

Applicability of SEC Rule 144A to Securities Offerings by Regulated Savings Associations

Summary Conclusion: An OTS-regulated savings association may engage in the offer and sale of its securities, and such securities may be resold without an effective offering circular, provided that the savings association complies with all of the conditions set forth in 17 C.F.R. § 230.144A.

Date: November 17, 2003

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2003-8



Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

P-2003-8

Chief Counsel

November 17, 2003

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Re: Applicability of SEC Rule 144A to
Securities Offerings by Regulated Savings
Associations

Dear []:

I am responding to your letter of July 14, 2003, in which you request, on behalf of your client, [] ("Savings Bank"), the Office of Thrift Supervision's ("OTS") concurrence with your position that a private placement of securities by the Savings Bank would be exempt, pursuant to section 563g.3(b), from the offering circular requirements of section 563g.2, and may be resold, without an effective offering circular, in accordance with the conditions of Rule 144A,¹ as promulgated by the U.S. Securities and Exchange Commission ("SEC") under the Securities Act of 1933. For the reasons explained below, we conclude that a savings association regulated by OTS ("regulated savings association") may engage in the offer and sale of its securities, and such securities may be resold, without an effective offering circular, in reliance on Rule 144A, so long as the regulated savings association complies with all of the conditions set forth in that regulation.

Background

The Savings Bank is a federally chartered savings bank. On several occasions it has engaged in registered and underwritten subordinated debt offerings pursuant to OTS' Securities Offering regulation, 12 C.F.R. Part 563g. The Savings Bank anticipates that it will again undertake to sell subordinated debentures.

As you point out, the typical registration of securities requires approximately six to eight weeks, including the time necessary for OTS staff to review the Form OC, for the Savings Bank

¹ 17 C.F.R. § 230.144A (2003).

to respond to the staff's comments, and for the Form OC to be declared effective. It is your view that, if the Savings Bank were able to rely on Rule 144A, it would be able to sell such securities within a shorter time frame, thereby permitting the Savings Bank more flexibility to take advantage of favorable market conditions. The Savings Bank would intend to sell its subordinated debentures to one or more investment banks, acting as the initial purchasers of the securities, with the expectation that the initial purchasers would promptly resell the securities, without an effective offering circular, in transactions meeting the conditions of Rule 144A.

Discussion

1. The Securities Offering Regulations

Section 563g.2 prohibits all offers and sales of securities by regulated savings associations unless: (i) the offer or sale is accompanied or preceded by an offering circular filed with, and declared effective by, OTS; or (ii) an exemption from the offering circular requirement is available.² The offering circular requirement does not apply to the offer or sale of securities, *inter alia*, that are exempt from registration under either section 3(a) or section 4 of the Securities Act of 1933 ("Securities Act"), but only by reason of an exemption other than section 3(a)(5) (for regulated savings associations) and section 3(a)(11) (for intrastate offerings) of the Securities Act.³

In promulgating the Securities Offering regulation under its safety and soundness authority,⁴ the Federal Home Loan Bank Board ("FHLBB"), OTS' predecessor, determined that it should carefully consider and follow, to the extent deemed appropriate, the scheme of registration and exemption from registration⁵ of securities developed under the Securities Act as administered by the SEC.⁶ The FHLBB's intent was, and the OTS' intent is, to pursue a scheme of securities registration that is known, workable, and generally consistent with the SEC's securities registration and reporting scheme. The FHLBB and OTS generally have sought parity between its regulated savings associations and SEC registrants to permit regulated savings associations to compete in the capital markets on as equal a footing as possible.⁷

² 12 C.F.R. § 563g.2(a) (2003).

³ 12 C.F.R. § 563g.3(b) (2003).

⁴ 50 F.R. 38839, at 38842 (September 13, 1985).

⁵ See section 563g.3(b) for use of the exemptions of sections 3(a) and 4 of the Securities Act, 15 U.S.C. §§ 77c(a) and 77d, respectively. See section 563g.4(a) for use of the SEC's Regulation D – Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933, 17 C.F.R. §§ 501-508 (2003). See also Opinion Chief Counsel, May 19, 1994, regarding the use of SEC Rule 144, 17 C.F.R. § 230.144, by regulated savings associations.

⁶ 50 F.R. 38839, at 38845-38846.

⁷ Id.

