



12 CFR Parts 303, 333, 335, and 390

RIN 3064-AF33

Transferred OTS Regulations Regarding Securities Offerings of State Savings Associations, 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

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking and rescission of a statement of policy.

SUMMARY: In order to streamline Federal Deposit Insurance Corporation (FDIC) regulations and guidance, the FDIC proposes to rescind and remove from the Code of Federal Regulations (CFR) rules entitled *Securities Offerings* that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The FDIC also is proposing to rescind its 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. At the same time, the FDIC is proposing a new regulation regarding securities disclosures to be made by 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. The proposal also would include technical amendments to update related regulations.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods:

- **FDIC Website:** <https://www.fdic.gov/regulations/laws/federal/>. Follow instructions for submitting comments on the agency website.
- **Email:** Comments@fdic.gov. Include RIN 3064-AF33 on the subject line of the message.
- **Mail:** James P. Sheesley, Assistant Executive Secretary, Attention: Comments/RIN 3064-AF33, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivery to FDIC:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should only submit information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to <https://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Maureen Loviglio, Senior Staff Accountant, (202) 898-6777, mloviglio@fdic.gov, Division of Risk Management Supervision; Suzanne Dawley, Counsel, sudawley@fdic.gov; or Gregory Feder, Counsel, gfeder@fdic.gov, Legal Division.

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- I. Objectives**

The objectives of the proposed rule are twofold. The first is to simplify the FDIC's regulations by removing unnecessary regulations, or realigning existing

regulations in order to improve the public's understanding and to improve the ease of reference. The second is to promote parity between State nonmember banks and State savings associations by referring both classes of institution to the same securities offering regulation. Thus, as further detailed below in this Supplementary Information section, the FDIC proposes to rescind and remove from the CFR part 390, subpart W, applicable to State savings associations. At the same time, the FDIC proposes to rescind its current *Statement of Policy Regarding the Use of Offering Circulars in Connection with the Public Distribution of Bank Securities* (1996 Statement of Policy), and replace both part 390, subpart W and the 1996 Statement of Policy with a proposed regulation that will, among other things, incorporate changes in the securities laws and regulations that have occurred since the statement of policy was last updated in 1996 and ensure the principles therein are relevant to State savings associations. Additionally, the FDIC proposes to make technical amendments to existing regulations in order to update regulatory cross-references.

II. Background

A. FDIC's General Approach Regarding Securities Offerings of 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 As more fully described below, generally, banks and savings associations are exempt from

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.

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. 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, serious capital loss or litigation could result if bank or 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 document that contains varying informational and financial disclosures, depending on the exemption provision. The offering document can be used to comply with the antifraud provisions of the Securities Act. As more fully described below, the FDIC has not issued 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 Securities and Exchange Commission (SEC) and other agency regulations regarding the content of registration statements and prospectuses to assist

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.”

⁷ See, e.g., FDIC Statement of Policy, “Use of Offering Circulars in Connection with Public Distribution of Bank Securities,” September 5, 1996, (61 FR 46087, Sept. 5, 1996) (available at <https://www.fdic.gov/regulations/laws/rules/5000-500.html#fdic5000statementop>).

them in complying with the antifraud provisions of the Securities Act. For the reasons described below, the FDIC 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 Act

The Dodd-Frank Act,⁸ signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,⁹ the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller 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 Act¹⁰ provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials issued, made, prescribed, or allowed to become effective by the OTS, providing that, if such 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.

Pursuant to section 316(c) of the Dodd-Frank Act,¹¹ on June 14, 2011, the FDIC's Board of Directors (FDIC Board) approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer

⁸ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁹ 12 U.S.C. 5411.

¹⁰ 12 U.S.C. 5414(b).

¹¹ 12 U.S.C. 5414(c).

Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011.¹²

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act¹³ 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)¹⁴ 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 “appropriate Federal banking agency” contained in section 3(q) of the FDI Act,¹⁵ 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 associations.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC 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, 2011.¹⁶ 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.¹⁷

¹² 76 FR 39246 (July 6, 2011).

¹³ 12 U.S.C. 5412(b)(2)(B)(i)(II).

¹⁴ 12 U.S.C. 1811 *et seq.*

¹⁵ 12 U.S.C. 1813(q).

¹⁶ 76 FR 47652 (Aug. 5, 2011).

¹⁷ *Id.*

C. *The Securities Act*

The Securities Act generally exempts securities issued by banks from its provisions.¹⁸ Similarly, securities issued by certain savings institutions supervised and examined by State or Federal regulators with examination and supervision authority are also exempt from most Securities Act requirements.¹⁹ However, bank- and savings association-issued securities are not exempt from the general antifraud provisions of the Securities Act.²⁰

The original exemption in section 3(a)(5) of the Securities Act exempted an institution “substantially all the business of which is confined to the making of loans to members....”²¹ However, in 1970, the law was amended to require an exempted institution to be supervised and examined by a State or Federal supervisory authority.²² Lawmakers intended the oversight provided by State and Federal banking regulators to serve as an alternative to oversight by the SEC.

Legislative history of the Securities Act supports this assertion.²³ In explaining why the 1933 bill did not cover bank-issued securities, Representative Rayburn explained, “[b]ecause the United States Government, through its examiners and State

¹⁸ See 15 U.S.C. 77c(a)(2) (“Except as hereinafter expressly provided, the provisions of [the Securities Act] shall not apply to any of the following classes of securities: . . . (2) Any security issued or guaranteed by . . . any bank; . . . or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term “investment company”);

¹⁹ See *id.* at 77c(a)(5)(A), (“Except as hereinafter expressly provided, the provisions of [the Securities Act] shall not apply to any of the following classes of securities: (5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution...”); see Pub. L. 91-547, sec. 27(c), 84 Stat. 1434 (1970) (requiring that the institution be supervised and examined by a State or Federal supervisory authority to qualify for the exemption).

²⁰ See footnote 6.

²¹ See Pub. L. 91-547, sec. 27(c), 84 Stat. 1434 (1970) (amended to require that the institution be supervised and examined by a State or Federal supervisory authority to qualify for the exemption).

