

Office of Thrift Supervision

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Handbook: Thrift Activities
Subjects: Capital Stock and Ownership, Capital Adequacy

Sections: 310, 320
TB 31-5

August 31, 1989

Disclosure of Regulatory Capital by Savings Institutions in Securities Filings Made with the Bank Board

RESCINDED

Summary: An institution is obligated to make certain disclosures in its securities filings with the Bank Board regarding its regulatory capital; its regulatory capital requirement; and any material difference between its tangible, regulatory, and GAAP capital.

OTS Identification:
CASD Memorandum No. 5
July 27, 1989

For Further Information Contact:
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Thrift Bulletin 31-5

This memorandum summarizes the obligations of savings institutions with regard to disclosure of an institution's regulatory capital in securities filings made with the Federal Home Loan Bank Board ("Bank Board") pursuant to Section 13 of the Securities Exchange Act of 1934 ("Exchange Act"), 12 C.F.R. Part 563b ("Conversion Regulations"), or 12 C.F.R. Part 563g ("Securities Offering Regulations"). The general policy of the Corporate and Securities Division with respect to disclosure of an institution's regulatory capital, regulatory capital requirement, and capital calculated in accordance with generally accepted accounting principles ("GAAP"), in its securities filings, such as an annual report on Form 10-K, a quarterly report on Form 10-Q, an offering circular on Form OC, or certain proxy statements relating to material transactions such as a merger, is set forth below:

Disclosure Regarding Regulatory Capital

The institution should disclose, and where appropriate discuss, in such securities filings the following information:

- (a) the institution's regulatory capital as a dollar amount and a percentage of assets and a percentage of liabilities, calculated in accordance with applicable regulatory requirements;
- (b) the institution's current regulatory capital requirement as a dollar amount and as a percentage of assets and/or a percentage of liabilities, if appropriate;
- (c) the dollar amount of any shortfall or excess of the institution's actual regulatory capital as compared to its regulatory capital requirement;
- (d) the current and projected regulatory capital requirements for the thrift industry, under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the effect upon the institution of any projected regulatory capital requirements, including any applicable requirements such as the phase-out of goodwill and the imposition of any tangible and risk based capital requirements.¹

Differences Between Regulatory and GAAP Capital

If there is a material difference, in dollar amount and/or composition, between either an institution's tangible capital, regulatory capital, and/or GAAP capital, appropriate disclosure of the amount(s) and an explanation of such difference(s) should be made. In the cases where such a disclosure would be made more understandable by the use of a reconciliation table, such a presentation should be used.

The textual discussion of the material difference or the reconciliation table, as appropriate, should include the following information for the institution:

- (a) its tangible capital as a dollar amount and as a percentage of assets and a percentage of liabilities, calculated in accordance with GAAP;
- (b) its regulatory capital as a dollar amount and as a percentage of assets and a percentage of liabilities, calculated in accordance with applicable regulatory requirements;
- (c) its capital as a dollar amount and as a percentage of assets and a percentage of liabilities, calculated in accordance with GAAP;

Thrift Bulletin

TB 31-5

- (d) pro forma information, if appropriate, as a dollar amount and as a percentage of assets and a percentage of liabilities, calculated in accordance with GAAP or applicable regulatory requirements as appropriate; and
- (e) each reconciliation item which is an addition or adjustment to either tangible, regulatory, or GAAP capital as a dollar amount and as a percentage of assets and a percentage of liabilities, calculated in accordance with GAAP or applicable regulatory requirements as appropriate.

The pro forma information should be provided in the textual discussion or in the reconciliation table, as appropriate, where there is a proposed transaction which would materially adjust either the amount of tangible, regulatory, or GAAP capital and should be presented in accordance with the requirements of Rule 170, 17 C.F.R. § 230.170, under the Securities Act of 1933. If the reconciliation table includes multiple columns showing alternative pro forma information, then the percentage of assets, rather than percentage of assets and percentage of liabilities, may be shown to simplify the reconciliation table.

