

Via E-Mail (comments@fdic.gov)

February 27, 2023

Mr. Manny Cabeza
Regulatory Counsel
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

**Subject: Securities of State Nonmember Banks and State Savings Associations,
OMB Number: 3064-0030**

Dear Mr. Cabeza:

Thank you for the opportunity to comment on the FDIC's proposal to renew its currently approved collections of information entitled Securities of State Nonmember Banks and State Savings Associations (OMB Number: 3064-0030).¹ My comments are focused on two of the information collections listed on the Summary of Estimated Annual Burden and then described in the relevant Federal Register notices: Form 4, Statement of Changes in Beneficial Ownership of Securities; and Form 5, Annual Statement of Beneficial Ownership of Securities.²

Applicable FDIC Regulations

As discussed in the FDIC's January 6, 2023, and February 22, 2023, Federal Register notices, pursuant to Section 12(i) of the Securities Exchange Act of 1933 (Exchange Act), the FDIC has the authority, including rulemaking authority, to administer and enforce specified sections of the Exchange Act and the Sarbanes-Oxley Act of 2002 (including Section 16 of the Exchange Act, 15 U.S.C. 78p, Directors, officers, and principal stockholders) as may be necessary with respect to state nonmember banks and state savings associations. Section 12(i) generally requires the FDIC to issue regulations substantially similar to those issued by the Securities and Exchange Commission (SEC) to carry out these responsibilities, which the FDIC has accomplished through the issuance of Part 335 of its regulations: Securities of State Nonmember Banks and State Savings Associations (12 CFR 335). In this regard, Section 335.101(b) of the FDIC's regulations states that

¹ See the FDIC's initial Paperwork Reduction Act Federal Register notice (88 FR 1069, January 6, 2023), which is available at <https://www.govinfo.gov/content/pkg/FR-2023-01-06/pdf/2023-00055.pdf>. The FDIC republished this proposed collection renewal on February 22, 2023 (88 FR 10895), the Federal Register notice for which is available at <https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03655.pdf>.

² See 88 FR 1070-1071 and 88 FR 10896-10897.

Part 335 generally incorporates through cross reference the regulations of the SEC as these regulations are issued, revised, or updated from time to time under sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), except as provided at § 335.801 of this part. References to the Commission in the regulations of the SEC are deemed to refer to the FDIC unless the context otherwise requires. (emphasis added)

Section 335.601 of the FDIC’s regulations (“Requirements of section 16 of the Securities Exchange Act of 1934”) states, in part, that

Persons subject to section 16 of the Exchange Act with respect to securities registered under this part shall follow the applicable and currently effective SEC regulations issued under section 16 of the Exchange Act (17 CFR part 240), except that the forms described in § 335.611 (FDIC Form 3), § 335.612 (FDIC Form 4), and § 335.613 (FDIC Form 5) shall be used in lieu of SEC Form 3, Form 4, and Form 5, respectively.

Part 335 of the FDIC’s regulations then specifically addresses the filing of FDIC Forms 4 and 5, as follows:

§ 335.612 Statement of changes in beneficial ownership of securities ([FDIC] Form 4).

This form shall be filed in lieu of SEC Form 4 pursuant to SEC Rules for statements of changes in beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

§ 335.613 Annual statement of beneficial ownership of securities ([FDIC] Form 5).

This form shall be filed in lieu of SEC Form 5 pursuant to SEC Rules for annual statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

Recent Relevant SEC Rulemaking

On December 14, 2022, the SEC adopted a final rule entitled “Insider Trading Arrangements and Related Disclosures,” which takes effect February 27, 2023.³ However, the final rule states that “Section 16 reporting persons will be required to comply with the amendments to [SEC] Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023.”⁴

³ See 87 FR 80362 (December 29, 2022), which is available at <https://www.govinfo.gov/content/pkg/FR-2022-12-29/pdf/2022-27675.pdf>.

⁴ See 87 FR 80393 (December 29, 2022).

According to the SEC's Fact Sheet for this final rule,⁵ the amendments made by the final rule on "Insider Trading Arrangements and Related Disclosures" will

[u]pdate [SEC] Forms 4 and 5 to require filers to identify transactions made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) and to disclose all bona fide gifts of securities on Form 4.

The SEC's Fact Sheet also states that

The amendments also create new disclosure requirements that include:

...

- A requirement that [SEC] Form 4 and 5 filers indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

More specifically, the final rule amends certain paragraphs in the SEC's rules at 17 CFR 240.16a-3, Reporting transactions and holdings, and revises SEC Forms 4 and 5.⁶ The final rule updates SEC Form 4 (referenced in 17 CFR 249.104) by

- a. Adding new General Instruction 10; and
- b. Adding text and one check box at the top of the first page immediately below the text "Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b)."

The text addition to SEC Form 4 reads as follows

- Check this box to indicate that a transaction was made pursuant to a contract, instruction or written plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). *See* Instruction 10.

Similarly, the final rule updates SEC Form 5 (referenced in 17 CFR 249.105) by

- a. Adding new General Instruction 10; and
- b. Adding text and one check box at the top of the first page immediately below the text "Form 4 Transactions Reported".

The text addition to SEC Form 5 reads as follows

- Check this box to indicate that a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). *See* Instruction 10.

⁵ The SEC's Fact Sheet is available at <https://www.sec.gov/files/33-11138-fact-sheet.pdf>.

⁶ See 87 FR 80430-80431 (December 29, 2022).

Recommended Action Regarding FDIC Forms 4 and 5

In its January 6, 2023, initial PRA Federal Register notice and its February 22, 2023, republished Federal Register notice,⁷ the FDIC has not proposed any revisions to existing FDIC Forms 4 and 5. However,

- (1) Section 335.101(b) of the FDIC's regulations provides that Part 335 generally incorporates through cross reference the regulations of the SEC as these regulations are issued, revised, or updated from time to time under Section 16 and other sections of the Exchange Act;
- (2) Under the authority of Section 16, the SEC has adopted a final rule amending certain paragraphs in Part 240 of its regulations, with an effective date of February 27, 2023, and SEC Forms 4 and 5, with a compliance date of April 1, 2023; and
- (3) Section 335.601 of the FDIC's regulations provides that "[p]ersons subject to section 16 of the Exchange Act with respect to securities registered under this part shall follow the applicable and currently effective SEC regulations issued under section 16," except that these persons must file FDIC Forms 3, 4, and 5 to report their transactions and holdings in lieu of SEC Forms 3, 4, and 5.

Thus, as a result of the SEC's December 2022 final rule on "Insider Trading Arrangements and Related Disclosures," which amends the SEC's regulations issued under Section 16 and the information to be reported on SEC Forms 4 and 5, the current versions of the FDIC's Forms 4 and 5 will no longer be substantially similar to those of the SEC. Absent revisions to the FDIC's Forms 4 and 5, persons using these forms to report their transactions and holdings to the FDIC with respect to securities registered under Part 335 will be prevented from complying with their reporting obligations under the SEC's amended regulations as cross referenced in Part 335.

Therefore, in connection with its proposed renewal of the FDIC Forms 4 and 5 information collections, I strongly recommend that the FDIC revise its versions of these two forms to incorporate the recent revisions the SEC has made to SEC Forms 4 and 5, as described above.

Your consideration of this recommended action would be greatly appreciated. Please contact me if you would like to further discuss this recommendation regarding FDIC Forms 4 and 5.

Thank you.

Sincerely,

A solid black rectangular box redacting the signature of Robert F. Storch.

Robert F. Storch

⁷ See footnote 1.