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MEMORANDUM TO: Board of Directors

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

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

Summary: In November 2014, the FDIC published a proposed rule in the *Federal Register* for public comment to revise the filing requirements and processing procedures for changes in control with respect to State nonmember banks and State savings associations ("proposed rule"). Staff is now requesting that the FDIC Board of Directors ("Board") adopt and issue the attached final rule titled, *Filing Requirements and Processing Procedures for Changes in Control with respect to State Nonmember Banks and State Savings Associations* ("final rule") and authorize its publication in the *Federal Register*. The final rule generally adopts the proposed rule without change; however, it includes one modification to require a second notice for certain acquisitions by persons who have already been approved to acquire control.

The attached final rule amends the FDIC's filing requirements and processing procedures for notices filed under the Change in Bank Control Act ("Notices"). The final rule consolidates into one subpart the requirements and procedures for Notices filed with respect to State nonmember banks and State savings associations, and eliminates Part 391, subpart E. The final rule also adopts the best practices of the related regulations of the Office of the Comptroller of the Currency ("OCC") and the Board of Governors of the Federal Reserve System ("Board of Governors"). In addition, the final rule enhances the transparency of the FDIC's current practices and procedures with respect to the existing regulation. This final rule is also part of the FDIC's continuing review of its regulations under the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

Concur:

Charles Yi
General Counsel

Recommendation: That the Board adopt and issue the attached final rule and authorize its publication in the *Federal Register*.

Discussion:

Background – the Transferred OTS Regulation

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

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

[1] 12 U.S.C. 1817(j).
[2] 12 CFR 303.80 et seq.
[3] Certain industrial loan companies, trust companies, and credit card banks that are State nonmember banks under the FDI Act are not "banks" under the Bank Holding Company Act ("BHC Act"). 12 U.S.C. 1841(c)(2). Therefore, a company that seeks to control such an institution would not necessarily have to be a bank holding company under the BHC Act and would not have to be subject to supervision by the Board of Governors. However, such a company would have to file a Notice with, and obtain the approval of, the FDIC prior to acquiring such an institution.
[4] 12 U.S.C. § 5411.
[5] 12 U.S.C. § 5414(b).

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

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

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

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

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

Proposed Rule

The proposed rule was published in the *Federal Register* for a 60-day comment period on November 25, 2014.[13] The FDIC did not receive any comments in response to the proposed rule.

Final Rule

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

(1) adopt best practices of the OCC and the Board of Governors and thereby increase the consistency of Subpart E of Part 303 with the related regulations of the OCC and the Board of Governors;[14]

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

(3) consolidate and conform the transferred regulation with the change in control regulation for State nonmember banks.[15]

The final rule adopts the best practices of the OCC and the Board of Governors by incorporating certain rebuttable presumptions of acting in concert. FDIC's current Subpart E of Part 303 does not include any presumptions related to persons acting in concert, and the FDIC has addressed such situations on a case-by-case basis, often conducting a detailed review of groups of persons proposing to acquire voting securities. The Board of Governors and the OCC, however, have relied on rebuttable presumptions of acting in concert in appropriate cases when applying the Change in Bank Control Act to groups of persons proposing to acquire voting

[13] 79 FR 70121 (Nov. 25, 2014).
[14] 12 CFR 5.50 et seq. (OCC) and 12 CFR 225.41-.43 (Board of Governors).
[15] A company that is not a bank holding company nor a savings and loan holding company and that seeks to acquire a State savings association that operates solely in a fiduciary capacity would not be subject to supervision by the Board of Governors. Such a company would have to file a Notice with, and obtain the approval of, the FDIC.

securities of insured depository institutions.[16] The adoption of acting-in-concert presumptions should make the acting-in-concert review process more streamlined and efficient for both the acquirers and the FDIC. The final rule includes rebuttable presumptions of acting in concert with respect to the following persons:

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

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

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

[16] *See, e.g,* 12 CFR 225.41(d) and 79 FR 33260 (June 10, 2014).

provides that nonvoting securities that may be converted into voting securities are presumed to be voting securities subject to rebuttal.

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

As compared to the proposed rule, the final rule requires a person to file a second Notice in certain circumstances unless waived by the FDIC. In particular, the final rule requires a person who has previously been approved to acquire control with less than 25% of any class of the voting securities of the covered institution, and who has maintained that control, to file a second Notice if that person's ownership, control, or power to vote will increase to 25 percent or more of any class of voting securities. Under the current Subpart E of Part 303, a person that has lawfully acquired and maintained control can acquire additional securities without filing another Notice.

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

Conclusion

FDIC staff recommends that the FDIC Board adopt the attached final rule and authorize its publication in the *Federal Register*.

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