²² *Id.*

²³ See *e.g.*, Hearings before the Senate Comm. On Banking and Currency on S. 875, 73d Cong., 1st Sess. 99 at 76 (1933) (Mr. Thompson explaining that banks should be exempted from securities regulations because other regulators provide the necessary oversight: “But when it comes to supervision of anything that has to do with Federal Reserve banks . . . , or rather, that they investigate and control in the sense of the issuance of securities, then so far as the surveillance of this bill is concerned we exempted them.”).

officials, is supervising these banks, and it has been complained that we are going into fields where we had no business.”²⁴

D. 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.”²⁵ 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 raise capital and a concomitant adverse effect on the safety and soundness of such institutions and the [Federal Savings and Loan Insurance Corporation (FSLIC)].”²⁶

In explaining the impetus for part 563g, the FHLBB cited Louis D. Brandeis’ endorsement of full disclosure: “sunlight is said to be the best of disinfectants.”²⁷ In additional explanations for promulgating part 563g, the FHLBB cited section 3(a)(2) of the Securities Act and stated that the main reason for the exemption of securities issued by savings and loans associations and similar institutions is that the principal Federal authority, rather than the SEC, should regulate such activity.²⁸ As such, the FHLBB determined it was appropriate to promulgate securities disclosure regulations to protect the public, as well as the FSLIC fund.²⁹

²⁴ 77 Cong. Rec. 2941 (1933) (remarks of Rep. Rayburn); *cf. id.* at 2942 (remarks of Rep. Cannon: “[the banks] are not properly supervised...with respect to the sale of their securities.”).

²⁵ 50 FR 53284 (Dec. 31, 1985).

²⁶ *Id.* at 53284-85. At the time, the FHLBB was the operating head of the FSLIC.

²⁷ *Id.* at 53285 (also citing Professor Louis Loss, “people who are forced to undress in public will presumably pay some attention to their figures.”).

²⁸ 50 FR 38839, 38840 (Sept. 24, 1985).

²⁹ *Id.* (“The use of inadequate or misleading disclosure by individual insured institutions in connection with the offer and sale of securities could have a significant adverse effect on the capabilities of other insured

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.³⁰ 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.³¹ The OTS transferred and republished part 563g in 1989 with minor changes.³² Obsolete exceptions from offering circular requirements were removed, the definition of “savings association” was added, the definition of “insured institution” was removed, and language on what constitutes an unsafe and unsound practice was clarified.³³ Beyond these minimal changes, the OTS transferred part 563g from the FHLBB without substantive discussions on policy.

E. Part 390, Subpart W

As discussed above in section II.B. of this Supplementary Information section, 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.³⁴ In 2011, the FDIC transferred all

institutions to raise capital, could result in an irrational allocation of capital within the industry, and could lead to illiquid and disorderly markets for the securities of insured institutions. Therefore, the [FHLBB] Board has the responsibility of regulating the securities activities of insured institutions when it determines that such regulation is necessary or appropriate for the preservation of the safety and soundness of insured institutions. Further, the [FHLBB] Board has the responsibility of regulating the securities activities of insured institutions when it determines that such regulation is necessary or appropriate to ensure that they are able to perform their functions as providers of housing finance. Finally, the [FHLBB] Board has the responsibility of regulating the securities activities of all insured institutions with a class of securities registered under the Exchange Act when it determines that such regulation is necessary or appropriate in the public interest for the protection of investors and to ensure fair dealing in the securities of such insured institutions.”).

³⁰ Pub. L. 101-73, 103 Stat. 183 (1989).

³¹ *Id.*; 54 FR 49411 (Nov. 30, 1989).

³² 54 FR at 49417.

³³ *Id.*

³⁴ 76 FR 47652 (Aug. 5, 2011).

regulations of the former OTS applicable to State savings associations from 12 CFR chapter V to 12 CFR chapter III.³⁵

Part 563g of the former OTS's regulations addressed securities offerings.³⁶ The FDIC transferred the rules in part 563g with only technical revisions to part 390, subpart W.³⁷ For part 390, subpart W, the FDIC removed references to Federal savings associations as well as the enforcement provisions of the Home Owners' Loan Act (HOLA).³⁸ The FDIC's reasons for rescinding part 390, subpart W at this time are discussed in section III of this Supplementary Information section, below.

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

Issuance of securities for FDIC-supervised institutions generally is addressed by State securities laws and regulations, which until fairly recently have required State-chartered institutions to follow SEC regulations. In May of 1974, the FDIC proposed a regulation that would have required State nonmember banks issuing securities to comply with disclosure and offering-circular requirements.³⁹ The FDIC reissued the proposal in 1977 for comment with changes based on the FDIC's experience reviewing offering circulars voluntarily submitted by State nonmember banks.⁴⁰ The re-proposed regulation 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

³⁵ *Id.* at 47653.

³⁶ *Id.* at 47654.

³⁷ *Id.*

³⁸ *Id.* at 47654.

³⁹ *See* 39 FR 7434 (Feb. 26, 1974).

⁴⁰ *See* 42 FR 27955 (June 1, 1977).

regulation.”⁴¹ 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.⁴² Furthermore, a State nonmember bank’s failure to comply with the securities antifraud provisions could result in a violation of the law and warrant an enforcement action by the FDIC.⁴³

In proposing the regulation, the FDIC referenced sections 5 and 6 of the FDI Act,⁴⁴ which require the FDIC Board to consider the adequacy of a bank’s capital structure.⁴⁵ The FDIC explained that the review of an application by a State nonmember bank that has issued securities or proposes to issue securities should include a review of the associated disclosures of material facts to ensure such disclosures are sufficient.⁴⁶ Additionally, the FDIC noted that the OCC had already adopted similar disclosure requirements at 12 CFR part 16.⁴⁷

The FDIC subsequently withdrew the proposed disclosure regulations on July 6, 1979.⁴⁸ In explaining its decision to withdraw, the FDIC noted that proposal had been public without being acted upon for a long time, and that many State nonmember banks already were complying voluntarily.⁴⁹ Additionally, the FDIC argued that the OCC’s

⁴¹ *Id.* at 27955 (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 Rule 10b-5 of the Securities and Exchange Commission (SEC) (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).”).

⁴² 42 FR at 27995.

⁴³ *Id.* at 27995 (citing 12 U.S.C. 1818(b)).

⁴⁴ 12 U.S.C. 1815, 1816.

⁴⁵ *Id.* at 27956.

⁴⁶ *Id.*

⁴⁷ *Id.* (citing 12 CFR part 16, which remains in force).

