

MEMORANDUM TO: Board of Directors

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

SUBJECT: *Notice of Proposed Rulemaking.* Removal of Transferred OTS Regulations Regarding Securities Offerings of State Savings Associations, Rescission of Statement of Policy on the Use of Offering Circulars, Proposed Rulemaking Regarding Securities Offerings by State Nonmember Banks and State Savings Associations, and Other Technical Amendments.

Summary: Staff requests that the FDIC Board of Directors (Board) approve and authorize for publication in the *Federal Register* with a 60-day public comment period, a notice of proposed rulemaking (NPR or proposal) to take four actions. First, the NPR would rescind and remove 12 CFR part 390, subpart W, entitled *Securities Offerings*, which was transferred to the FDIC from the former Office of Thrift Supervision (OTS). Second, the NPR would rescind the 1996 Statement of Policy Regarding the Use of Offering Circulars in Connection with the Public Distribution of Bank Securities, which provides a guide for a State nonmember banks and other institutions in the preparation of offering circulars. Third, the NPR would propose a new regulation regarding securities offerings to be made by certain State nonmember banks and State savings associations (FDIC-supervised institutions). In so doing, the FDIC would create a unified scheme for securities disclosure requirements applicable to FDIC-supervised institutions. Finally, the proposal also would include technical amendments to update related regulations.

Recommendation: Staff requests that the Board approve the notice of proposed rulemaking and authorize its publication in the *Federal Register* with a 60-day comment period.

Concur:

Nicholas J. Podsiadly
General Counsel

I. Background

A. *FDIC's General Approach Regarding Securities Offerings of FDIC-Supervised Institutions*

Among other things, banks and savings associations may issue securities as part of organization efforts;¹ as part of a capital raise,² including pursuant to an enforcement action;³ and to facilitate a conversion from a mutual to stock form of ownership.⁴ Generally, banks and savings associations are exempt from the securities disclosure requirements of the Securities Act of 1933 (Securities Act),⁵ although in certain circumstances, State securities laws do require compliance with all or portions of these requirements. In exempting banks and savings associations from the Securities Act, lawmakers intended the oversight provided by State and Federal banking regulators to serve as an alternative to oversight by the Securities and Exchange Commission (SEC).

The issuance of securities by banks and savings associations is, however, subject to the antifraud provisions of the Federal securities laws, which require full disclosure of material facts necessary for an investor to make a determination to invest in securities offered for sale.⁶ From a safety and soundness perspective, there is a risk of serious capital loss or litigation if bank or

¹ See 12 U.S.C. 1815; 12 CFR part 303, subpart B.

² See 12 U.S.C. 1831o; 12 CFR part 324.

³ See 12 U.S.C. 1818.

⁴ See 12 CFR 333.4; 12 CFR part 303, subpart I.

⁵ Pub. L. 73-22, 48 Stat. 74, 15 U.S.C. 77a *et seq.* Holding companies for banks and thrifts are not exempt from the Securities Act. As of June 30, 2020, of the 3,264 insured institutions supervised by the FDIC, 2,637 have holding companies and 627 do not.

⁶ See 15 U.S.C. 77q(c), which makes it unlawful in connection with the offer of a security: (a) To employ any device, scheme, or artifice to defraud; (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

savings association securities are sold in violation of the antifraud provisions of the Federal securities laws.

A securities issuance may require a registration statement and prospectus. If a securities issuance is exempt from registration or prospectus requirements, the issuer may be required to provide an offering circular that contains varying informational and financial disclosures, depending on the exemption provision. The offering circular can be used to comply with the antifraud provisions of the Securities Act. As more fully described below, the FDIC has not issued separate regulations regarding the content of registration statements and prospectuses, but rather, historically has provided supervisory guidance for FDIC-supervised institutions in the form of a policy statement to describe principles for preparing offering circulars.⁷ Chief among these principles has been to refer FDIC-supervised institutions to SEC and other agency regulations regarding the content of registration statements and circulars to assist them in complying with the antifraud provisions of the Securities Act. For the reasons described below, the staff is proposing to rescind the 1996 Statement of Policy and issue a regulation governing the securities offering disclosure requirements for FDIC-supervised institutions.

B. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,⁸ 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 Office of Comptroller

⁷ See FDIC Statement of Policy, “Use of Offering Circulars in Connection with Public Distribution of Bank Securities,” September 5, 1996 available at <https://www.fdic.gov/regulations/laws/rules/5000-500.html#fdic5000statementop>.

