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Federal Deposit Insurance Corporation

12 CFR Part 362

RIN 3064-AD88

Permissible Investments for Federal and State Savings Associations: Corporate Debt Securities

AGENCY: Federal Deposit Insurance Corporation (FDIC)

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is seeking public comment to amend the FDIC's regulations in accordance with the requirements of Federal Deposit Insurance Act (FDI Act). Specifically, to prohibit any insured savings association from acquiring and retaining a corporate debt security unless it determines, prior to acquiring such security and periodically thereafter, that the issuer has adequate capacity to meet all financial commitments under the security for the projected life of the investment. For purposes of the Proposed Rule, an issuer would satisfy this requirement if, based on the assessment of the savings association, the issuer presents a low risk of default and is likely to make full and timely repayment of principal and interest. As proposed, this standard is consistent with alternative creditworthiness standards proposed by other Federal agencies under the Dodd-Frank Act and existing guidance regarding securities investments and credit classifications of banks and savings associations. In connection with this NPR, the FDIC is also seeking public comment on proposed guidance, published elsewhere in today's *Federal Register*, that sets forth supervisory expectations for savings associations conducting due diligence to

determine whether a corporate debt security is eligible for investment under this proposed rule.

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

ADDRESSES: You may submit comments, identified by RIN [3064-AD88], by any of the following methods:

- **Agency Web Site:** http://www.fdic.gov/regulations/laws/federal/propose.html. Follow instructions for submitting comments on the Agency Web Site.
- **E-mail:** Comments@fdic.gov. Include the RIN [3064-AD88] on the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.
- **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

Public Inspection: All comments received must include the agency name and RIN [3064-AD88] for this rulemaking. All comments received will be posted without change to http://www.fdic.gov/regulations/laws/federal/propose.html, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at 1 (877) 275-3342 or 1 (703) 562-2200.

FOR FURTHER INFORMATION CONTACT: Kyle Hadley, Chief, Examination Support Section, (202) 898-6532, Division of Risk Management Supervision; Eric Reither, Capital Markets Specialist, (202) 898-3707, Division of Risk Management Supervision; Mark Handzlik, Counsel, Bank Activities Section, (202) 898-3990; Michael Phillips, Counsel, Bank Activities Section, (202) 898-3581; or Rachel Jones, Honors Attorney, Legal Division, (202) 898-6858.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Under Section 28(d)(1) of the FDI Act, Federal and state savings associations generally are prohibited from acquiring or retaining, either directly or through a financial subsidiary, a corporate debt security that is not "of investment grade."[1] Section 28(d)(4) defines investment grade as follows: "Any corporate debt security is not of 'investment grade' unless that security, when acquired by the savings association or subsidiary, was rated in one of the four highest ratings categories by at least one nationally recognized statistical rating organization" (each, an "NRSRO").[2]

Consistent with the requirements of Section 28(d), § 362.11(b)(1) of the FDIC's regulations generally prohibits a state savings association from acquiring or retaining a corporate debt security that is not of investment grade.[3] Under 12 CFR 362.10(b), the term "corporate debt securities that are not of investment grade" is defined, in a manner consistent with Section 28(d), as, "any corporate security that when acquired was not rated among the four highest rating categories by at least one nationally recognized statistical rating organization."[4]

The FDIC currently may require a state savings association to take corrective measures in

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[1] Section 28(d)(1) of the FDI Act, 12 U.S.C. 1831e(d)(1). Regulations governing permissible investment activities for federal savings associations are found in 12 CFR part160, and regulations governing permissible investment activities for state savings associations are found in 12 CFR 390.260-262.

[2] Id. Under Section 28(d)(2), the investment-grade requirement does not apply to a corporate debt security acquired or retained by a "qualified affiliate" of a savings association, defined as, (i) in the case of a stock savings association, an affiliate other than a subsidiary or an insured depository institution; and (ii) in the case of a mutual savings association, a subsidiary other than an insured depository institution, so long as all of the savings association's investments in and extensions of credit to the subsidiary are deducted from the capital of the savings association.

[3] 12 CFR 362.11(b).