⁴⁸ 44 FR 39469 (July 6, 1979).

⁴⁹ *Id.*

securities offering disclosure rules⁵⁰ and the SEC's Regulation A⁵¹ provided adequate direction that State nonmember banks could rely on in preparing offering materials with adequate content and proper format.⁵² In keeping with the "FDIC's policy favoring the shortening and simplification of its regulatory requirements wherever possible," the FDIC withdrew the proposed part 340 securities disclosure regulation.⁵³

In its stead, on the same day that the proposed part 340 was withdrawn, the FDIC published a statement of policy, the *Statement of Policy Regarding the Use of Offering Circulars* (1979 Statement of Policy).⁵⁴ 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."⁵⁵ 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."⁵⁶ 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.⁵⁷ The FDIC also suggested that State

⁵⁰ 12 CFR part 16.

⁵¹ 17 CFR 230.251 through 230.263.

⁵² 44 FR 39469.

⁵³ *Id.*

⁵⁴ 44 FR 39381 (July 6, 1979).

⁵⁵ *Id.*

⁵⁶ *Id.* at 39382.

⁵⁷ *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 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

nonmember banks requiring additional guidance look to the OCC's regulations at 12 CFR part 16.⁵⁸

In 1996, the FDIC published a new 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 laws and standards and needs of the industry.⁵⁹ 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.⁶⁰ In the 1996 update, the FDIC recognized that certain States are also involved in the regulation of securities offered by insured State nonmember banks.

III. 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, the FDIC 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, and make other, technical amendments to certain FDIC regulations⁶¹ to revise regulatory references.

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.*

⁵⁸ *Id.*

⁵⁹ *See* footnote 7.

⁶⁰ *Id.* at 46807-08.

⁶¹ 12 CFR 303.163, 333.4, part 335.

A. Rescission of Part 390, Subpart W

The FDIC 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 (discussed below in section III.C. of this Supplementary Information section) 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, rather than a statement of policy, 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, the FDIC proposes to rescind and remove part 390, subpart W, and replace it with the proposed regulation, addressing securities offering disclosure requirements.

B. Rescission of the 1996 Statement of Policy

Since the 1996 Statement of Policy was adopted, the Securities Act was revised⁶² and the SEC issued new regulations,⁶³ State laws applicable to certain securities offerings of FDIC-supervised institutions were rescinded, 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 in section II.C. of this Supplementary Information section, the FDIC has relied on State laws and regulations for securities disclosure matters. However, changes to the Federal securities laws have resulted in the rescission 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,⁶⁴ and certain exempt offerings under SEC Rule 506.⁶⁵ Furthermore, the Jumpstart Our Business Startups Act (JOBS Act),⁶⁶ as implemented by SEC regulation, preempted State

⁶² See, e.g., the Jumpstart Our Business Startups Act (JOBS Act), Pub. L. 112-106, 126 Stat. 306 (Apr. 5, 2012), which amends certain provisions of the Securities Act to exempt certain securities offerings from registration requirements.

⁶³ 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.

⁶⁴ 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").

⁶⁵ 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 through 230.508.

⁶⁶ Pub. L. 112-106, 126 Stat. 306 (April 5, 2012).

registration authority over additional offerings under the amended and expanded SEC “Regulation A+” rules.⁶⁷

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 the 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 applicable SEC and OCC regulations. The proposed regulation would be located in subpart A of part 335 of the FDIC’s regulations.⁶⁸

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,⁶⁹ 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 part 192 of the OCC regulations, entitled *Conversions from Mutual to Stock Form*.⁷⁰ 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 Rule 144⁷¹ and Rule

⁶⁷ See Amendments to Regulation A, Release Nos. 33-9741, 34-74578, 39-2501, 80 FR 21806 (Apr. 20, 2015). 17 CFR 230.251 through 230.263.

⁶⁸ 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.

⁶⁹ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷⁰ 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.

⁷¹ 17 CFR 230.144.

144A⁷² to the list of potentially relevant Federal regulations for FDIC-supervised institutions to reference. 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 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, and FDIC-supervised institutions converting from a mutual to stock form of ownership. The proposed regulation would also apply to securities offerings made by the subsidiaries of State savings associations in any of the three prior scenarios.

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.

⁷² 17 CFR 230.144A.

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 documents issued by FDIC-supervised institutions in connection with 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.

The proposed regulation is set forth at the end of this Supplementary Information section.

D. Technical Regulatory Amendments

1. Mutual-to-Stock Conversions

The FDIC 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 in section II.D. of this Supplementary Information section, 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. This proposal would make the necessary technical amendments.

2. *Part 335*

Part 335, entitled *Securities of State Nonmember Banks and State Savings Associations*, addresses securities recordkeeping and requirements and there are no subparts enumerated. The proposal 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.

E. Request for Comments

The FDIC invites comments on all aspects of this proposed action, and specifically invites comments on the following:

Question 1. What positive or negative impacts, if any, can you foresee in the FDIC's proposal to issue an amended regulation with respect to securities offering disclosures?

Question 2. What negative impacts, if any, can you foresee in the FDIC's proposal to rescind part 390, subpart W and remove it from the Code of Federal Regulations?

Question 3. What negative impacts, if any, can you foresee in the FDIC's proposal to remove and rescind the Statement of Policy Regarding the Use of Offering Circulars in Connection with the Public Distribution of Bank Securities (1996 Statement of Policy)?

Question 4. Are the descriptions of the form and content requirements in the proposed regulation adequately descriptive? Would additional information or other references (e.g., to other regulations) be helpful? If so, what?

Question 5. Are the procedures regarding the confidential treatment of registrations statement and prospectuses adequate? Would a more specific description be helpful?

Question 6. Is the proposed treatment of the securities offerings of State savings association subsidiaries appropriate? If not, what changes should be made?