⁸ 12 U.S.C. § 5411.

of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act⁹ provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials that were issued, made, prescribed, or allowed to become effective by the OTS, providing 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, 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 Act¹⁰ 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 the FDIC and the OCC, respectively. 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.”¹¹

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act¹² 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 (FDI Act)¹³ and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c)(1) of the Dodd-Frank Act revised the definition of

⁹ 12 U.S.C. § 5414(b).

¹⁰ 12 U.S.C. § 5414(c).

¹¹ 76 FR 39247 (July 6, 2011).

¹² 12 U.S.C. § 5412(b)(2)(B)(i)(II).

¹³ 12 U.S.C. § 1811 *et seq.*

“appropriate Federal banking agency” contained in section 3(q) of the FDI Act,¹⁴ to add State savings associations to the list of entities for which the FDIC is designated as the “appropriate Federal banking agency.” As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify, and rescind regulations involving such institutions.

As noted, on June 14, 2011, operating pursuant to this authority, the Board reissued and re-designated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the *Federal Register* on August 5, 2011.¹⁵ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.¹⁶

C. OTS Offering Circular Regulations at 12 CFR Part 563g

In 1985, the Federal Home Loan Bank Board (FHLBB) adopted the original predecessor rule to part 390, subpart W, the rules codified at 12 CFR part 563g, to “regulate an area of thrift activity currently left unregulated by an exemption in the Securities Act for securities issued by regulated thrift institutions.”¹⁷ Among other things, the FHLBB determined that uniform disclosure requirements were necessary to address the risk “that securities offerings without uniform disclosure requirements would have a negative effect on the ability of institutions to

¹⁴ 12 U.S.C. 1813(q).

¹⁵ 76 FR 47652 (Aug. 5, 2011).

¹⁶ *Id.*

¹⁷ 50 FR 53284 (Dec. 31, 1985).

raise capital and a concomitant adverse effect on the safety and soundness of such institutions and the [Federal Savings and Loan Insurance Corporation (FSLIC)].”¹⁸

In 1989, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) transferred authority to regulate savings associations from the FHLB System and the FSLIC to the OTS.¹⁹ FIRREA required the OTS to adopt and publish the FHLBB regulations and transfer the regulations to the OTS as the thrift regulatory authority designated by FIRREA.²⁰ The OTS transferred and republished part 563g in 1989 with minor changes.²¹

D. Part 390, Subpart W

As discussed above, the Dodd-Frank Act transferred the functions, powers, and duties of the former OTS relating to State saving associations to the FDIC, and named the FDIC as the “appropriate Federal banking agency” for State saving associations.²² In 2011, the FDIC transferred all regulations of the former OTS applicable to State savings associations from 12 CFR chapter V to 12 CFR chapter III.²³

Part 563g of the former OTS’s regulations addressed securities offerings.²⁴ The FDIC transferred the rules in part 563g with only technical changes to part 390, subpart W.²⁵ For part 390, subpart W, the FDIC removed references to Federal savings associations as well as the

¹⁸ *Id.* at 53284-85. At the time, the FHLBB was the operating head of the FSLIC.

¹⁹ Pub. L. 101-73, 103 Stat. 183 (1989).

²⁰ *Id.*; 54 FR 49411 (Nov. 30, 1989).

²¹ 54 FR at 49417.

²² 76 FR 47652 (Aug. 5, 2011).

²³ *Id.* at 47653.

²⁴ *Id.* at 47654.

²⁵ *Id.*

enforcement provisions of the Home Owners' Loan Act (HOLA).²⁶ Staff's reasons for rescinding part 390, subpart W at this time are discussed below.

E. FDIC-Proposed Securities Disclosure Regulations and Previously Adopted Statements of Policy

Issuance of securities for FDIC-supervised institutions is generally addressed by State securities laws and regulations, which until fairly recently have required State-chartered institutions to follow the regulations of the SEC. The FDIC has twice proposed (in 1974 and 1977) and later withdrawn proposed regulations that would have established “minimum standards for disclosure of material facts in connection with the offer and sale by or on behalf of an insured State nonmember bank of securities issued by the bank where such offer and sale meet the criteria specified in the regulation.”²⁷ In the proposals, the FDIC noted that sufficient disclosure to enable a purchaser to make an informed investment decision is a requirement of the antifraud provisions from which banks are not exempt.²⁸

The FDIC subsequently withdrew the proposed disclosure regulations on July 6, 1979,²⁹ noting that such withdrawal was consistent with the “FDIC’s policy favoring the shortening and simplification of its regulatory requirements wherever possible.”³⁰ The FDIC also pointed out

²⁶ *Id.* at 47654.