2. The Securities Act and Rule 144A

Section 5 of the Securities Act requires the use of an effective registration statement for the offer and sale of securities.⁸ Sections 3 and 4 of the Securities Act provide for exemptions from the registration statement requirements.⁹ In promulgating Rule 144A as a non-exclusive safe harbor from the registration of securities,¹⁰ the SEC focused on the purpose of the registration requirements of the Securities Act, stating that:

The "Securities Act was remedial legislation designed 'to protect the investing public and honest business.'¹¹ The 'investing public' intended to benefit from the registration provisions of the Securities Act was unsophisticated, individual investors. (footnote omitted) Despite measurable institutional presence in the capital markets, (footnote omitted) Congress concentrated on the protection of individuals."¹² (footnote omitted)

Congress focused on the need to protect individual investors and to ensure that individual investors have sufficient information to make informed investment decisions.¹³

Congress did not intend to regulate comprehensively the offer and sale of securities to limited numbers of persons that are in a position to obtain sufficient, relevant information and to make informed decisions. Congress developed an exemption for transactions "not involving any public offering."¹⁴ "The sale of an issue of securities to insurance companies or to a limited group of experienced investors, was certainly not a matter of concern to the Federal government."¹⁵ The SEC noted that, "[T]he 'private placement' exemption had its roots in transactions with institutions that had no practical need for registration protection."¹⁶

Private placements had their beginnings and early development in the negotiated sale of specially tailored debt securities to a limited number of large institutional investors who were in a position to insist upon and to receive more information than that provided by registration and to require such protective covenants and

⁸ 15 U.S.C. § 77e.

⁹ 15 U.S.C. §§ 77c and 77d, respectively.

¹⁰ 53 F.R. 44016-44038 (November 1, 1988) (the proposed rule); 55 F.R. 17933-17949 (April 30, 1990) (the final rule).

¹¹ S. Rep. No. 47, 73rd Cong., 1st Sess. 1 (1933). 53 F.R. 44016, at 44023.

¹² 53 F.R. 44016, at 44023.

¹³ See, generally, the SEC's review of the legislative history of the Securities Act in proposing Rule 144A; 53 F.R. 44016, at 44023-44024.

¹⁴ See section 4(2) of the Securities Act, 15 U.S.C. 77d(2). 53 F.R. 44016, at 44024.

¹⁵ SEC, 25th Annual Report xviii (1959). The statement is the recollection of Mr. James Landis, a principal draftsman of the Securities Act and the second Chairman of the SEC.

¹⁶ 53 F.R. 44016, at 44024. In 1980 Congress added section 4(6) to the Securities Act, 15 U.S.C. 77d(6), to provide an exemption from registration for certain offers or sales made by an issuer solely to accredited investors.

restrictions which, together with their ability to supervise constantly and to take appropriate action instantly, supported the view that such offerings were non-public in character for which the registration provisions were probably unnecessary.¹⁷

The SEC also considered judicial interpretations of the Securities Act in finding support for Rule 144A. In SEC v. Ralston Purina Co.,¹⁸ the U.S. Supreme Court noted that, “the applicability of section 4(2) should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction ‘not involving any public offering.’”¹⁹ The SEC concluded that:

The key to the analysis of proposed Rule 144A is that certain institutions can fend for themselves and that, therefore, offers and sales to such institutions do not involve a public offering. ‘The Commission has recognized by its interpretations that a ‘public offering’ is necessary for ‘distribution.’ (footnote omitted) Since the offering to eligible institutions under proposed Rule 144A is not public, no distribution takes place, and an exemption from registration would be available.²⁰

Rule 144A, as adopted, provides certain conditions to its use.²¹ In brief, the purchaser of the securities must be a “qualified institutional buyer” (“QIB”), or an offeree or purchaser that the seller reasonably believes is a QIB.²² The seller must take steps to ensure that the QIB is aware that the seller is relying on Rule 144A.²³ The securities sold must not be of the same class of securities listed on a national exchange or quoted on an automated inter-dealer quotation system.²⁴ And, the issuer either files periodic information as required by section 13 or 15(d) of the Securities Exchange Act of 1934,²⁵ as amended, or agrees to make such information available to the holder of the securities.

In addition, any person, other than the issuer or a dealer, who sells securities in compliance with the Rule 144A conditions is not considered to be engaged in a distribution of such securities and, therefore, is not considered to be an underwriter of the securities within the meaning of sections 2(11) and 4(1) of the Securities Act.²⁶

¹⁷ Cohen, M., Federal Legislation Affecting the Public Offering of Securities, 28 Geo. Wash. L. Rev. 119, 142 n.64 (1959).