IV. Expected Effects

As previously discussed, the proposed rule would rescind Part 390, Subpart W which outlines public disclosure requirements in connection with securities issuances for State savings associations, make technical amendments to §§ 303.163 and 333.4, and establish a new regulation part 335, subpart B which outlines regulations relating to securities offering disclosures for all FDIC-supervised institutions. Concurrent with the adoption of these changes the FDIC plans to rescind its 1996 Statement of Policy. These actions would affect all FDIC-supervised institutions, particularly those that engage in issuing securities. According to the most recent data, the FDIC supervises 3,270 insured depository institutions.⁷³ Therefore, the FDIC estimates that the proposed rule, if adopted, potentially would affect 3,270 institutions. However, the new regulation part 335, subpart A would only directly affect FDIC-supervised institutions that issue offering documents. The FDIC does not currently have access to information that would facilitate an accurate estimate the number of institutions that will issue offering documents. To estimate the number of FDIC-supervised institutions that could be directly affected, staff utilized Call Report data to determine the average number of cooperative banks,

⁷³ Call Report data, June 30, 2020.

cooperative banks with stock ownership, mutual commercial banks, mutual savings and loan associations, mutual savings banks, savings and loan associations with stock ownership, savings banks with stock ownership, and de novo institutions, in existence at year-end over the past five years.⁷⁴ Based on this analysis, the FDIC estimates that 376 institutions would be directly affected by the rescission of the 1996 Statement of Policy and establishment of the new regulation part 335, subpart A.

The proposed rule, if adopted, would rescind part 390, subpart W. However, this aspect of the proposed rule is unlikely to substantively affect FDIC-supervised State savings associations. According to the most recent data, the FDIC supervised 35 State savings associations.⁷⁵ Sections 390.410 through 390.430 include requirements that prescribe definitions, public accountant qualifications, and set forth the form and content of financial statements pertaining to certain securities and their related transaction documents. As previously discussed, the FDIC's 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. Although the contents of part 390, subpart W being rescinded are more detailed than the contents of the proposed amended regulation, the new regulation part 335, subpart A is consistent with both the requirements of part 390, subpart W and the guidance in the 1996 Statement of Policy. Therefore, the FDIC believes that the proposed rule is unlikely to substantively affect FDIC-supervised State savings associations.

The establishment of a new regulation, part 335, subpart A by the proposed rule would pose several broad effects on FDIC-supervised institutions. As previously discussed, the proposed part 335, subpart A is consistent with both the requirements of

⁷⁴ Call Report data for the quarter ending December 31 in 2015-2019.

⁷⁵ Call Report data, June 30, 2020.

part 390, subpart W and the guidance in the 1996 Statement of Policy. Therefore, the primary effect of the proposed rule is to codify in regulation what was previously guidance for FDIC-supervised institutions that are not State savings associations. Since the proposed rule largely harmonizes the FDIC's regulations with updated laws and regulations, the FDIC does not believe that the marginal effect of adopting part 335, subpart A will be significant for FDIC-supervised institutions that are not State savings associations. This aspect of the proposed rule has the benefit of simplifying and harmonizing FDIC regulations by establishing a consistent set of requirements that apply to all FDIC-supervised institutions. Further, this aspect of the proposed rule is likely to benefit FDIC-supervised institutions by treating the securities offerings of FDIC-supervised institutions more like those of other corporations and eliminating a duplicative system of regulations and forms. If the proposed rule were adopted, the establishment of a new regulation part 335, subpart A would pose some disclosure costs for entities directly affected by the proposed rule. However, because part 335, subpart A is consistent with the 1996 Statement of Policy, the concurrent rescission of the 1996 Statement of Policy means there is no net change in disclosure for FDIC-supervised institutions. Finally, this aspect of the proposed rule could pose regulatory costs for FDIC-supervised institutions associated with potentially reviewing and revising existing internal processes and procedures for compliance with applicable disclosure regulations. However, because the number of directly affected FDIC-insured institutions is estimated to be relatively small, the FDIC believes at any such regulatory costs are also likely to be relatively small.

The technical amendments to 12 CFR 303.163 and 12 CFR 333.4 are expected to clarify those regulations but not pose any substantive effect for FDIC-supervised institutions.

Finally, the FDIC believes that the proposed rule, if adopted will benefit FDIC-supervised institutions and the public by clarifying regulations and improving the ease of reference.

V. Alternatives

The FDIC has considered alternatives to the rule but believes that rescinding part 390, subpart W, rescinding the 1996 Statement of Policy, adopting part 335, subpart A, and making technical amendments to the FDIC's regulations represent the most appropriate option for FDIC-supervised institutions. As discussed previously, the Dodd-Frank Act transferred certain powers, duties, and functions formerly performed by the OTS to the FDIC. The FDIC's Board reissued and re-designated certain transferred regulations from the OTS, but noted that it would evaluate them and might later incorporate them into other FDIC regulations, amend them, or rescind them, as appropriate. The FDIC has evaluated the existing regulations relating to securities offerings of State savings associations. The FDIC considered the status quo alternative of retaining the current regulations and 1996 Statement of Policy, but chose not to do so. If the FDIC did not rescind part 390, subpart W, then State savings associations would be subject to an outdated and obsolete set of regulations while State nonmember banks would be referred to the 1996 Statement of Policy, which does not take into account subsequent changes in securities laws and regulations. Therefore, the FDIC believes maintaining the status quo would not be an acceptable option, and is proposing to rescind part 390, subpart W, to rescind the 1996 Statement of Policy, to adopt part 335, subpart A to incorporate securities offerings requirements for issuers, underwriters and dealers of securities of FDIC-supervised institutions, and to make technical amendments to existing regulations.

Another alternative available to the FDIC was to apply the regulations in part 390, subpart W to all FDIC-supervised institutions, but the FDIC chose not to do so. The

FDIC believes it is important for there to be a consistent set of securities offering disclosure regulations for all FDIC supervised institutions that is reflective of updated laws and regulations, and the regulations in part 390, subpart W do not meet this standard. As noted previously, based on supervisory experience, the FDIC has found 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.⁷⁶

Question 7. The FDIC invites comments on all aspects of the expected effects and alternatives analysis. In particular, would the amended regulation have any costs or benefits to covered entities that the FDIC has not identified?

VI. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),⁷⁷ the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The rescission and removal from FDIC regulations of part 390, subpart W and the rescission of the 1996 Statement of Policy do not create new or modify existing information collection requirements. However, certain provisions of the proposed rule contain “collection of information” requirements within the meaning of the PRA of 1995. In accordance with the requirements of the PRA, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

⁷⁶ If in the future the FDIC determines that enforceable regulations are required to ensure safe and sound practices at FDIC-supervised institutions, then that option will be available.

⁷⁷44 U.S.C. 3501–3521.

