September 23, 2014

**MEMORANDUM TO:** Board of Directors

**FROM:** Doreen R. Eberley, Director
Division of Risk Management Supervision

**SUBJECT:** Notice of proposed rulemaking: *Filing Requirements and Processing Procedures for Changes in Control with respect to State Nonmember Banks and State Savings Associations*

**Summary:** The proposed rule would consolidate into one subpart the requirements and procedures for Notices filed with respect to State nonmember banks and State savings associations, and eliminate Part 391, subpart E.

More fundamentally, the attached Notice of Proposed Rulemaking titled, *Filing Requirements and Processing Procedures for Changes in Control with respect to State Nonmember Banks and State Savings Associations* ("NPR" or "proposed rule"), would amend the FDIC's filing requirements and processing procedures for notices filed under the Change in Bank Control Act ("Notices"). The proposed rule would adopt the best practices of the related regulations of the Office of the Comptroller of the Currency ("OCC") and the Board of Governors of the Federal Reserve System ("Board of Governors"). In addition, the proposed rule would enhance the transparency of the FDIC's current practices and procedures that interpret and implement the existing regulation. This proposed rule is also part of the FDIC's continuing review of its regulations under the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

**Concur:**

Richard J. Osterman, Jr.
Acting General Counsel

**Recommendation:** That the Board of Directors of the FDIC ("Board") adopt and issue the attached proposed rule and authorize its publication in the *Federal Register* with a 60-day comment period.

**Discussion:**

Background – the Transferred OTS Regulation

Section 7(j) of the Federal Deposit Insurance Act ("FDI Act") (the "Change in Bank Control Act") generally provides that no person may acquire control of an insured depository institution unless the person has provided the appropriate Federal banking agency with prior written notice of the transaction and the banking agency has not objected to the proposed transaction.[1] Subpart E of part 303 of the FDIC's rules and regulations[2] ("Subpart E of Part 303") implements section 7(j) of the FDI Act and sets forth the filing requirements and processing procedures for Notices filed with respect to the proposed acquisition of control of State nonmember banks and certain parent companies thereof.[3]

On July 21, 2011 (the transfer date established by section 311 of the Dodd-Frank Act)[4] the powers, duties, and functions formerly performed by the Office of Thrift Supervision ("OTS") were divided among the FDIC, as to State savings associations, the OCC, as to federal savings associations, and the Board of Governors, as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act[5] provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified,

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[1] 12 U.S.C. 1817(j).
[2] 12 CFR 303.80 et seq.
[3] A State nonmember bank that is either an industrial loan company, a trust company, or a credit card bank is not a "bank" under the Bank Holding Company Act ("BHC Act"). 12 U.S.C. 1841(c)(2). Therefore, a company that is not a bank holding company and that seeks to acquire one or more such State nonmember banks would not be subject to supervision by the Board of Governors. As a result, such a company would have to file a Notice with, and obtain the approval of, the FDIC.
[4] 12 U.S.C. § 5411.
[5] 12 U.S.C. § 5414(b).

terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act[6] further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by each agency. On June 14, 2011, the Board approved for issuance in the *Federal Register* a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act."[7]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act,[8] granted the OCC rulemaking authority relating to both State and federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act[9] ("FDI Act") and other laws as the "appropriate Federal banking agency" or under similar statutory authority. Section 312(c) of the Dodd-Frank Act amended section 3(q) of the FDI Act[10] and designated the FDIC as the "appropriate Federal banking agency" for State savings associations. As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar authority) for State savings associations, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

As noted above, on June 14, 2011, operating pursuant to this authority, the Board reissued and re-designated certain regulations of the former OTS as new FDIC regulations.[11] In the preamble to this interim rule, the FDIC specifically noted that its staff would evaluate the transferred rules and might later recommend incorporating them into FDIC rules that existed before the transfer, amending them, or rescinding them, as appropriate. One of the regulations transferred to the FDIC governed acquisitions of State savings associations under the Change in Bank Control Act ("transferred regulation").[12]

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[6] 12 U.S.C. § 5414(c).
[7] 76 Fed. Reg. 39247 (July 6, 2011).
[8] 12 U.S.C. § 5412(b)(2)(B)(i)(II).
[9] 12 U.S.C. § 1811 *et seq.*
[10] 12 U.S.C. § 1813(q).
[11] 76 Fed. Reg. 47652 (Aug. 5, 2011).
[12] 12 CFR Part 391, Subpart E of Part 303, entitled Acquisitions of Control of State Savings Associations.

Proposed Rule

The proposed rule would amend the FDIC's regulation implementing the Change in Bank Control Act, as it existed before the transfer of regulations from the OTS to:

(1) adopt best practices of the OCC and the Board of Governors and thereby increase the consistency of Subpart E of Part 303 with the related regulations of the OCC and the Board of Governors;[13]

(2) update Subpart E of Part 303 to provide greater transparency based on the FDIC's practices in interpreting and implementing the Change in Bank Control Act; and

(3) consolidate and conform the change in control regulations for State nonmember banks, State savings associations, and certain parent companies thereof[14].