In the textual discussion or in footnotes to the reconciliation table, where appropriate, each of the reconciliation items which is an addition or adjustment to either tangible, regulatory, or GAAP capital should be described. If there are any items which are subject to phase-out or amortization, such items and the phase-out and/or amortization schedules should be fully discussed in the text or in footnotes to the reconciliation table. Alternatively, in the textual discussion or in footnotes to the reconciliation table, a cross-reference to the disclosure of

such information elsewhere in the document should be provided.

Where it is asserted that the difference, in the dollar amount and composition, between an institution's tangible capital, regulatory capital and GAAP capital is not material, the institution may be requested to provide supplemental information which supports such position. If any such difference is not material, the inclusion of a reconciliation table or discussion will not be required. However, a reconciliation table or discussion may be included, if the institution desires to include it.

Location of Disclosures

Disclosure regarding an institution's regulatory capital and its regulatory capital requirement should be set forth in an appropriate textual portion of the securities filing, in addition to any appropriate disclosure in the notes to the financial statements. The appropriate textual portions for such disclosure would be:

- (a) the business discussion,
- (b) the management's discussion and analysis of financial condition and results of operation ("MD&A"), and/or
- (c) the regulation discussion.

In addition, depending on where the discussion appears, it may be necessary to cross-reference the discussion to related discussions in the other portions of the securities filing.

Disclosures Regarding Failure to Meet Regulatory Capital Standards

In the cases where an institution is failing or is in danger of failing to satisfy its current or projected regulatory capital requirements, the fol-

lowing information should also be disclosed in the MD&A portion of the securities filing:

- (a) the reason(s) why the institution is failing or is in danger of failing to satisfy its current or projected regulatory capital requirements,
- (b) the possible and probable effects of failing to satisfy the current or projected regulatory capital requirements on both the institution and its stockholders, and
- (c) a description of management's plans to satisfy the institution's current and projected regulatory capital requirements and the viability of such plans.

The failure of an institution to satisfy its current regulatory capital requirement is a material event for an institution which should cause the institution to promptly consider its disclosure obligations, which may include the issuance of a press release and/or certain appropriate securities filings, such as a current report on Form 8-K, regarding such failure and any related material supervisory actions.

If the subject securities filing relates to a securities offering and the institution is failing or is in danger of failing to satisfy its current or projected regulatory capital requirement, an appropriate risk factor should be included in the front textual portion of the offering circular. The risk factor should disclose the amount of the actual and/or projected deficit in regulatory capital; should cross-reference any discussion or table of regulatory capital on a pro forma basis and any discussion or table which reconciles the amounts of tangible, regulatory, and GAAP capital; and should include any other relevant material informa-

Thrift Bulletin

TB 31-5

tion. See also, Financial Reporting Release No. 16, FRR-16, regarding the disclosure implications of uncertainties about an institution's continued existence.

Enforcement

While the disclosure in each case may vary depending on the particular facts and circumstances of each case, an institution should include the above applicable disclosures in its securities filings, along with any other material information. An institution which fails to comply with its requirements to make adequate dis-

closure of material information will be the subject of a referral to the Bank Board's Office of Enforcement for appropriate enforcement action.

Further Information

For further information, please contact: John P. Harootunian, Assistant General Counsel for Securities Policy, (202) 906-6415; Deborah F. Silberman, Deputy Director for Securities, (202) 906-7013; Howard C. Bluver, Assistant Deputy Director, (202) 906-7504; V. Gerard Comizio, Director, Corporate and Securities Division, (202) 906-6411; or Julie L.

Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 906-6549.

¹ Forward-looking information is required to be disclosed in the management's discussion and analysis ("MD&A") portion of the institution's securities filings by several specific provision in Item 303 of Regulation S-K. See, 17 C.F.R. § 229.303(a)1, (a)(2)(ii) and (a)(3)(ii). See also, the Securities and Exchange Commission's release regarding MD&A disclosure, Release Nos. 33-6835, 34-26831, IC-16961, FR-36, dated May 18, 1989, 54 FR 22427 (May 24, 1989), particularly the discussion of prospective information, at Part III.B.



— Julie L. Williams, Deputy General Counsel