The OMB control number for *Securities of State Nonmember Banks and State Savings Associations* is 3064-0030 and will be extended, with revision.

Current Action

Estimated Annual Number of Respondents and Responses

The set of potential respondents include all. State nonmember banks and State savings associations. According to recent Call Report data, the FDIC supervises approximately 3,270 insured depository institutions,⁷⁸ including 2,492 entities considered small for purposes of the Regulatory Flexibility Act.⁷⁹ However, the proposed rule would only directly apply to FDIC-supervised institutions that issue offering documents.⁸⁰ The FDIC does not currently have access to information that would enable it to precisely estimate the number of FDIC-supervised institutions that will issue offering documents. To estimate the number of respondents to this information collection, the FDIC has utilized Call Report data to determine the average number of cooperative banks, cooperative banks with stock ownership, mutual commercial banks, mutual savings and loan associations, mutual savings banks, savings and loan associations with stock ownership, savings banks with stock ownership, and de novo institutions, in existence at year-end over the past five years. The FDIC estimates that 376 institutions will respond to the disclosure requirements in the proposed rule.

Charter and Ownership Type	Year-End Period					5-yr Avg
	12/31/15	12/31/16	12/31/17	12/31/18	12/31/19	
Cooperative Bank	21	18	17	16	16	
Cooperative Bank - Stock	10	10	9	8	5	

⁷⁸ FDIC Call Reports, June 30, 2020.

⁷⁹ The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

⁸⁰ The proposed rule would not apply to offering documents issued by an FDIC-supervised institution's holding company.

Mutual Commercial Bank				12	11	
Mutual Savings & Loan	37	37	34	22	22	
Mutual Savings Bank	158	152	142	136	131	
Savings & Loan Association – Stock	11	10	10	14	14	
Stock Savings Bank	166	163	158	147	137	
De novo Banks	1	0	5	8	14	
Total	404	390	375	363	350	376.4
Source: FDIC						

Estimated Time Per Response

The FDIC estimates that respondents will incur 114 labor hours on average, complying with the disclosure requirements of the proposed rule. The FDIC reviewed burden estimates for Regulation A⁸¹ and registered offerings from the SEC, requirements of the proposed rule, and also considered information that is provided to the FDIC and ERISA and other regulatory agencies in the ordinary course of business. The FDIC also considered experience with other types of filings that occur. The FDIC estimates that, of the 376 potential filings, 23 percent are likely to be associated with Regulation D, which may be estimated at 100 hours, 65 percent are likely to be associated with Regulation A, which may be estimated at 120 hours, and 10 percent are likely to be associated with employee stock plans, which may be estimated at 100 hours, and finally, registered offerings are likely to comprise 5 percent rate of the total, which may be estimated at 250 hours. Thus, of the 376 estimated offerings, 9,400 hours are likely to be attributed to Regulation D, 27,072 to Regulation A, 1,900 to employee stock plan offerings, and 4,700 to registered offerings. The total hours of 42,864 divided by 376 total offerings provides an average labor hourly amount per offering of 114.

Annual Burden Summary

The estimated PRA compliance labor hours for the proposed rule are summarized in the table below, which lists the estimated annual number of responses per respondent

⁸¹ OMB Control No. 3235-0286.

and estimated time per response, as described above.

Information Collection (IC) Description	Type of Burden	Estimated Number of Respondents	Estimated Frequency of Responses	Estimated Time per Response	Total Estimated Annual Burden (Hrs)
Part 335, Subpart A – Securities Disclosure	Disclosure	376	1	114	42,864

As the table below shows, the proposed rule would impose an estimated average annual PRA burden of 42,864 hours once the proposed rule has been adopted.

The Estimated Total Annual Burden for Revised Information Collection:

	Type of Burden	Estimated Number of Responses	Hours per Response	Frequency of Response	Number of Responses per Year	Estimated Burden
Form 3 - <i>Initial Statement of Beneficial Ownership</i>	Reporting	58	1	On Occasion	1	58
Form 4 - <i>Statement of Changes in Beneficial Ownership</i>	Reporting	297	0.5	On Occasion	4	594
Form 5 - <i>Annual Statement of Beneficial Ownership</i>	Reporting	69	1	Annual	1	69
Form 8-A	Reporting	2	3	On Occasion	2	12
Form 8-C	Reporting	2	2	On Occasion	1	4
Form 8-K	Reporting	21	2	On Occasion	4	168
Form 10	Reporting	2	215	On Occasion	1	430
Form 10-C	Reporting	1	1	On Occasion	1	1
Form 10-K	Reporting	21	140	Annual	1	2,940
Form 10-Q	Reporting	21	100	Quarterly	3	6,300
Form 12b-25	Reporting	6	3	On Occasion	1	18
Form 15	Reporting	2	1	On Occasion	1	2
Form 25	Reporting	2	1	On Occasion	1	2
Schedule 13D	Reporting	2	3	On Occasion	1	6
Schedule 13E-3	Reporting	2	3	On Occasion	1	6

Schedule 13G	Reporting	2	3	On Occasion	1	6
Schedule 14A	Reporting	21	40	Annual	1	840
Schedule 14C	Reporting	2	40	On Occasion	1	80
Schedule 14D-1 (Schedule TO)	Reporting	2	5	On Occasion	1	10
Part 335, Subpart A – Securities Disclosure	Disclosure	376	114	On Occasion	1	42,864
Totals		535				54,410

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; (d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this document that may affect reporting or recordkeeping requirements and burden estimates should be sent to the addresses listed in the ADDRESSES section of this Supplementary Information. A copy of the comments may also be submitted to the FDIC OMB desk officer: By mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by facsimile to 202-395- 5806, Attention, Federal Banking Agency Desk Officer.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on

small entities.⁸² However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the Federal Register together with the rule. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million.⁸³ Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As previously discussed, the proposed rule would rescind part 390, subpart W, which outlines public disclosure requirements in connection with securities issuances for State savings associations; establish a new regulation part 335, subpart A, which outlines regulations relating to securities offering disclosures for all FDIC-supervised institutions; and make technical amendments to §§ 303.163 and 333.4. Concurrent with the adoption of these changes the FDIC plans to rescind its 1996 Statement of Policy. These actions would affect all FDIC-supervised institutions, particularly those that engage in issuing securities. According to the most recent data, the FDIC supervises 3,270 insured

