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REVERSE inquiries

*Structured and market-linked product news for inquiring minds.*

# FDIC Proposes to Rescind 1996 Statement of Policy on the Use of Offering Circulars and Replace It with a New Rule of Narrower Scope

**In This Issue**



The disclosure requirements for offerings of securities by state non-member banks have long been governed by the Federal Deposit Insurance Corporation's ("FDIC") 1996 Statement of Policy on the Use of Offering Circulars in Connection with Public Distribution of Bank Securities (the "1996 Statement").[1] The 1996 Statement focuses on disclosure, requires that specific legends be included in offering circulars used by state non-member banks issuing securities and has no filing requirement. The 1996 Statement also refers to the disclosure requirements of the former Office of Thrift Supervision.

On January 19, 2021, the FDIC proposed, among other items, rescinding the 1996 Statement and replacing it with a new regulation to be codified in Subpart A of 12 C.F.R. Part 335, as "Securities of State Nonmember Banks and State Savings Associations" (the "Proposed Rule").[2] The Proposed Rule is limited in its scope, as opposed to the 1996 Statement, which applies to all state nonmember banks. Comments on the Proposed Rule must be submitted to the FDIC by April 5, 2021.

The Proposed Rule applies to offerings of bank securities in the following circumstances:

- FDIC-supervised institutions (*i.e.*, state nonmember banks and state savings associations) in organization;
- FDIC-supervised institutions subject to an enforcement order or capital restoration plan that intend to issue securities;
- FDIC-supervised institutions converting from a mutual to stock form of ownership; and
- Subsidiaries of state savings associations in any of the three situations above.[3]

[1] 61 Fed. Reg. 46,807 (Sept. 5, 1996).

[2] FDIC FIL-6-2021 is available at: https://bit.ly/3cwA0c0. The Proposed Rule is available at: https://bit.ly/3sz7wUt. The Proposed Rule also would rescind the rules for securities offerings by state savings associations, which the FDIC inherited from the Office of Thrift Supervision in 2011.

[3] See Proposed Rule at 335.1(b). The offers and sales of the securities of state savings associations in connection with a mutual-to-stock conversion also are subject to the rules set forth by the Office of the Comptroller of the Currency at 12 C.F.R. pt. 192.

Unlike under the 1996 Statement, an insured state nonmember bank issuing debt securities outside of the first three bullet points above would not be subject to the Proposed Rule. However, the Proposed Rule is instructive as to the type of disclosure to include in an offering circular for an offering of bank securities by a state nonmember bank, and the FDIC indicates that in its experience, many state nonmember banks comply with federal securities offering rules even if they are not legally required to do so.

State nonmember banks and state savings associations subject to the Proposed Rule would be required to file a registration statement, including a prospectus, with the appropriate regional FDIC office, notwithstanding the availability of the exemption from the registration requirements of Section 5 of the Securities Act of 1933 ("Securities Act") provided by Section 3(a)(2) thereunder.[4] The registration statement and prospectus would need to conform to Regulation C under the Securities Act, unless provided otherwise in the Proposed Rule.[5] With respect to disclosure, the documents would need to conform to the requirements of Regulations S-K and S-X under the Securities Act.[6]

The Proposed Rule would exempt the following types of offerings from the registration statement and prospectus requirements of Regulation C (*i.e.*, an offering document would still need to be filed with the FDIC, but no particular form would be required):

- Regulation A under the Securities Act;
- Regulation D under the Securities Act;
- Rule 701 under the Securities Act;
- Rules 144 and 144A under the Securities Act; and
- Other reorganization and dissolution events.[7]

Registration statements, prospectuses and any offering circular used in connection with any of the exempt offerings listed above would need to be filed with the FDIC prior to the commencement of an offering. Once the FDIC confirms in writing that no additional changes or information to the offering circular are required, the offering could commence.[8]

As in the 1996 Statement, the standard legends (*i.e.*, the securities are not deposits, not FDIC insured, no approval by the FDIC is implied and debt securities are subordinated to deposits) would need to be included in the offering circular in bold capital letters.[9]

Because all offerings of securities, including those by state nonmember banks, are subject to the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, offering circulars of state nonmember banks tend to include the full scope of disclosure included in registration statements and prospectuses for offerings registered under the Securities Act. Consequently, it is unlikely that the disclosure in

[4] See Proposed Rule at 335.3(a).

[5] See Proposed Rule at 335.3(b).

[6] See Proposed Rule at 335.3(c), (d).