²⁷ See 39 FR 7434 (Feb. 26, 1974). Proposal to establish minimum standards for disclosure of material facts to be required in connection with the offer and sale of securities by or on behalf of an insured State nonmember bank. See also, 42 FR 27955 (June 1, 1977). (Noting that securities issued by a bank are exempt from the registration and prospectus-delivery provisions of the Securities Act but “they are subject to the general antifraud provisions of Section 17(a) of that Act (15 U.S.C. 77q(a)) and SEC Rule 10b-5 (17 CFR 240.10b-5) promulgated under Section 10(b) of the Exchange Act (15 U.S.C. 78j (b)). See *Lehigh Valley Trust Co. v. Central National Bank of Jacksonville*, 409 F.2d 989 (5th Cir. 1969).”).

²⁸ 42 FR at 27995.

²⁹ 44 FR 39469 (July 6, 1979).

³⁰ *Id.*

that the proposal had been public without being acted upon for a long time, and that many State nonmember banks were voluntarily complying already.³¹ Additionally, the FDIC argued that the OCC's regulation³² and the SEC's Regulation A³³ provided adequate direction that State nonmember banks could rely on in preparing offering materials with adequate content and proper format.³⁴

In its stead, on the same day that the proposal was withdrawn, the FDIC published a statement of policy, the *Statement of Policy Regarding the Use of Offering Circulars* (1979 Statement of Policy).³⁵ The 1979 Statement of Policy was “applicable to the offering of securities by insured State nonmember banks and banks in organization which intend to apply for Federal deposit insurance.”³⁶ The 1979 Statement of Policy recognized the FDIC's statutory duty to determine capital adequacy and stated that its purpose was “to protect insured State nonmember banks against possible serious capital losses or insolvency that could result if bank securities are sold in violation of the antifraud provisions of the Federal securities laws.”³⁷ The 1979 Statement of Policy provided a list of information that offering circulars prepared by an insured State nonmember bank should include but noted that the FDIC would not impose the burden of filing and awaiting regulatory approval.³⁸ The FDIC also suggested that State

³¹ *Id.*

³² 12 CFR part 16.

³³ 17 CFR 230.251 *et seq.*

³⁴ 44 FR 39469.

³⁵ 44 FR 39381 (July 6, 1979).

³⁶ *Id.*

³⁷ *Id.* at 39382.

³⁸ *Id.* The FDIC stated that it believed the following information, as applicable, should be included in the offering circular of a State nonmember bank: (1) the name, address, principal place of business and telephone number of the issuing bank; (2) the amount and title of the securities being offered; (3) the offering price and proceeds to the bank on a per share and aggregate basis; (4) the plan and cost of distribution; (5) the reason for the offering and the

nonmember banks requiring additional guidance look to the OCC's regulations at 12 CFR part 16.³⁹

In 1996, the FDIC published a revised statement of policy, the *Statement of Policy Regarding the Use of Offering Circulars in Connection with the Public Distribution of Bank Securities* (1996 Statement of Policy), to address the changing standards and needs of the industry.⁴⁰ Among other things, the 1996 Statement of Policy included enhanced disclosures for mutual-to-stock conversions and sales of a bank's securities on bank premises.⁴¹ In the 1996 update, the FDIC recognized that certain States are also involved in the regulation of securities offered by insured State nonmember banks.

II. The Proposal to Rescind and Remove the Transferred OTS Securities Offerings Regulations, to Rescind the FDIC's Statement of Policy, to Propose a New Regulation, and to Make Other, Technical Amendments

After careful review of part 390, subpart W, staff has determined that the FDIC should rescind subpart W, which is applicable only to State savings associations, rescind the FDIC's 1996 Statement of Policy, propose a new regulation governing securities offering disclosures,

purposes for which the proceeds are to be used, and a brief description of the material risks, if any, involved in the purchase of the securities; (6) a description of the present and proposed business operations of the bank and its capital structure; (7) the principal officers, directors and principal security holders and the amount of securities owned by each; (8) the remuneration and interest in recent or proposed transactions of management and principal security holders and their associates; (9) the high and low sales prices of the securities within the past two years and the source of the quotations; (10) a brief description of any material pending legal proceedings; (11) a summary of any material terms and restrictions applicable to the securities; and (12) Financial Statements: a balance sheet as of the preceding fiscal year end, statements of income for the preceding two fiscal years and interim periods where necessary, notes to financial statements, and schedules of the allowance for possible loan losses. *Id.*

³⁹ *Id.*

⁴⁰ FDIC Statement of Policy on the Use of Offering Circulars, 61 FR 46807 (September 5, 1996).