⁸² 5 U.S.C. 601, *et seq.*

⁸³ The SBA defines a small banking organization as having \$600 million or less in assets, where an organization’s “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201 (as amended, by 84 FR 34261, effective August 19, 2019). “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

depository institutions, of which 2,492 are considered small banking organizations for the purposes of RFA.⁸⁴ Therefore, the FDIC estimates that the proposed rule, if adopted, potentially would affect 2,492 small institutions. However, the new regulation in part 335, subpart A would only directly affect small FDIC-supervised institutions that issue offering documents. The FDIC does not currently have access to information that would facilitate an accurate estimate the number of small institutions that will issue offering documents. To estimate the number of small FDIC-supervised institutions that could be directly affected, staff utilized Call Report data to determine the average number of cooperative banks, cooperative banks with stock ownership, mutual commercial banks, mutual savings and loan associations, mutual savings banks, savings and loan associations with stock ownership, savings banks with stock ownership, and de novo institutions, in existence at year-end over the past five years.⁸⁵ Based on this analysis, the FDIC estimates that 260 (10.4 percent) small FDIC-supervised institutions will be directly affected by the rescission of the 1996 Statement of Policy and establishment of the new regulation part 335, subpart A.

The proposed rule, if adopted, would rescind part 390, subpart W, however this aspect of the proposed rule is unlikely to substantively affect small FDIC-supervised State savings associations. According to the most recent data, the FDIC supervised 33 small State savings associations.⁸⁶ Sections 390.410 through 390.430 include requirements that prescribe definitions, public accountant qualifications, and set forth the

⁸⁴ Call Report data, June 30, 2020. The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

⁸⁵ Call Report data for the quarter ending December 31 in 2015-2019.

⁸⁶ Call Report data, June 30, 2020.

form and content of financial statements pertaining to certain securities and their related transaction documents. As previously discussed, the FDIC's 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. Although the contents of part 390, subpart W being rescinded are more detailed than the contents of the proposed regulation, the new regulation at part 335, subpart A is consistent with both the requirements of part 390, subpart W and the 1996 Statement of Policy. Therefore, the FDIC believes that the proposed rule is unlikely to substantively affect small FDIC-supervised State savings associations.

The establishment of a new regulation, part 335, subpart A by the proposed rule would pose several broad effects on small FDIC-supervised institutions. As previously discussed, the proposed part 335, subpart A is consistent with both the requirements of part 390, subpart W and the 1996 Statement of Policy. Therefore, the primary effect of the proposed rule is to codify in regulation what was previously guidance for small FDIC-supervised institutions that are not State savings associations. Since the proposed rule largely harmonizes the FDIC's regulations with updated laws and regulations, the FDIC does not believe that the marginal effect of adopting part 335, subpart A will be significant for small FDIC-supervised institutions that are not small State savings associations. However, this aspect of the proposed rule is likely to benefit small FDIC-supervised institutions by establishing a consistent set of requirements that apply to all FDIC-supervised institutions. Further, this aspect of the proposed rule is likely to benefit small FDIC-supervised institutions by treating the securities offerings of small FDIC-supervised institutions more like those of other corporations and eliminating a duplicative system of regulations and forms. If the proposed rule were adopted, the establishment of a new regulation part 335, subpart A would pose some disclosure costs for entities

directly affected by the proposed rule. However, because part 335, subpart A is consistent with the 1996 Statement of Policy, the concurrent rescission of 1996 Statement of Policy means there is no net change in disclosure for small FDIC-supervised institutions. Finally, this aspect of the proposed rule could pose regulatory costs for small FDIC-supervised institutions associated with potentially reviewing and revising existing internal processes and procedures for compliance with applicable securities offering disclosure regulations. However, because the number of directly affected small, FDIC-insured institutions is estimated to be relatively small, the FDIC believes at any such regulatory costs are also likely to be relatively small.

The technical amendments to §§ 303.163 and 333.4 are expected to clarify those regulations but not pose any substantive effect for small FDIC-supervised institutions.

Finally, the FDIC believes that the proposed rule, if adopted, will benefit small FDIC-supervised institutions and the public by clarifying regulations and improving the ease of reference.

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Question 8. The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects on small entities that the FDIC has not identified?

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act⁸⁷ requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC

⁸⁷ Pub. L. 106–102, 113 Stat. 1338, 1471 (codified at 12 U.S.C. 4809).

has sought to present the proposed rule to rescind part 390, subpart W in a simple and straightforward manner.

Question 8. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.⁸⁸ The FDIC, along with the other Federal banking agencies, submitted a Joint Report to Congress on March 21, 2017, (EGRPRA Report) discussing how the review was conducted, what has been done to date to address regulatory burden, and further measures that will be taken to address issues that were identified. As noted in the EGRPRA Report, the FDIC is continuing to streamline and clarify its regulations through the OTS rule integration process. By removing outdated or unnecessary regulations, such as part 390, subpart W, this proposal complements other actions the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 333

Banks, banking.

⁸⁸ Pub. L. 104–208, 110 Stat. 3009 (1996).

12 CFR Part 335

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

12 CFR Part 390

Administrative practice and procedure, Advertising, Aged, Civil rights, Conflict of interests, Credit, Crime, Equal employment opportunity, Fair housing, Government employees, Individuals with disabilities, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation proposes to amend 12 CFR parts 303, 333, 335, and 390 as follows:

PART 303—FILING PROCEDURES

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 478, 1463, 1467a, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831i, 1831e, 1831o, 1831p–1, 1831w, 1831z, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5412; 15 U.S.C. 1601–1607.

2. Amend § 303.163 by revising paragraph (b) to read as follows:

§ 303.163 Processing.

* * * * *

(b) *Additional considerations.* (1) In reviewing the notice and other materials submitted under this subpart, the FDIC will take into account the extent to which the proposed conversion transaction conforms with the various provisions of the mutual-to-stock conversion regulations of the Office of Comptroller of the Currency (OCC) (12 CFR part 192), as currently in effect at the time the notice is submitted. Any non-conformity with those provisions will be closely reviewed.

(2) Conformity with the OCC requirements will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion transaction would pose a risk to the bank's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty.