¹⁸ 346 U.S. 119 (1953).

¹⁹ *Id.*, at 125.

²⁰ 53 F.R. 44016, at 44026.

²¹ 17 C.F.R. §230.144A(d) (2003).

²² 17 C.F.R. §230.144A(d)(1) (2003). A “qualified institutional buyer” is defined in 17 C.F.R. § 230.144A(a)(1)(i)-(vi) (2003).

²³ 17 C.F.R. § 230.144A(d)(2) (2003).

²⁴ 17 C.F.R. § 230.144A(d)(3) (2003).

²⁵ 15 U.S.C. §§ 78m and 78o(d), respectively.

²⁶ 15 U.S.C. §§ 77b(11) and 77d(1), respectively. 17 C.F.R. § 230.144A(b) (2003).

Further, a dealer who offers or sells securities in compliance with the Rule 144A conditions is not considered to be a participant in a distribution of the securities within the meaning of section 4(3)(C) of the Securities Act, and the securities will not be considered to be offered to the public within the meaning of section 4(3)(A) of the Securities Act.²⁷

Conclusion

As mentioned above, the FHLBB promulgated the Securities Offering regulation under its safety and soundness authority to help ensure that regulated savings associations engage in the offer and sales of securities in a manner designed to allow access to the capital markets on as equal a footing as possible as other companies. A principal focus for promulgating the Securities Offering regulation was the safe and sound conduct of the offering and sales of securities, with the recognition that the Securities Act also furthered other purposes, *e.g.*, to provide individual investors with sufficient information to make investment decisions. The FHLBB and OTS have, from time to time, addressed specific issues under the Securities Act to permit regulated savings associations to offer and sell securities on parity with other companies. In our view, those investors that are the focus of Rule 144A are the same persons that might invest in a regulated savings association's securities. Thus, in our view, it is appropriate to apply the same analysis applied by the SEC to determine whether OTS should permit the use of Rule 144A by regulated savings associations.

The parties involved in the Rule 144A offerings are considered to have the ability to seek sufficient relevant information and to possess the level of sophistication to evaluate such information in order to arrive at an investment decision. The definition of QIB is intended to limit the participants in this private placement market to such sophisticated persons. The SEC concluded, based on Congress's stated intent and judicial interpretation, that these parties do not require the protections of the federal securities laws (other than the general antifraud provisions), if certain conditions are met. We concur that such persons should be able to obtain information, evaluate such information, arrive at an investment decision, and enforce their rights appropriately. Thus, these persons should not, as a practical matter, need the protections of OTS' Securities Offering regulation, provided all of the conditions of Rule 144A are followed.

Therefore, after careful consideration, we conclude that a regulated savings association may engage in the offer and sale of its securities, and such securities may be resold, without an effective offering circular, in reliance on Rule 144A, so long as the savings association complies with all of the conditions set forth in that regulation.

The regulated savings association would remain subject to OTS' overall safety and soundness authority. In this regard, the regulated savings association should carefully plan any

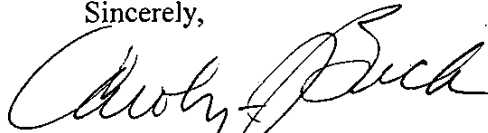
²⁷ 15 U.S.C. §§ 77d(3)(C) and 77(d)(3)(A), respectively. 17 C.F.R. § 230.144A(c) (2003).

issuance of securities, especially an issuance that would be exempt from registration, and should review the proposed issuance of securities with the OTS Regional Office responsible for the oversight of the regulated savings association. We note that if a regulated savings association were to engage in an unsafe or unsound practice during the course of an offering or sale of its security, the savings association would be subject to OTS' enforcement authority, in addition to any general antifraud provisions of the federal securities laws and regulations. Therefore, investors, and certainly the thrift industry, would be afforded the necessary legal protection from unsafe and unsound practices.

In reaching the foregoing conclusion, we have relied on the factual representations contained in the materials submitted to us by you on behalf of the Savings Bank. Our position depends on the accuracy and completeness of those representations. Any material change in facts or circumstances could result in a different conclusion from that expressed herein.

If you have any questions regarding the above matter, please contact Gary Jeffers, Senior Attorney, Business Transactions Division, at (202) 906-6457.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carolyn J. Buck".

Carolyn J. Buck
Chief Counsel

cc: Regional Director
Regional Counsel