



Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, DC 20552 • (202) 906-7984

Scott M. Albinson
Managing Director

RESCINDED

Any attachments to this document are rescinded only as they relate to national banks and federal savings associations.

August 21, 2003

MEMORANDUM FOR: CHIEF EXECUTIVE OFFICERS

FROM:

Scott M. Albinson

SUBJECT:

SEC's Final Rule Discussing Reports on Internal Control That May Satisfy Both SEC Requirements and FDIC Part 363 Requirements

On June 18, 2003, the Securities and Exchange Commission (SEC), as directed by Section 404 of the Sarbanes-Oxley Act of 2002, issued a final rule entitled Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports. This rule requires that companies subject to the reporting requirements of the Securities Exchange Act of 1934¹ ('34 Act) include in their annual reports to the SEC the following reports:

- A report of management on the company's internal control over financial reporting.
- The registered public accounting firm's attestation report on management's assessment as part of the annual report.

You may access the final rule in the June 18, 2003 Federal Register at pages 36636-36673 (Volume 68, No. 117)² or at www.gpoaccess.gov/fr by entering the page number, or at the SEC's website www.sec.gov/rules/final/33-8238.htm.

These public reporting requirements are similar to the internal control reporting requirements under Section 36 of the Federal Deposit Insurance (FDI) Act (12 USC 1831m) as implemented by Part 363 of the Federal Deposit Insurance Corporation's (FDIC) regulations (12 CFR Part 363).³

¹ Savings associations affected are those with securities registered with the Office of Thrift Supervision (OTS) under Sections 12(b) or 12(g) of the '34 Act, and that file reports pursuant to Sections 13(a) of that Act. Section 12(i) of the '34 Act delegates authority to OTS to administer specific sections of the '34 Act for savings associations with securities registered under the '34 Act. Savings associations also may have securities registered with OTS pursuant to 12 CFR Part 563g, and may or may not be subject to either of the internal control reporting requirements discussed in this memorandum.

² 68 Federal Register 36649 (June 18, 2003).

³ Each FDIC-insured depository institution with total assets of \$500 million or more is required to annually submit, among other things, audited financial statements, a management report, and an accountant's attestation report on management's assertions concerning the effectiveness of the institution's internal control structure and procedures for financial reporting pursuant to 12 CFR Part 363.

Savings associations subject to Part 363 requirements that must also meet SEC public filing requirements are subject to preparing two sets of reports.⁴ To eliminate unnecessary duplication, the SEC coordinated with the federal banking regulators,⁵ to the extent possible, these public filing requirements with the requirements of Part 363. As a result, savings associations and savings association holding companies may choose to prepare a single management report that satisfies both Part 363 and the new SEC requirements rather than prepare two separate management reports.

As discussed in the preamble to the SEC's final rule, if a savings association or its holding company chooses to prepare a single report to satisfy both sets of requirements, the report of management on the association's or holding company's internal control over financial reporting (as defined in SEC Rule 13a-15(f) or 15d-15(f)) must contain the following information:

- A statement of management's responsibility for preparing the reporting entity's annual financial statements, for establishing and maintaining adequate internal control over financial reporting for the reporting entity, and for the reporting entity's compliance with laws and regulations relating to safety and soundness designated by the FDIC and the appropriate federal banking agencies;
- A statement identifying the framework used by management to evaluate the effectiveness of the reporting entity's internal control over financial reporting as required by SEC Rule 13a-15 or 15d-15;
- Management's assessment of the effectiveness of the reporting entity's internal control over financial reporting as of the end of the reporting entity's most recent fiscal year, including a statement as to whether or not management has concluded that the reporting entity's internal control over financial reporting is effective, and of the reporting entity's compliance with the designated safety and soundness laws and regulations during the fiscal year. This discussion must include disclosure of any material weakness in the reporting entity's internal control over financial reporting identified by management;⁶ and
- A statement that the registered public accounting firm that audited the financial statements included in the reporting entity's annual report has issued an attestation report on management's assessment of the reporting entity's internal control over financial reporting.

⁴ Although savings association holding companies are not required under Part 363 to prepare internal control reports, many holding companies do so under a provision of Part 363 that allows an insured depository institution that is the subsidiary of a holding company to satisfy the institution's internal control report requirements by substituting the internal control report of the consolidated holding company's management under certain circumstances. See 12 CFR Part 363, Appendix A, Guideline 4 and 12 CFR § 363.1(b)(2).

⁵ The federal banking agencies include the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System.

⁶ Management will not be permitted to conclude that a reporting entity's internal control over financial reporting is effective if there are one or more material weaknesses in its internal control over financial reporting.

Additionally, the reporting entity will have to provide the registered public accounting firm's attestation report on management's assessment in its annual report filed under the '34 Act. For purposes of the report of management and the attestation report, financial reporting must encompass both financial statements prepared in accordance with generally accepted accounting principles (GAAP) and those prepared for regulatory reporting purposes.

Where a savings association holding company's report of management will be used to satisfy both SEC requirements and FDIC Part 363 requirements, both the report of management and the accountant's attestation report are to be filed as follows:

- To meet SEC requirements - with the SEC.
- To meet FDIC requirements - with the OTS, FDIC, and any appropriate state depository institution supervisor.

Where a savings association's report of management will be used to satisfy both SEC requirements and FDIC Part 363 requirements, both the report of management and the accountant's attestation report are to be filed as follows:

- To meet SEC requirements - with the OTS.⁷
- To meet FDIC requirements - with the OTS, FDIC, and any appropriate state depository institution supervisor.

A reporting entity that is an accelerated filer⁸ as of the end of its first fiscal year ending on or after June 15, 2004, must begin to comply with the management report on internal control over financial reporting disclosure requirements in its annual report for that fiscal year. A reporting entity that is not an accelerated filer as of the end of its first fiscal year ending on or after June 15, 2004, including a foreign private issuer, must begin to comply with the annual internal control report for its first fiscal year ending on or after April 15, 2005. Thus, a reporting entity that has been subject to Part 363 will not be subject to these SEC requirements until after it has filed one or two annual Part 363 reports.

If you have questions, please contact Christine Smith, Thrift Policy Project Manager, (202) 906-5740 (christine.smith@ots.treas.gov) or Gary Jeffers, Senior Attorney, (202) 906-6457 (gary.jeffers@ots.treas.gov).

⁷ Pursuant to Section 12(i) of the '34 Act, OTS is delegated the authority to administer specific sections of the '34 Act for savings associations with securities registered under the '34 Act.

⁸ An accelerated filer is defined in SEC Rule 12b-2 of the '34 Act as having an aggregate market value of common equity held by outsiders of \$75 million or more, has been a reporting company for at least 12 months, has filed at least one annual report, and is not eligible to use Forms 10-KSB and 10-QSB.