition of securities by issuers, and other matters.

The provisions of the applicable and currently effective SEC regulations under sections 13(d) and 13(e) of the Exchange Act shall be followed as codified at 17 CFR part 240.

15. Section 335.401 is revised to read as follows:

§ 335.401 Solicitations of proxies.

The provisions of the applicable and currently effective SEC regulations under sections 14(a) and 14(c) of the Exchange Act shall be followed as codified at 17 CFR part 240.

16. Section 335.501 is revised to read as follows:

§ 335.501 Tender offers.

The provisions of the applicable and currently effective SEC regulations under sections 14(d), 14(e), and 14(f) of the Exchange Act shall be followed as codified at 17 CFR part 240.

17. Section 335.601 is revised to read as follows:

§ 335.601 Requirements of section 16 of the Securities Exchange Act of 1934.

Persons subject to section 16 of the Exchange Act with respect to securities registered under this part shall follow the applicable and currently effective SEC regulations issued under section 16 of the Exchange Act (17 CFR part 240), except that the forms described in § 335.611 (FDIC Form 3), § 335.612 (FDIC Form 4), and § 335.613 (FDIC Form 5) shall be used in lieu of SEC Form 3, Form 4, and Form 5, respectively. FDIC Forms 3, 4, and 5 shall be filed electronically on *FDICconnect* at <https://www2.fdicconnect.gov/index.asp>. Copies of FDIC Forms 3, 4, and 5 and the instructions thereto can be printed and downloaded at <https://www.fdic.gov/regulations/laws/forms>.

18. Section 335.611 is revised to read as follows:

§ 335.611 Initial statement of beneficial ownership of securities (Form 3).

This form shall be filed in lieu of SEC Form 3 pursuant to SEC rules for initial statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

19. Section 335.612 is revised to read as follows:

§ 336.612 Statement of changes in beneficial ownership of securities (Form 4).

This form shall be filed in lieu of SEC Form 4 pursuant to SEC Rules for statements of changes in beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

20. Section 335.613 is revised to read as follows:

§ 336.613 Annual statement of beneficial ownership of securities (Form 5).

This form shall be filed in lieu of SEC Form 5 pursuant to SEC Rules for annual statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

21. Section 335.701 is revised to read as follows:

§ 335.701 Filing requirements, public reference, and confidentiality.

(a) *Filing requirements.* Unless otherwise indicated in this part, one original and four

conformed copies of all papers required to be filed with the FDIC under the Exchange Act or regulations thereunder shall be filed at its office in Washington, DC. Official filings may be filed electronically at <https://www2.fdicconnect.gov/index.asp>, except for FDIC Beneficial Ownership Forms 3, 4, and 5 for which electronic filing is mandatory as described in § 335.801(b). Paper filings should be submitted to the FDIC's office in Washington, DC, and should be addressed as follows: Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Material may be filed by delivery to the FDIC through the mails or otherwise. The date on which paper filings are actually received by the designated FDIC office shall be the date of filing.

(b) *Inspection.* Except as provided in paragraph (c) of this section, all information filed regarding a security registered with the FDIC will be available for inspection at the Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Beneficial ownership report forms and other official filings that are electronically submitted to the FDIC are available for inspection on the FDIC's Web site at <http://www2.fdic.gov/efr/>.

(c) *Nondisclosure of certain information filed.* Any person filing any statement, report, or document with the FDIC under the Exchange Act may make a written objection to the public disclosure of any information contained therein in accordance with the procedure set forth in this paragraph (c) or the instructions provided for electronic filing available on the FDIC's Web site at <https://www2.fdicconnect.gov/index.asp>.

(1) The person shall omit from the statement, report, or document, when it is filed, the

portion thereof that it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the statement, report, or document that the confidential portion has been so omitted and filed separately with the FDIC.

