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Handbooks: Compliance Activities, Thrift Activities,
Application Processing

Sections: 425, 240, 770
TB 31-2

Subjects: FSLIC Advertising, Oversight by the Board of Directors,
Subordinated Debt

August 31, 1989

Application of Securities Offering Rule to

Materials of Offerings of Debt

Summary: Media advertisements, sales literature, and other types of publicity used by institutions offering debt securities in public offerings are subject to restrictions pursuant to 12 C.F.R. Part 563g.

OTS Identification:
CASD Memorandum No. 2
March 21, 1989

For Further Information Contact:
The Office of General Counsel, Corporate and Securities Division, Deborah Silberman, Deputy Director for Securities, (202) 906-7013.

Thrift Bulletin 31-2

Concerns have arisen in connection with the use of media advertisements, sales literature, and other forms of publicity by institutions offering debt securities in public offerings pursuant to the Board's securities offering regulations, 12 C.F.R. Part 563g. The purpose of this Memorandum is to highlight the bases for those concerns under the securities offering regulations and to provide guidance to issuers on matters of compliance.

The staff is aware that it is common practice, in "over-the-counter" debt offerings by institutions, to use a variety of sales literature, advertisements and other materials to promote sales of the security. It is also common practice, either overtly or by implication, to liken the debt security being offered to an insured account, like a certificate of deposit. The express or implied characterization of debt securities as certificates of deposit or other types of insured accounts increases the probability that such advertising will be confusing or misleading. Because of these concerns, advertising that tends to

blur the lines between insured and uninsured instruments has consistently been discouraged by the staff. Nevertheless, such advertising problems have continued and the staff has determined that it must offer clear and unequivocal guidance as to what will constitute acceptable advertising for "over-the-counter" debt offerings.

Generally, securities offerings by thrift institutions are subject to the Board's securities offering regulations contained at 12 C.F.R. Part 563g. These regulations prohibit any offer or sale of securities unless (1) the offer or sale is accompanied or preceded by an offering circular filed with and declared effective by the Board or (2) an exemption from the offering circular requirements is available. The practical result of these regulations is that certain media advertisements, sales literature and other forms of publicity, depending on their content, could constitute offering materials that either must be filed with and declared effective by the Board, or accompanied or preceded by an offering circular sent to the reader of the publicity which includes the information required by Part 563g and which has been filed with and declared effective by the Board. Obviously, to send an offering circular to every potential reader of a newspaper advertisement, for example, would be an unworkable burden. However, the rules further provide exemptions for certain types of communications, which would not

be deemed to be "offers" for purposes of the regulations. These exemptions, which are similar to the disclosure rules under the federal securities laws,¹ are available for (1) any notice of the proposed offering used prior to the filing of an offering circular with the Board which meets the requirements of Rule 135 under the Securities Act of 1933; (2) any notice, circular, advertisement, letter or other communication, including media communications such as radio or television advertisements, which meets the requirements of Rule 134 under the Securities Act which is used after the filing with the Board of an offering circular; and (3) oral offers after the filing of an offering circular. Generally, newspaper and other media advertisements fall into the second category and seek to qualify as not constituting "offers" under the standards of Rule 134.

As applied through Part 563g, Rule 134 provides that the term "prospectus" (or "offering circular," as defined in Section 563g.1(c)) shall not include a notice, circular, advertisement, letter or other communication published or transmitted to any person after an offering circular has been filed, if it contains only the statements required or permitted to be included therein by the Rule. The Rule sets forth a very limited "laundry list" of permitted and required disclosures. Any communication outside the parameters of the information contemplated in Rule 134 could be considered a prospectus

Thrift Bulletin

TB 31-2

that would require filing with and review by the staff, and that could, if used and if different from any prospectus declared effective by the staff or if not meeting the requirements for a prospectus under the regulations, both create substantial liability for the institution issuing the securities and form a basis for enforcement action to be taken by the Board.

The Rule permits the following information:

1. The name of the issuer;
2. The title of the security;
3. The amount of securities being offered;
4. A brief indication of the general type of business of the issuer (limited to various types of disclosures dependent on the nature of the business of the issuer);
5. The price of the security, the method by which the price will be determined, or the probable price range;
6. If a fixed interest debt security, the yield, or probable yield;
7. The name and address of the sender of the communications and the fact that the sender is participating in the distribution of the security (if true);
8. The names of the managing underwriters, if any;
9. The approximate date upon which the distribution will commence;
10. Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies or

other investors under the laws of any state;

11. Whether, in the opinion of counsel, the security is exempt from specified taxes;
12. Whether the security is being offered through rights, and if so, certain information about the rights offering;
13. Any statement or legend required by state law or administrative authority;
14. For debt securities or preferred stock, the rating from a nationally recognized statistical rating organization and the name of the rating agency, if any.