[7] See Proposed Rule at 335.4(a). The Proposed Rule does not explain the meaning of the reference to Rule 144 beyond a statement that it and Rule 144A "provide guidance for persons who are not deemed to be engaged in a distribution and therefore are not underwriters, and for private resales of securities to institutions."

[8] Proposed Rule at 335.7.

[9] Proposed Rule at 335.6.

offering circulars for offerings of securities by state nonmember banks will change at all if the Proposed Rule is finalized.

# 2021 Report on FINRA's Examination and Risk Monitoring Program

This February, the Financial Industry Regulatory Authority, Inc. ("FINRA") released its Report on FINRA's Examination and Risk Monitoring program (the "Report").[10] The Report replaces FINRA's former Report on FINRA Examination Findings and Observations, and its Risk Monitoring and Examination Priorities Letter. The Report, in its new format, will be released annually.

The Report covers a broad spectrum of issues. This article focuses on areas of interest to the structured products industry.

## REGULATION BEST INTEREST

This part of the Report generally asks firms whether they have policies, procedures and controls in place to implement all aspects of Regulation Best Interest, including relating to recommendations, record keeping, disclosures and training. There are also inquiries relating to the use of Form CRS. FINRA Rule 2111 (Suitability) is still relevant, as the Report asks whether a member firm's "policies, procedures and controls continue to address compliance with FINRA Rule 2111 (Suitability), which still applies to recommendations made to non-retail investors …."[11]

## COMMUNICATIONS WITH THE PUBLIC (FINRA RULE 2210)

FINRA reminds firms that all communications must be fair, balanced and not misleading, noting that if a communication promotes the benefits of a high-risk or illiquid security, it should also explain the associated risks. In particular, the Report asks "[d]o your firm's communications balance specific claims of investment benefits from a securities product or service (especially complex products) with the key risks specific to that product or service?"[12]

The Report reflects FINRA's concerns about the use of digital communication channels and digital assets, as summarized below:

- Whether a firm's digital communication policy addresses all permitted and prohibited digital communication channels and features available to customers and associated persons;
- Whether the firm reviews for red flags that may indicate a registered representative is communicating through unapproved communication channels, and whether there is any follow up on such red flags;
- How a firm supervises and maintains books and records in accordance with SEC and FINRA rules for all approved digital communications;

[10] The Report is available at: https://bit.ly/3rsCbBK.

[11] Report at 18.

[12] *Id*. at 19.

- If a firm offers an app to customers that includes an interactive element, whether the information provided to customers constitutes a "recommendation" that would be covered by Regulation Best Interest, which requires a broker-dealer to act in a retail customer's "best interest," or suitability obligations under FINRA Rule 2360 (Options);
- If a firm's app platform design includes "game-like" aspects that are intended to influence customers to engage in certain trading or other activities, whether the firm addresses and discloses the associated potential risks to its customers; and
- Whether a firm's communications—regardless of the platform through which they are made—comply with the content standards set forth in FINRA Rule 2210.[13]

FINRA's question on whether a member firm's app platform includes "game-like" aspects follows on the heels of a complaint by the Massachusetts Secretary of State, Securities Division, against a FINRA member, alleging, among other things, the "use of strategies such as gamification to encourage and entice continuous and repetitive use of its trading application …."[14]

The Report includes a section, titled "Emerging Digital Communication Risks – New Digital Platforms With Interactive and 'Game-Like' Features," in which FINRA, while acknowledging that such features may improve access to firm systems and investment products, warned that these features may increase risks to customers if not designed with appropriate compliance considerations in mind. In this context, FINRA reminds firms to meet regulatory obligations relating to, among others:

- Regulation Best Interest and Form CRS if any communication constitutes a recommendation to a retail customer;
- Disclosing risks relating to fees, costs, conflicts of interest and required standards of conduct;
- Ensuring that all communications are fair and balanced;
- Developing a comprehensive supervisory system, including identifying red flags and maintaining proper record keeping; and
- Complying with FINRA's communication rules.[15]

Member firms' activities relating to digital assets are also scrutinized, with two questions relating to potential investor confusion about the characteristics of digital assets:

- Does your firm provide a fair and balanced presentation in marketing materials and retail communications, including addressing risks presented by digital asset investments, and not misrepresenting the extent to which digital assets are regulated by FINRA or the federal securities laws or eligible for protections thereunder, such as Securities Investor Protection Corporation coverage?

[13] See the Report at 20.

[14] See *In Re Robinhood Financial, LLC* at 2, available at: https://www.sec.state.ma.us/sct/current/sctrobinhood/MSD-Robinhood-Financial-LLC-Complaint-E-2020-0047.pdf.

[15] See the Report at 22.