⁴¹ *Id.* at 46807-08.

and make other, technical amendments to FDIC's regulations referencing mutual-to-stock conversions.⁴²

A. Rescission of Part 390, Subpart W

Staff does not believe it is necessary to treat State savings associations differently than State nonmember banks with respect to public disclosure in connection with securities issuances. Replacing part 390, subpart W with a new regulation that applies to all FDIC-supervised institutions will ensure that the same regulations apply to both State savings associations and State nonmember banks with regard to registration statements, prospectuses, and other securities law matters without creating excess burden on either type of insured financial institution. The new requirements are consistent with both the requirements of part 390, subpart W and with the principles set forth in the 1996 Statement of Policy. A regulation is appropriate because the FDIC's long-term experience has been that FDIC-supervised institutions are either required to follow SEC disclosure regulations by State law or voluntarily follow them and other applicable regulations as a means to comply with the Federal antifraud provisions. In the interests of regulatory transparency, the proposed regulation will make clear the FDIC's expectations for disclosures to be made in connection with the issuance of securities by FDIC-supervised institutions. Therefore, staff proposes to rescind and remove part 390, subpart W and to replace it with the proposed regulation, addressing securities offering disclosure requirements.

⁴² 12 CFR 303.163, 333.4.

B. Rescission of the 1996 Statement of Policy

Since the 1996 Statement of Policy was adopted, the Securities Act was revised⁴³ and the SEC issued new regulations,⁴⁴ State laws applicable to certain securities offerings of FDIC-supervised institutions were preempted, and the FDIC received supervisory authority over State savings associations. Rescinding part 390, subpart W and the 1996 Statement of Policy provides the FDIC with an opportunity to bring FDIC-supervised institutions' regulations into harmony with current securities laws and regulations, to address the preemption of State law, and to locate in one place the FDIC's expectations regarding FDIC-supervised institutions.

C. Proposed Regulation on Securities Offering Disclosures

In light of the Securities Act exemptions discussed above, the FDIC has relied on State laws and regulations for securities disclosure matters. However, changes to the Federal securities laws have resulted in the preemption of much of the applicable State law. The National Securities Markets Improvement Act of 1996 (NSMIA) preempted state authority in two areas that impacted the FDIC: offerings by companies traded on a national securities exchange,⁴⁵ and certain exempt offerings under SEC Rule 506.⁴⁶ Furthermore, the Jumpstart Our Business Startups Act (JOBS Act),⁴⁷ as implemented by SEC regulation, preempted State

⁴³ See, e.g., the Jumpstart Our Business Startups Act (JOBS Act), Public Law 112-106, 126 Stat. 306 (Apr. 5, 2012), which amends certain provisions of the Securities Act to exempt certain securities offerings from registration requirements.

⁴⁴ See 80 FR 21806, 21856 (Apr. 20, 2015) (<https://www.sec.gov/rules/final/2015/33-9741.pdf>, pp. 205-207) for a discussion on how SEC regulations relationship with State securities laws and preempt certain State registration requirements with respect to companies offering securities under SEC Regulation A, Tier 2.

⁴⁵ 15 U.S.C. 77r(b)(1)(B) (preempting state registration authority over a security "listed, or authorized for listing, on a national securities exchange").

⁴⁶ 15 U.S.C. 77r(b)(3) (preempting state registration authority over the "offer or sale of the security to qualified purchasers, as defined by the Commission by rule"). Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act, 15 U.S.C. 77d, and is codified at 17 CFR 230.500 - 508.

⁴⁷ Public Law 112-106, 126 Stat. 306 (April 5, 2012)

registration authority over additional offerings under the amended and expanded SEC “Regulation A+” rules.⁴⁸

Notwithstanding the preemption of State law, it has been the FDIC’s experience that FDIC-supervised institutions follow SEC regulations voluntarily in order to comply with the anti-fraud provisions. However, given the recent regulatory changes and preemption of State law, the FDIC is proposing a regulation to address and clarify requirements for securities offering disclosures by State nonmember banks and State savings associations. Similar to the 1996 Statement of Policy, the amended regulation parallels the requirements of the SEC, and also the requirements of applicable OCC regulation. The proposed regulation would be located in subpart A of part 335 of the FDIC’s regulations.⁴⁹

The proposed regulation would refer to these updated laws and regulations and also would acknowledge that under Section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act,⁵⁰ granting the OCC rulemaking authority relating to both State and Federal savings associations, a mutual State savings association that intends to use a securities offering in connection with a stock offering as part of its conversion to the stock form is by law subject to the disclosure and other requirements of the OCC regulations at 12 CFR part 192, entitled *Conversions from Mutual to Stock Form*.⁵¹ The proposed regulation would indicate that the principles described therein also would be relevant for subsidiaries of State savings associations that issue securities and would add SEC

⁴⁸ See Amendments to Regulation A, Release Nos. 33-9741, 34-74578, 39-2501, 80 FR 21,806 (Apr. 20, 2015). 17 CFR 230.251–.263.