[4] Id. at § 362.10(b). Under section 28(d)(4)(C) of the FDI Act, however, this term does not include any obligation issued or guaranteed by a corporation that may be held by a federal savings association without limitation as a percentage of assets under section 5(c)(1)(D), (E), or (F) of the Home Owners Loan Act ("HOLA").

the event a corporate debt security experiences a downgrade (to non-investment grade status) following acquisition. For example, a savings association may be required to reduce the level of non-investment grade corporate debt security investments as a percentage of tier 1 or total capital, write-down the value of the security to reflect an impairment, or divest the security. The FDIC addresses nonconforming investments on a case-by-case basis through the examination process, and in view of the risk profile of the savings association and size and composition of its investment portfolio.

Section 939(a)(2) of the Dodd-Frank Act amends Section 28(d) by (a) removing references to NRSRO credit ratings, including the investment-grade standard under paragraph (1) and the definition of "investment grade" under paragraph (4); and (b) inserting in paragraph (1) a reference to "standards of creditworthiness established by the [FDIC]". Section 939(a) is effective on July 21, 2012, and, therefore, as of this date federal and state savings associations will be permitted to invest only in corporate debt securities that satisfy creditworthiness standards established by the FDIC.[5]

II. Description of the Proposed Rule and Consistency with Other Federal Regulations

In accordance with the requirements of Section 939(a), the Proposed Rule would amend §§ 362.09, 362.10, and 362.11(b)(1) of the FDIC's regulations. Section 362.10 would be amended by deleting the definition of corporate debt securities not of investment grade. Section 362.11(b)(1) would be amended by replacing the investment-grade standard, applicable to permissible corporate debt securities investments of a state savings association, with a requirement, applicable to federal and state savings associations, that prior to acquiring a corporate debt security, and periodically thereafter, the savings association must determine that the issuer has adequate capacity to meet all financial commitments under the security for the

[5] See section 939(g) of the Dodd-Frank Act.

projected life of the investment. For purposes of the Proposed Rule, an issuer would satisfy this requirement if the savings association appropriately determines that the obligor presents low default risk and is likely to make timely payments of principal and interest. The FDIC notes that, in addition to the requirements of the Proposed Rule, any savings association investment in a corporate debt security must be conducted in a manner that is consistent with safety and soundness principles.

In determining whether an issuer has an adequate financial capacity to satisfy all financial commitments under a security for the projected life of the investment, the FDIC would expect savings associations to consider a number of factors commensurate with the risk profile and nature of the issuer. Although savings associations would be permitted to consider an external credit assessment for purposes of such determination, they must supplement any external credit assessment with due diligence processes and analyses that are appropriate for the size and complexity of the investment.

If promulgated in final form, the Proposed Rule would be effective on July 21, 2012, in accordance with the requirements of section 939(g) of the Dodd-Frank Act. The Proposed Rule would not grandfather any corporate debt securities acquired before the effective date and, therefore, federal and state savings associations would be permitted to retain only those securities for which the savings association determines that (as of the effective date and periodically thereafter) the issuer has adequate capacity to satisfy all financial commitments under the security for the expected life of the investment. This proposed treatment for previously acquired securities is consistent with the requirements of Section 28(d) and the Proposed Rule, which prohibit a savings association from acquiring or <u>retaining</u> any corporate debt security that does not satisfy the creditworthiness standard described in this proposal. Accordingly, savings associations will be required to periodically review and update the analysis required to make such determination.

The FDIC is not revising its current supervisory practice with respect to nonconforming corporate debt securities investments. That is, if a security acquired in compliance with the Proposed Rule experiences credit impairment or other deterioration following its acquisition, the appropriate federal regulator may require a state savings association to take corrective measures on a case-by-case basis.

In addition to the revisions described above, the Proposed Rule would make conforming, technical amendments to § 362.9 of the FDIC's regulations to expand the scope of the rule to federal savings associations[6] and reflect the abolishment of the Office of Thrift Supervision under section 313 of the Dodd-Frank Act.

