March 3, 2021

MEMORANDUM TO: Board of Directors

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

SUBJECT: Interim Final Rule: Amendment to the Capital Rule to Facilitate the Emergency Capital Investment Program

SUMMARY: In order to support and facilitate the timely implementation and acceptance of the Congressionally authorized Emergency Capital Investment Program (ECIP) for the Department of the Treasury to make capital investments in low- and moderate-income community financial institutions, staff is presenting for approval of the Federal Deposit Insurance Corporation (FDIC) Board of Directors (FDIC Board) a request to adopt and publish the attached interagency interim final rule. Specifically, the interim final rule provides that preferred stock issued under ECIP qualifies as additional tier 1 capital and that subordinated debt issued under ECIP qualifies as tier 2 capital under the regulatory capital rule of the FDIC, Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Federal Reserve) (together, the agencies).

Recommendation: Staff requests that the FDIC Board approve this interim final rule and authorize its publication in the *Federal Register* with a 60-day public comment period.

Concur:

Nicholas J. Podsiadly
General Counsel

Discussion:

I. Background

On December 27, 2020, the Consolidated Appropriations Act, 2021,[1] was signed into law and added a new Section 104A to the Community Development Banking and Financial Institutions Act of 1994 (the Act). Section 104A of the Act authorizes the Secretary of the Treasury to establish the Emergency Capital Investment Program (ECIP or Program) through which the Department of the Treasury (Treasury) can make capital investments in certain low- and moderate-income community financial institutions. The Act states that the purpose of these capital investments is to support the efforts of low- and moderate-income community financial institutions to, among other things, provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers in low-income and underserved communities, including persistent poverty counties, which may be disproportionately impacted by the economic effects of the Coronavirus 2019 (COVID–19) event.[2]

Under ECIP, a financial institution is generally eligible to receive capital investments from Treasury if it is a low- and moderate-income community financial institution, which is defined by the Act to include any financial institution that is (1) a community development financial institution or minority depository institution,[3] and (2) an insured depository institution, bank holding company, savings and loan holding company, or federally insured credit union (collectively, eligible banking organizations).

---

[1] Pub. L. 116-260.

[2] *Id.*

[3] The terms "Community Development Financial Institution" and "Minority Depository Institution" are defined in section 104A of the Act.

Under ECIP, Treasury can acquire senior preferred stock from eligible banking organizations (Senior Preferred Stock). Additionally, if the Secretary of the Treasury determines that an eligible banking organization cannot feasibly issue preferred stock, such as a bank organized as an S corporation[4] or mutual banking organization, Treasury can acquire subordinated debt instruments (Subordinated Debt) from such an eligible banking organization.[5] Under the Act, Treasury is required to seek to establish the terms of preferred stock issued under ECIP to enable such instruments to qualify as tier 1 capital under the respective capital rule of the agencies.[6]

On [date], Treasury published the [proposed] terms of the Senior Preferred Stock and Subordinated Debt.[7] As described in the terms published by Treasury, Senior Preferred Stock issued under ECIP will be noncumulative, perpetual preferred stock that is senior to the issuer's common stock and *pari passu* with (or, in some cases, senior to) the issuer's most senior class of existing preferred stock. Subordinated Debt issued under ECIP will be unsecured subordinated debt. The Subordinated Debt will rank junior to all other debt of the issuer except that it will rank senior to mutual capital certificates or similar instruments issued by a mutual banking organization and to any equity instruments issued by an S corporation.

II. Description of the Proposed Rule

The Senior Preferred Stock and Subordinated Debt will feature characteristics that are similar to those of instruments that qualify under the agencies' capital rule as additional tier 1 capital and tier 2 capital, respectively. Further, the establishment of ECIP and the capital

---

[4] An S corporation is corporation that has elected Subchapter S corporation status under the Internal Revenue Code.

[5] Section 104A(d)(5)(B) of the Act.

[6] Section 104A(f) of the Act.

[7] The term sheets for the Senior Preferred Stock and Subordinated Debt may be found on Treasury's website. For a complete description of the terms of the instruments, see [link to UST's website.]

investments being made thereunder help support the efforts of low- and moderate-income community financial institutions to provide financial intermediary services in low-income and underserved communities. To facilitate implementation of ECIP, the agencies are revising the capital rule to provide that the Senior Preferred Stock will qualify as additional tier 1 capital and Subordinated Debt will qualify as tier 2 capital.[8] These revisions are based on the terms and conditions of the Senior Preferred Stock and Subordinated Debt provided in the Senior Preferred Stock term sheet and the Subordinated Debt term sheet published by the U.S. Department of the Treasury on [date]. If the terms and conditions for the Senior Preferred Stock or Subordinated Debt are modified in the future such that they differ materially from the terms and conditions provided in the term sheets, the agencies may reevaluate whether such capital treatment remains appropriate.

In addition, the OCC is adding language to its licensing rule to clarify that provisions and covenants added to a subordinated debt document pursuant to requirements imposed by the Treasury Department for purposes of ECIP, will not be considered to limit the authority of a national bank or interfere with the OCC's supervision of the national bank.

Conclusion: Staff requests that the FDIC Board approve this interim final rule and authorize its publication in the *Federal Register* with a 60-day public comment period.

Staff Contacts:

<u>RMS/Capital Markets</u>

Bobby Bean, Associate Director (ext. 8-6705)

Ben Bosco, Chief, Capital Policy Section (ext. 8-6853)

Noah Cuttler, Senior Policy Analyst (ext. 8-3556)

---

[8] *See* 12 CFR 3.20 (OCC); 12 CFR 217.20 (Board); 12 CFR 324.20 (FDIC).

Legal

Ashby Hilsman, Assistant General Counsel (ext. 8-6636)

Francis Kuo, Counsel (8-6654)

Amanda Ledig, Attorney (ext. 8-7261)