(2) The person shall file with the copies of the statement, report, or document filed with the FDIC:

(i) As many copies of the confidential portion, each clearly marked "Confidential Treatment," as there are copies of the statement, report, or document filed with the FDIC and with each exchange, if any. Each copy shall contain the complete text of the item and, notwithstanding that the confidential portion does not constitute the whole of the answer, the entire answer thereto; except that in the case where the confidential portion is part of a financial statement or schedule, only the particular financial statement or schedule need be included. All copies of the confidential portion shall be in the same form as the remainder of the statement, report, or document;

(ii) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion and shall contain:

(A) An identification of the portion of the statement, report, or document that has been omitted;

(B) A statement of the grounds of the objection;

(C) Consent that the FDIC may determine the question of public disclosure upon the basis of the application, subject to proper judicial reviews; and

(D) The name of each exchange, if any, with which the statement, report, or

document is filed;

(iii) The copies of the confidential portion and the application filed in accordance with this paragraph shall be enclosed in a separate envelope marked "Confidential Treatment" and addressed to Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(3) Pending the determination by the FDIC as to the objection filed in accordance with paragraph (c)(2)(ii) of this section, the confidential portion will not be disclosed by the FDIC.

(4) If the FDIC determines that the objection shall be sustained, a notation to that effect will be made at the appropriate place in the statement, report, or document.

(5) If the FDIC determines that disclosure of the confidential portion is in the public interest, a finding and determination to that effect will be entered and notice of the finding and determination will be sent by registered or certified mail to the person.

(6) The confidential portion shall be made available to the public:

(i) Upon the lapse of 15 days after the dispatch of notice by registered or certified mail of the finding and determination of the FDIC described in paragraph (c)(5) of this section, or the date of the electronic filing, if prior to the lapse of such 15 days the person shall not have filed a written statement that he intends in good faith to seek judicial review of the finding and determination;

(ii) Upon the lapse of 60 days after the dispatch of notice by registered or certified mail, or the date of the electronic filing, of the finding and determination of the FDIC, if the statement described in paragraph (c)(6)(i) of this section shall have been filed and if a petition for judicial review shall not have been filed within such 60 days; or

(iii) If such petition for judicial review shall have been filed within such 60 days upon final disposition, adverse to the person, of the judicial proceedings.

(7) If the confidential portion is made available to the public, a copy thereof shall be attached to each copy of the statement, report, or document filed with the FDIC and with each exchange concerned.

22. Amend Section 335.801 by revising paragraphs (b)(1), (b)(2), (b)(6)(iv), and (b)(6)(v) to read as follows:

§ 335.801 Inapplicable SEC regulations; FDIC substituted regulations; additional information.

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(b) *Electronic filings.* (1) The FDIC does not participate in the SEC's EDGAR (Electronic Data Gathering Analysis and Retrieval) electronic filing program (17 CFR part 232). The FDIC permits voluntary electronically transmitted filings and submissions of correspondence and other materials in electronic format to the FDIC, with the exception of Beneficial Ownership Reports (Forms 3, 4, and 5) for which electronic filing is mandatory. Beneficial Ownership Report filing requirements are provided in paragraph (b)(2) of this section.

(2) All reporting persons must electronically file Beneficial Ownership Reports (FDIC Forms 3, 4, and 5), including amendments and exhibits thereto, using the Internet-based interagency Beneficial Ownership Filings System, except that a reporting person that has obtained a continuing hardship exemption under these rules may file the forms with the FDIC in paper format. For electronic filing purposes, FDIC Forms 3, 4, and 5 are accessible at the Internet-based interagency website for Beneficial Ownership Filings at

FDICconnect at <https://www2.fdicconnect.gov/index.asp>. These forms and the instructions thereto are available for printing and downloading at <http://www.fdic.gov/regulations/laws/forms>. A reporting person that has obtained a continuing hardship exemption under these rules may file the appropriate forms with the FDIC in paper format. Instructions for continuing hardship exemptions are provided in paragraph (b)(6) of this section.

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(6)

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(iv) Where a continuing hardship exemption is granted with respect to an exhibit only, the paper format exhibit shall be filed with the FDIC under Form SE (17 CFR part 249). The name of the FDIC shall be substituted for the name of the SEC on the form. Form SE shall be filed as a paper cover sheet to all exhibits to Beneficial Ownership Reports submitted to the FDIC in paper form pursuant to a hardship exemption.

(v) Form SE may be filed with the FDIC up to six business days prior to, or on the date of filing of, the electronic form to which it relates but shall not be filed after such filing date. If a paper exhibit is submitted in this manner, requirements that the exhibit be filed with, provided with, or accompany the electronic filing shall be satisfied. Any requirements as to delivery or furnishing the information to persons other than the FDIC shall not be affected by this section.

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By order of the Board of Directors.

FEDERAL DEPOSIT INSURANCE CORPORATION

Dated at Washington, D.C., this day of , 2011.

Robert E. Feldman

Executive Secretary