In connection with this NPR, the FDIC is seeking public comment on proposed guidance, published elsewhere in today's *Federal Register*, that sets forth supervisory expectations for due diligence conducted by a savings association in determining whether a corporate debt security is eligible for investment under this proposal. The proposed guidance describes the factors savings associations should consider in evaluating the creditworthiness of an issuer and, in particular, determining whether the issuer has adequate capacity to satisfy all financial commitments under the security for the expected life of the investment. The FDIC encourages commenters to review and comment on the proposed guidance in connection with their review of the Proposed Rule.

Consideration of Potential Alternative Creditworthiness Standards

In developing the Proposed Rule, the FDIC considered various alternatives to the proposed creditworthiness standard, that is, that the issuer has adequate capacity to satisfy all financial commitments under the security for the expected life of the investment. One option for

[6] Currently, § 362.11(b) applies only to insured state savings associations.

assessing the creditworthiness of a corporate debt security would be to differentiate the credit risk of the security based on financial and economic measures appropriate to the issuer. For example, the FDIC could require the savings association to demonstrate that the issuer satisfies certain metrics based on balance sheet or cash flow ratios such as current assets to current liabilities, debt to equity, or some form of debt service to cash flow ratio. Alternatively, for publicly traded issuers, the FDIC could require the savings association to demonstrate that the issuer satisfies certain market-based measures, such as credit spreads, market-implied risk, and measures of capital adequacy and liquidity.

The Proposed Rule would require a savings association to determine that the issuer has adequate capacity to satisfy all financial commitments under the security for the projected life of the investment. The FDIC believes that the proposed standard provides a flexible, straightforward measure of creditworthiness that is generally consistent with existing policy[7] and supervisory guidance for classifying exposures as substandard, doubtful, or loss.[8] Although the alternatives present certain advantages, including the potential for identical or similar creditworthiness assessments across institutions, the FDIC believes the Proposed Rule would foster prudent risk management; be transparent, replicable, and well-defined; allow different savings associations to make a similar creditworthiness assessment with respect to the same credit exposure; allow for supervisory review; differentiate among investments in the same asset class with different credit risk; and provide for the timely and accurate measurement of negative and positive changes in investment quality. In addition, as described below, the FDIC believes that the Proposed Rule is consistent with the requirements of section 939A ("Section 939A") of the Dodd-Frank Act, which requires the federal agencies, to the extent feasible, to establish

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[7] See Supervisory Policy Statement on Investment Securities and End-User Derivatives (April 23, 1998).
[8] See Uniform Agreement on the Classification of Assets and Appraisal of Securities Held by Banks and Thrifts (June 15, 2004).

uniform standards of creditworthiness. Section 939A also directs the agencies to consider the differences among their regulated entities and the purposes of which these entities would rely on such standards.

Consistency with Other Federal Regulations

As discussed above, in accordance with the requirements of Section 939A, the FDIC reviewed standards of creditworthiness proposed by other federal agencies to ensure, to the extent feasible, that the FDIC adopts a consistent creditworthiness standard. The FDIC reviewed proposed rules from the Department of Treasury ("Treasury"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC").

On September 27, 2011, the Treasury issued a proposed rule that would implement Section 939A with respect to its liquid capital rule, which prescribes the minimum capital requirements for registered government securities brokers and dealers.[9] Currently, if a government securities broker or dealer invests in commercial paper, the investment could qualify for a more favorable haircut if the issuer is rated by at least two NRSROs in one of the three highest categories. As a substitute standard of creditworthiness, the Treasury is proposing that commercial paper with a "minimal amount of credit risk," as determined by the broker or dealer, receive the favorable haircut. Similarly, under the FDIC's Proposed Rule, instead of relying solely on an NRSRO credit rating, a savings association would be required to determine the credit risk of a corporate debt security by considering various factors. Additionally, the Treasury would require security brokers and dealers to establish and maintain written policies and procedures on how they assess credit risk. The Treasury would not mandate any particular evaluation criteria, but would provide recommendations. For example, the Treasury recommends considering the following factors: credit spreads, liquidity, securities-related

[9] 76 FR 59592 (September 27, 2011).

research, internal or external credit risk assessments (which includes rating agencies), default statistics, inclusion on an index, price and/or yield, and factors specific to the commercial paper market (e.g., general liquidity conditions). Also similar to the FDIC's Proposed Rule, brokers and dealers would be required to periodically review their creditworthiness determination. The frequency of the review would depend on the characteristics of the underlying commercial paper instrument.