The disclosures required by the Rule are as follows:

1. If the registration statement (offering circular) has not yet become effective, a prescribed legend is mandated;
2. A statement whether the security is being offered in connection with a distribution by the issuer, or by a security holder, or both, and whether the issue represents a new financing, or refunding, or both;
3. The name and address of a person or persons from whom a written prospectus meeting the requirements of the Securities Act (Part 563g in the case of securities issued by an insured institution) may be obtained.

It is the staff's position that, other than oral offers, all advertisements, sales literature or other "communications" used in the offering of securities subject to the offering circular requirements of Part 563g that are not accompanied or preceded by an offering circular that has been

filed with and declared effective by the Board must comply with Rule 134 or Rule 135. In addition, for "over-the-counter" debt offerings, i.e., where the security may be purchased at or through facilities of the institution or an affiliate of the institution, in order for such communications not to be materially misleading, the following disclosures MUST be included in any and all such communications:

1. A legend, in type at least as large as the largest type size used in the communication, that the security is not federally insured;
2. A statement that the investment in such debt securities is subject to certain "investment considerations" or "risk factors" (whichever is appropriate), such as the absence of any indenture, trustee, or market for the securities, the fact that the securities are unsecured and subordinated to all other obligations of the institution, the probability of redemption if interest rates decline, etc.
3. A statement that any "Cash Bonus" or "Cash Premium" offered as a sales incentive could result in certain tax consequences to the purchaser.
4. A legend stating that potential investors should obtain and read a copy of the offering circular before making an investment in the securities.

These disclosures are particularly important given the usually "traffic-stopping type size" of the yield figures for these securities.

The staff will not under any circumstances consider the following types of disclosure as being in compliance with the requirements of Rule 134:

Thrift Bulletin

TB 31-2

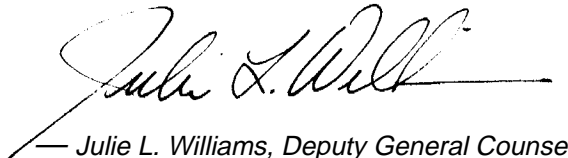
1. Statements designed to have or having the effect of implying that the security is an insured account (i.e., statements that the yield or interest rate of the security being offered is “higher than those offered on our other insured accounts”);
2. Statements comparing the security being offered to insured accounts available at the institution. (This would include attention-getting headlines);²
3. Statements implying that the security is likely to remain outstanding until “maturity” (since, if the institution is able to borrow money more cheaply else-

where, it will likely immediately redeem these high-interest rate debt securities).

Issuers and their counsel are encouraged to continue to submit to the staff for review all proposed sales literature, advertisements, etc. to be used in connection with debt offerings in order to insure compliance with the above standards. Any questions concerning the above requirements and concerns may be directed to Deborah Silberman, Deputy Director for Securities, at (202) 906-7013, Paul Glenn, Staff Attorney, at (202) 906-6203, David Berliner, Deputy Director for Special Projects, at (202) 906-6444, or Howard Bluver, Staff Attorney, at (202) 906-7504.

¹ As a matter of policy, the staff follows the procedures and regulations of the Securities and Exchange Commission as closely as possible in the administration of Part 563g. In particular, the staff has routinely applied the Commission's Rules 134 and 135, promulgated under the Securities Act of 1933, to securities offerings under the Board's jurisdiction. See, 12 C.F.R. Section 563g.2; preamble to 1986 amendments to the Conversion Regulations, 51 Fed. Reg. at 40136 (November 5, 1986).

² The staff is aware of the provision in Rule 134 (a)(3)(iii) permitting the use of certain “attention-getting headlines” by investment companies, and of the SEC's interpretive position allowing the use of such headlines even if the issuer is not an investment company. However, the staff is also aware that no guidance has been offered by the Commission as to what would constitute an acceptable attention-getting headline “designed to direct the reader's attention to the textual materials included in the communication pursuant to other provisions of Rule 134”. The staff will not consider circumvention of the otherwise stringent requirements of the rule through the use of such attention-getting headlines to be acceptable disclosure under the Rule.



— Julie L. Williams, Deputy General Counsel