* * * * *

PART 333—EXTENSION OF CORPORATE POWERS

3. The authority citation for part 333 continues to read as follows:

Authority: 12 U.S.C. 1816; 1817(i); 1818; 1819(a) (Seventh, Eighth, and Tenth), 1828, 1828(m), 1831p-1(c), 5414 and 5415.

4. Amend § 333.4 by revising paragraph (e) introductory text to read as follows:

§ 333.4 Conversions from mutual to stock form.

* * * * *

(e) *Stock benefit plan limitations.* The FDIC will presume that a stock option plan or management or employee stock benefit plan that does not conform with the applicable percentage limitations of the regulations issued by the Office of the Comptroller of the Currency constitutes excessive insider benefits and thereby evidences a breach of the board of directors' or trustees' fiduciary responsibility. In addition, no converted insured mutual state savings bank shall, for one year from the date of the conversion, implement a stock option plan or management or employee stock benefit plan, other than a tax-qualified employee stock ownership plan, unless each of the following requirements is met:

* * * * *

PART 335 – SECURITIES OF STATE NONMEMBER BANKS AND STATE SAVINGS ASSOCIATIONS

5. The authority citation for part 335 is revised to read as follows:

Authority: 12 U.S.C. 1819.

Subpart A also issued under 12 U.S.C. 1816, 1818, 1828, 1831o, 1831p-1, 1462a, 1463, 1464, 5412.

Subpart B also issued under 15 U.S.C. 78j-1, 78l(i), 78m, 78n, 78p, 78w, 5412, 5414, 5415, 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

6. Add subpart A to read as follows:

Subpart A – Securities Disclosure

Sec.

335.1 Purpose, scope, and applicability.

335.2 Definitions.

335.3 Registration statement and prospectus requirements.

335.4 Exemptions from registration statement and prospectus requirements.

335.5 Sales practices regarding securities issuances.

335.6 Securities legends.

335.7 Filing procedures and confidentiality.

Subpart A – Securities Disclosure

§ 335.1 Purpose, scope, and applicability.

(a) *Purpose and scope.* This subpart sets forth rules for filing with the FDIC registration statements, prospectuses, and other offering documents related to offers and sales of FDIC-supervised institution securities and the securities of the subsidiaries of State savings associations by issuers, underwriters, and dealers.

(b) *Applicability.* (1) This subpart is applicable to the offers or sales of securities of FDIC-supervised institutions in connection with:

(i) Organizational efforts pursuant to 12 U.S.C. 1815 and subject to the requirements of 12 CFR part 303, subpart B;

(ii) A capital raise by an FDIC-supervised institution subject to an enforcement action pursuant to 12 U.S.C. 1818 or a capital restoration plan pursuant to 12 U.S.C. 1831o and 12 CFR part 324;

(iii) A mutual state-chartered bank conversion from mutual to stock form pursuant to 12 CFR 333.4 and part 303, subpart I; and

(iv) A mutual state savings association conversion from mutual to stock form pursuant to 12 CFR part 192.

(2) This subpart applies also to a security offering by a subsidiary of any State savings association described in paragraphs (b)(1)(i) through (iv) of this section.

(c) *Cross references to securities regulations--(1) Securities offerings generally.* This subpart generally cross references the regulations of the Securities and Exchange Commission as these regulations are issued, revised, or updated from time to time under the Securities Act of 1933, as amended (15 U.S.C. 77a *et seq.*), except as provided otherwise in this subpart.

(2) *State savings associations' mutual-to-stock conversion securities offerings.* The offers or sales of the securities of state savings association in connection with a mutual-to stock conversion are subject to the rules set forth by the Office of the Comptroller of the Currency at 12 CFR part 192 for the purposes of this subpart.

(d) *Rule of construction.* Any references to the regulations issued by another agency include such regulations as they may be amended or replaced from time to time.

§ 335.2 Definitions.

Unless otherwise defined in this subpart, definitions shall have the meaning given to them in the Securities Act and the regulations of the SEC.

For the purposes of this subpart, the following definitions apply:

FDIC-supervised institution means any state nonmember bank or state savings association.

Issue means the same as in section 2(a)(4) of the Securities Act (15 U.S.C. 77b(a)(4)).

Offering documents means the documents described in rules 252-254 of the SEC's Regulation A (17 CFR 230.252).

Prospectus means an offering document that includes the information required by section 10(a) of the Securities Act (15 U.S.C. 77j(a)).

Registration statement means a filing that includes the prospectus and other information required by section 7 of the Securities Act (15 U.S.C. 77g).

Sale, sell, offer to sell, offer for sale, and offer mean the same as in section 2(a)(3) of the Securities Act (15 U.S.C. 77b(a)(3)).

SEC or the *Commission* means the Securities and Exchange Commission. When used in the rules, regulations, or forms of the SEC referred to in this part, the terms SEC, Commission, or Commissioner shall be deemed to refer to the FDIC.

Security means the same as in section 2(a)(1) of the Securities Act (15 U.S.C. 77b(a)(2)).

Securities Act means the Securities Act of 1933, as amended (15 U.S.C. 77a-77aa).

§ 335.3 Registration statement and prospectus requirements.

(a) *Registration statement filing.* An FDIC-supervised institution shall file with the appropriate FDIC regional office a registration statement, including any prospectus, that conforms to the registration requirements of section 3 of the Securities Act (15 U.S.C. 77c), as if the FDIC-supervised institution was not otherwise exempt from such registration requirements.

(b) *Registration and prospectus requirements.* Except as provided in § 335.4, registration statements, prospectuses, and offering documents filed by an FDIC-supervised institution must conform to the form and content requirements of 17 CFR

230.400 through 230.498A (SEC Regulation C), except to the extent those requirements conflict with the specific requirements of this subpart.

(c) *Disclosure requirements.* Disclosures included in registration statements, prospectuses, and offering documents filed by an FDIC-supervised institution must conform to 17 CFR part 229 (SEC Regulation S-K).

(d) *Form and content of financial statements.* Financial statements included in registration statements, prospectuses, and offering documents filed by an FDIC-supervised institution must conform to 17 CFR part 210 (Regulation S-X).

§ 335.4 Exemptions from registration statement and prospectus requirements.