⁴⁹ Part 335, entitled *Securities of State Nonmember Banks and State Savings Associations*, addresses securities recordkeeping and requirements. The proposed regulation would create subpart B to contain the existing regulations of part 335 and create subpart A to contain the new proposed regulation relating to securities offering disclosures.

⁵⁰ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁵¹ See 12 CFR 192.300-192.310. This includes the restrictions on the officers and directors’ sale of stock post-conversion. 12 CFR 192.505.

Rule 144⁵² and Rule 144A⁵³ to the list of potentially relevant Federal regulations for FDIC-supervised institutions to reference.⁵⁴

The proposed regulation would apply to securities offerings to be made by FDIC-supervised institutions in organization, FDIC-supervised institutions subject to an enforcement order that intend to issue securities, FDIC-supervised institutions converting from a mutual to stock form of ownership, and the subsidiaries of State savings associations in one of the three foregoing categories.

The proposed regulation would incorporate defined terms from the Securities Act, would specifically reference SEC and OCC requirements for, and exemptions from, preparing registration statements and prospectuses, would set forth rules for offers and sales of securities by issuers, underwriters, and dealers, and would impose no new filing or other requirements on FDIC-supervised institutions. Thus, the proposed regulation eschews a recitation of the required contents of offering documents covering the securities issuances of FDIC-supervised institutions and instead requires that offering documents contain the information that would be required by the appropriate SEC form when offering securities for sale, if filing or registration were required under the Federal securities laws, and the information that would be required under the appropriate registration exemption if one applies. The proposed regulation thus seeks to treat the securities offerings of FDIC-supervised institutions more like those of other corporations falling under SEC jurisdiction and to eliminate a duplicative system of regulations and forms.

⁵² 17 CFR 230.144.

⁵³ 17 CFR 230.144A.

⁵⁴ Rules 144 and 144A provide guidance for persons who are not deemed to be engaged in a distribution and therefore are not underwriters, and for private resales of securities to institutions.

The proposed regulation also would provide requirements regarding sales practices on the premises of the issuing FDIC-supervised institution or online, and would require legends to avoid consumer confusion regarding the insured status of banking organization securities.

Consistent with existing authorities and supervisory practices, and to assess compliance with Federal antifraud provisions, the FDIC will continue to review offering circulars and other documents issued by FDIC-supervised institutions in organization, FDIC-supervised institutions subject to an enforcement order that intend to issue securities, and FDIC-supervised institutions converting from a mutual to stock form of ownership. Such offering circulars would be required to contain the forms and other content required by the registration exemption upon which the FDIC-supervised institution relies. The proposed rule would permit an FDIC-supervised institution to commence its securities offering upon receiving a written statement from the FDIC that no additional information or changes to the offering documents are necessary. Such offerings would have to be completed within the timeframe required by the appropriate SEC regulation, or a timeline imposed by the FDIC, including those related to the staleness of financial statements.

D. Technical Regulatory Amendments

Staff also is proposing to make technical amendments to §§ 303.163 and 333.4 of its regulations, which address the conversion of an insured mutual state-chartered savings bank to the stock form of ownership. As described above, the former OTS issued regulations relating to mutual-to-stock conversions, part 563b, which was transferred to the OCC with respect to Federal and State savings associations as part of the Dodd-Frank Act. Sections 303.163 and 333.4 refer to the OTS when the reference should be to the OCC. Section 303.163 also refers to part 563b when the reference should be to the OCC's regulations at 12 CFR part 192. To

provide a home for the proposed new regulation, the proposal would create subpart B of part 335, entitled *Securities of State Nonmember Banks and State Savings Associations*, to contain the existing regulations of part 335 and create subpart A to contain the new proposed regulation relating to securities offering disclosures.

Recommendation

The NPR proposes to rescind and remove 12 CFR part 390, subpart W, entitled *Securities Offerings*, to rescind the 1996 Statement of Policy, to add a proposed new regulation to part 335, and to make technical amendments to regulations related to mutual-to-stock conversions. Based on the foregoing, staff requests that the Board approve the attached Resolution to adopt and authorize the publication in the *Federal Register* of the referenced NPR for a public comment period of 60 days.

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