On March 9, 2011, the SEC published a notice of proposed rulemaking to implement Section 939A with respect to Rule 5b-3. SEC Rule 5b-3 permits funds under the Investment Company Act to treat certain repurchase agreements as an acquisition of the securities collateralizing the repurchase agreement instead of an interest in the counterparty.[10] A repurchase agreement may qualify for the favorable treatment only if, in part, the underlying collateral is comprised of securities that are rated investment grade by at least two NRSROs at the time the repurchase agreement is entered into. This provision ensures that the collateral can be easily liquidated in the event of default. In accordance with Section 939A, the SEC proposed to define a security as fully collateralized if, in part, the collateral (1) is issued by an issuer that has the highest capacity to meet its financial obligations; and (2) is sufficiently liquid that the securities can be sold at approximately their carrying value in the ordinary course of business within seven calendar days. Similar to the FDIC's proposal, the responsibility for making the creditworthiness determination is placed with the regulated institution. However, in contrast to the FDIC's Proposed Rule, the SEC proposed rules would require that funds determine the issuer has the highest capacity to meet its financial obligations.[11]

[10] 76 FR 12896 (March 9, 2011).
[11] As discussed previously in Section II, the FDIC's Proposed Rule only requires an adequate capacity to meet its financial commitments.

On May 12, 2011, the CFTC published a notice of proposed rulemaking to implement Section 939A with respect to regulations governing capital requirements for over-the-counter ("OTC") derivatives.[12] The new statutory framework provided under the Commodity Exchange Act, added by the Dodd-Frank Act, requires the CFTC to adopt capital requirements for certain swap dealers and major swap participants. The proposed regulation would require swap dealers and major swap participants to calculate current and potential future exposure to counterparties in determining their capital requirements. This exposure would be subject to a credit-risk factor of 50 percent regardless of the counterparty's credit rating. The swap dealer or major swap participant would be able to apply to the CFTC for approval to assign internal ratings to counterparties. If the internal credit-risk management system of the swap dealer or major swap participant is strong, the CFTC may approve the application to use internal ratings. The swap dealer and major swap participants would have to regularly update the internal rating, similar to the FDIC's Proposed Rule.

IV. Request for Comment

The FDIC seeks comment on all aspects of this NPR and the proposed creditworthiness standard for permissible corporate debt securities investments of federal and state savings associations. In addition, the FDIC strongly encourages commenters to provide comment on the proposed guidance, published elsewhere in today's *Federal Register*, released in connection with this NPR. Specifically, the FDIC seeks comment on the specific questions set forth below.

1. Does the proposed creditworthiness standard for corporate debt securities investments of federal and state savings associations satisfy the following criteria?

- Fosters prudent risk management;
- Is transparent, replicable, and well defined;

[12] 76 FR 27802 (May 12, 2011).

- Allows different banks or savings associations to assign the same or similar assessment of credit quality to the same or similar credit exposures;
- Allows for supervisory review;
- Differentiates among investments in the same asset class with different credit risk; and
- Provides for the timely and accurate measurement of negative and positive changes in investment quality, to the extent practicable?

2. Would the proposed creditworthiness standard for corporate debt securities investments of federal and state savings associations avoid concerns regarding regulatory arbitrage and oversimplified measures; dampen systemic risk; appropriately consider market complexities; identify appropriate time horizons; and, allow for accurate and timely reassessments? What changes could the FDIC make to the Proposed Rule to more appropriately address these objectives?

3. Does the proposed revised definition strike an appropriate balance between the measurement of credit risk and the implementation burden in considering alternative measures of creditworthiness? Are there other alternatives that strike a more appropriate balance between these objectives?

<u>V. Regulatory Analyses</u>

A. Paperwork Reduction Act (PRA)

No new collection of information pursuant to the PRA (44 U.S.C. 3501 *et seq.*) is contained in this NPR.

B. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally 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 a proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $175 million).[13] 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. 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 entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed in this NPR, Section 28(d) of the FDI Act, as amended by Section 939(a) of the Dodd-Frank Act, prohibits federal and state savings associations from acquiring or retaining a corporate debt security that does not meet FDIC's standards of creditworthiness. In accordance with the requirements of amended Section 28(d), this NPR proposes that savings associations cannot invest in a corporate debt security unless the savings association determines that the issuer has adequate capacity to meet all financial commitments under the security for the projected life of the investment. Consequently, this Proposed Rule only impacts savings associations that hold corporate debt security investments.

In determining whether this Proposed Rule would have a significant economic impact on a substantial number of small savings associations, the FDIC reviewed June 2011 Thrift Financial Report (TFR) data to evaluate the number of savings associations with corporate debt securities. There are 708 insured state and federal savings associations. Of these 708 insured

[13] 5 U.S.C. 601 et seq.

savings associations, 204 reported investments in the Other Investment Securities line of their TFR.[14] Even assuming the entire amount listed in the Other Investment Securities line of the TFR represents investment in corporate debt securities, Other Investment Securities represents only 2.40 percent of the aggregate total assets of the 708 applicable savings associations.

Moreover, only savings associations with total assets of $175 million or less apply for purposes of the RFA analysis. When applying this additional size criterion, only 61 institutions list Other Investment Securities in their TFR. For these smaller savings institutions, the total amount listed as investment in Other Investment Securities represents only .45 percent of the total assets. And only seven of these smaller thrifts have concentrations in Other Investment Securities that exceeds 50 percent of their tier 1 capital. Due to the small investment in corporate debt securities on small savings associations' balance sheets and due to the existing need to do due diligence relating to any investment in order to assure that a savings association is operating in a safe and sound manner, the additional compliance burden would not result in a significant economic impact on a substantial number of small savings associations.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act required the agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies invite comment on how to make this Proposed Rule easier to understand. For example:

- Have the agencies organized the material to suit your needs? If not, how could they present the rule more clearly?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly

[14] This line item is where the dollar exposure to corporate debt securities, along with other forms of investment, should be slotted according to the TFR instructions. This line may also include investments in instruments other than corporate debt securities, this limited granularity does not permit a precise understanding of the exposure to corporate debt securities.

stated?

- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the regulation easier to understand?

List of Subjects in 12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Investments, Reporting and recordkeeping requirements

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation proposes to amend part 362 of chapter III of Title 12, Code of Federal Regulations as follows:

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

1. The authority citation for part 362 continues to read as follows:

Authority: 12 U.S.C. 1816, 1818, 1819(a) (Tenth), 1828(j), 1828(m), 1828a, 1831a, 1831e, 1831w, 1843(l).

2. Amend § 362.9, by revising paragraph (a) to read as follows:.

§ 362.9 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart H of part 303 of this chapter, implements the provisions of section 28(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831e(a)) that restrict and prohibit insured state savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for a Federal savings association and their service corporations. This subpart also implements the provision of section 28(d) of the Federal Deposit Insurance Act (12 U.S.C. 1831e(d)) that restricts state and federal savings associations from investing in certain corporate debt securities. The term "activity permissible for a Federal savings association" means any activity authorized for a Federal savings association under any statute including the Home Owners' Loan Act (HOLA) (12 U.S.C. 1464 *et seq.*), as well as activities recognized as permissible for a Federal savings association in regulations issued by the Office of the Comptroller of the Currency (OCC) or in bulletins, orders or written interpretations issued by the OCC, or by the former Office of Thrift Supervision until modified, terminated, set aside, or superseded by the OCC.

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§ 362.10 [Amended]

3. Amend § 362.10 by removing paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d).

4. Amend § 362.11 by revising the section heading and the last sentence of paragraph (b)(1) to read as follows:

§ 362.11 Activities of insured savings associations.

*   *   *   *   *

(b) * * *

(1) * * * After July 21, 2012, an insured savings association directly or through a subsidiary (other than, in the case of a mutual savings association, a subsidiary that is a qualified affiliate), shall not acquire or retain a corporate debt security unless the savings association, prior to acquiring the security and periodically thereafter, determines that the issuer of the security has adequate capacity to meet all financial commitments under the security for the projected life of the investment.

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By order of the Board of Directors.

Dated at Washington, DC this 7th day of December, 2011.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Executive Secretary

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