(a) *Exemptions.* The securities offering of an FDIC-supervised institution is exempt from the registration statement and prospectus requirements of 17 CFR 230.400 through 230.498A (SEC Regulation C) if the securities offering meets the requirements of one of the following:

(1) 17 CFR 230.251 through 230.263 (SEC Regulation A);

(2) 17 CFR 230.500 through 230.508 (SEC Regulation D);

(3) 17 CFR 230.701 (SEC Rule 701);

(4) 17 CFR 230.144 (Rule 144) and 17 CFR 230.144A (Rule 144A);

(5) Offers and sales of securities in connection with a mutual-to-stock conversion pursuant to 12 CFR part 192; or

(6) Offers and sales in connection with the dissolution of the FDIC-supervised institution's holding company, provided all of the following requirements are met:

(i) The offer and sale of securities occurs solely as part of a dissolution in which the security holders exchange shares of securities in the FDIC-supervised institution's holding company (that had no significant assets other than securities of the FDIC supervised institution) for the FDIC-supervised institution's securities;

(ii) The FDIC-supervised institution's holding company's security holders receive, after the dissolution, substantially the same proportional share interests in the FDIC-supervised institution securities as they held in the holding company;

(iii) The rights and interests of the FDIC-supervised institution's holding company's security holders in the FDIC-supervised institution are substantially the same as those they had in the holding company prior to the transaction; and

(iv) The FDIC-supervised institution has substantially the same assets and liabilities as the FDIC-supervised institution's holding company had on a consolidated basis prior to the transaction.

(b) *Offering documents.* An FDIC-supervised institution subject to this subpart, the securities offering of which is exempt from registration statement and prospectus requirements, must provide the FDIC with an offering document that complies with the form and content requirements of the exemption upon which the FDIC-supervised institution relies.

§ 335.5 Sales practices regarding securities issuances.

(a) *Sales on the premises of an FDIC-supervised institution.* An FDIC-supervised institution must comply with the following restrictions when selling securities on the institution's premises:

(1) All sales must be conducted in a segregated area of the FDIC-supervised institution's offices, whenever possible;

(2) Offers and sales must be conducted by authorized personnel, excluding tellers, in places where deposits are not ordinarily received;

(3) The FDIC-supervised institution must obtain a signed and dated certification from the purchaser confirming that the purchaser has read and understands the disclosures set out in the offering document and the subscription order form;

(4) The certification must contain a separate place where a purchaser can indicate, by initialing or by comparable method, that the purchaser acknowledges that the securities being sold are not covered by FDIC deposit insurance; and

(b) *Online sales.* If an FDIC-supervised institution offers securities online, the FDIC-supervised institution must include in the FDIC-supervised institution's subscription order form the legends set forth in § 335.6.

§ 335.6 Securities legends.

(a) A securities offering must include the following legends in a prominent place in capital letters printed in boldfaced type:

THESE SECURITIES ARE NOT DEPOSITS. THESE SECURITIES ARE NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION OR ANY OTHER AGENCY, AND ARE SUBJECT TO INVESTMENT RISK, INCLUDING THE POSSIBLE LOSS OF PRINCIPAL.

THESE SECURITIES HAVE NOT BEEN APPROVED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION NOR HAS THE FEDERAL DEPOSIT INSURANCE CORPORATION PASSED ON THE ADEQUACY OR ACCURACY OF THE REGISTRATION STATEMENT AND PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

(b) A debt securities offering must include the following legend in a prominent place in capital letters printed in boldfaced type:

THESE DEBT OBLIGATIONS ARE SUBORDINATE TO THE CLAIMS OF DEPOSITORS AND OTHER CREDITORS AS MORE FULLY DESCRIBED IN THE REGISTRATION STATEMENT AND PROSPECTUS.

§ 335.7 Filing procedures and confidentiality.

(a) *Filings.* (1) An FDIC-supervised institution must file an offering document prior to the commencement of offering securities for offer or sale as follows:

(i) For offerings described in § 335.1(b)(1)(i), together with the application for deposit insurance;

(ii) For offerings described in § 335.1(b)(1)(ii), together with the capital restoration plan or otherwise as required by an Order of the FDIC;

(iii) For offerings described in § 335.1(b)(1)(iii), together with the notice and materials required by 12 CFR 303.161; and

(iv) For offerings described in § 335.1(b)(1)(iv), together with the forms required by 12 CFR 192.5.

(2) Unless otherwise indicated in this subpart, filings should be submitted to the appropriate regional office. Instructions for submitting filings may be obtained from the appropriate FDIC regional director. The FDIC may require the applicant to submit additional information.

(3) The FDIC may request that an FDIC-supervised institution provide additional information in, or otherwise revise, a registration statement, prospectus, or other offering document, consistent with the requirements of the filings described in § 335.1(b). An FDIC-supervised institution may offer or sell securities in a transaction subject to this subpart when it receives a written statement from the FDIC to the effect that no additional information or changes are required.

(b) *Confidentiality.* FDIC-supervised institutions should contact the appropriate FDIC regional office regarding materials such institutions wish to remain confidential.

§§ 335.101 through 335.801 [Designated as Subpart B]

7. Designate §§ 335.101 through 335.801 as subpart B and add a heading for newly designated subpart B to read as follows:

Subpart B – Securities of State Nonmember Banks and State Savings Associations

Sec.

335.101 Scope of part, authority and OMB control number.

335.111 Forms and schedules.

335.121 Listing standards related to audit committees.

335.201 Securities exempted from registration.

335.211 Registration and reporting.

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

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

335.241 Unlisted trading.

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

335.261 Exemptions, terminations, and definitions.

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

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

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

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

335.401 Solicitations of proxies.

335.501 Tender offers.

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

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

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

335.613 Annual statement of beneficial ownership of securities (Form 5).

335.701 Filing requirements, public reference, and confidentiality.

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

Subpart B [Amended]

8. Amend newly designated subpart B by:
 - a. Removing “Part 335” and adding “This subpart” in its place wherever it appears;

b. Removing “This part” and adding “This subpart” in its place wherever it appears; and

c. Removing “this part” and adding “this subpart” in its place wherever it appears.

**PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF
THRIFT SUPERVISION**

9. The authority citation for part 390 continues to read as follows:

Authority: 12 U.S.C. 1819.

* * * * *

Subpart W—[Removed and Reserved]

10. Remove and reserve subpart W, consisting of §§ 390.410 through 390.430.

Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on or about January 19, 2021.
James P. Sheesley,
Assistant Executive Secretary.

BILLING CODE 6714-01-P

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