The proposed rule would adopt the best practices of the OCC and the Board of Governors by incorporating certain rebuttable presumptions of acting in concert. FDIC's current Subpart E of Part 303 does not include any presumptions related to persons acting in concert, and the FDIC has addressed such situations on a case-by-case basis, often conducting a detailed review of a group of persons proposing to acquire voting securities. The Board of Governors and the OCC, however, have relied on rebuttable presumptions of acting in concert in appropriate cases when applying the Change in Bank Control Act to groups of persons proposing to acquire voting securities of insured depository institutions. Each of the acting in concert presumptions included in the proposed rule is derived from the rebuttable presumptions of acting in concert in the Board of Governors' regulation.[15] Similarly, the OCC recently proposed adopting several similar rebuttable presumptions of acting in concert.[16]

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[13] 12 CFR 5.50 et seq. (OCC) and 12 CFR 225.41-.43 (Board of Governors).
[14] A company that is not a bank holding company nor a savings and loan holding company and that seeks to acquire a State savings association that operates solely in a fiduciary capacity would not be subject to supervision by the Board of Governors. Such a company would have to file a Notice with, and obtain the approval of, the FDIC.
[15] 12 CFR 225.41(d).
[16] 79 FR 33260 (June 10, 2014).

The proposed rule would include rebuttable presumptions of acting in concert with respect to the following persons:

- A company and any controlling shareholder or management official of the company;
- An individual and the individual's immediate family;
- Companies under common control or a company and each company it controls;
- Two or more persons that have made, or propose to make, a joint filing under sections 13 or 14 of the Securities Exchange Act;
- A person and any trust for which the person serves as trustee or any trust for which the person is a beneficiary; and
- Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a covered institution, other than through revocable proxies.

The proposed rule would include a definition of "voting securities" that is very similar to the definition currently used by the Board of Governors. The proposed rule would also include new definitions of the terms "immediate family", "management official", "company", and "convertible securities" in relationship to the proposed rebuttable presumptions.

Based on the FDIC's experience interpreting and implementing the Change in Bank Control Act, staff has generally treated the acquisition of an option or warrant as the acquisition of the underlying voting securities notwithstanding that they may only be exercised after a period of time. Staff believes that non-voting debt or equity securities that convert to voting securities present similar abilities to exert influence over the issuer of the securities. Therefore, the proposed rule would include a rebuttable presumption that an acquisition of options, warrants, or convertible securities constitutes the acquisition of voting securities. The proposed rule provides that nonvoting securities that may be converted into voting securities are presumed to be voting securities subject to rebuttal.

The proposed rule would clarify that the exemption for acquisitions of voting securities of depository institution holding companies reviewed under the Change in Bank Control Act by the Board of Governors is only applicable when the Board of Governors reviews a Notice and not when the Board of Governors has jurisdiction but does not require a Notice. For example, if an individual acquires a controlling interest in a bank holding company, and the Board of Governors accepts passivity commitments from the acquirer instead of requiring a Notice, then the FDIC may require a Notice.

The proposed rule also would consolidate into one subpart the requirements and procedures for Notices filed with respect to State nonmember banks, State savings associations, and certain of their parent companies. Staff does not believe significant reasons exist to treat acquisitions of control of State savings associations differently than acquisitions of control of State nonmember banks, and the proposed rule makes the treatment of these charters as uniform as possible. In general, differences between the transferred regulation and Subpart E of Part 303 were resolved by conforming the provisions regarding State savings associations, to the requirements of Subpart E of Part 303. For example, the transferred regulation included the following provisions unique to State savings associations: "control factors" regarding the rebuttable presumptions of control; a "safe harbor", which permitted otherwise controlling acquirers to avoid filing notice; and rebuttable presumptions relating to the integrity and financial statutory factors. The proposed rule would not include such provisions that were unique to State savings associations and instead would adopt the same treatment for State savings associations as would be applicable for State nonmember banks.

The proposed rule includes two longstanding statutory reporting requirements that are not included in existing Subpart E of Part 303 or the transferred regulation. The first statutory reporting requirement relates to any foreign bank, or any affiliate thereof, that has credit outstanding to any person or group of persons which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a covered institution. The second statutory reporting requirement included in the proposed rule relates to changes in chief executive officers and directors of a bank within 12 months of a change in control being consummated. The proposed rule does not add to or modify the existing statutory requirements and only includes the longstanding statutory requirements to enhance transparency for covered institutions.

Conclusion

FDIC staff recommends that the FDIC Board adopt the attached proposed rule and authorize its publication in the *Federal Register* with a 60-day comment period.

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