- Do your firm's communications misleadingly imply that digital asset services offered through an affiliated entity are offered through and under the supervision, clearance and custody of a registered broker-dealer?[16]

The exam findings noted deficient digital assets communications by member firms, including false, misleading or unwarranted statements. With respect to digital communications, examinations found insufficient supervision and record keeping to be a problem.

### BOOKS AND RECORDS

Under the applicable books and records requirements, a member firm must create and preserve, in an easily accessible place, originals of all communications received and sent relating to its "business as such." These records may be maintained and preserved for the required time on electronic storage media, subject to certain conditions.

FINRA asks in the Report what kind of vendors, including cloud service providers, a member firm uses to comply with the books and records rules requirements, and suggested reviewing vendor contracts to confirm that these comply with those requirements. Exam findings had uncovered that some member firms had not performed sufficient due diligence on third party vendors as to whether they had the ability to comply with the books and records rules requirements.

### FIXED INCOME MARK-UP DISCLOSURE

Under FINRA Rule 2232, member firms are required to provide additional transaction-related information to retail customers for certain trades in corporate, agency and municipal debt securities. Disclosed mark-ups and mark-downs must be expressed as both a total dollar amount for the transaction and a percentage of prevailing market price (PMP). The considerations listed by FINRA in the Report relate to how member firms review the accuracy of reporting under Rule 2232 in customer confirmations.

Two items in the examination findings are of note:

- **Disclosure for Structured Notes** – Failing to provide disclosures on customer confirmations for trades in TRACE-reportable structured notes because firms did not realize the notes were subject to FINRA Rule 2232 or did not receive the PMP from the structured note distributors; and
- **Incorrect Designation of Institutional Accounts** – Failing to provide disclosures to certain customers because the firm identified those customers' accounts as "institutional," even though the customers did not meet the "institutional" definition in FINRA Rule 4512(c) (Customer Account Information).[17]

## LIBOR End Dates Confirmed

The administrator for LIBOR and other inter-bank offered rates, ICE Benchmark Administration ("IBA"), confirmed on March 5, 2021 its previously announced dates for LIBOR cessation.[18] On the same day, the U.K. Financial Conduct Authority ("FCA") announced that 1-week and 2-month USD LIBOR will cease publication

[16] Report at 20.

[17] Report at 17.

[18] See our previous article at: https://bit.ly/3u5KrJs.

after December 31, 2021, as will all non-USD LIBOR tenors, and that 3-month, 6-month and 1-year USD LIBOR will cease publication after June 30, 2023.

What does this mean for outstanding USD LIBOR floating rate notes that have the Alternative Reference Rates Committee's ("ARRC") recommended fallback provisions? A "Benchmark Transition Event," as defined in the ARRC fallbacks, has occurred.[19] However, USD LIBOR will not transition to the secured overnight financing rate ("SOFR") under the ARRC fallbacks because the required "Benchmark Replacement Date" has not occurred.

The FCA announcement also was an "Index Cessation Event" under Supplement No. 70 to the 2006 ISDA Definitions. Consequently, the ISDA fallback spread adjustments published by Bloomberg were fixed on March 5, 2021, which was the "Spread Adjustment Fixing Date" under ISDA Supplement No. 70. The ARRC has previously stated that it will use the same spread adjustments as ISDA for floating rate notes.

For 3-month USD LIBOR floating rate notes using the ARRC fallbacks, on the first business day after June 30, 2023, the replacement rate will be either Term SOFR, if available, or Compounded SOFR, plus the spread adjustment of 0.26161.[20]

In the FCA's announcement on the cessation of LIBOR, there was some discussion of a possible "synthetic" USD LIBOR. Synthetic USD LIBOR would be published after the respective cessation date of a USD LIBOR tenor, but would not be representative.[21] Synthetic IBORs would be used, according to the FCA, for "tough legacy contracts," *i.e.,* legacy IBOR contracts that, by their terms, do not include workable fallback provisions to transfer to a replacement rate. It is hard to see an application for synthetic USD LIBOR in the US capital markets, as the proposed New York and federal legislative solutions will, once passed, automatically cause outstanding legacy USD LIBOR floating rate notes and other USD LIBOR securities and contracts to fall back to SOFR under the ARRC's recommended fallback provisions.

# SEC Division of Examinations 2021 Examination Priorities

This March, the Securities and Exchange Commission released its new report on its 2021 Examination Priorities (the "Report").[22] The Report covers a broad spectrum of issues. This article focuses on areas of interest to the structured products industry.

## RETAIL INVESTORS

The Division of Examination (the "Division") stated in the Report its continued desire to emphasize the protection of retail investors, and the Division will prioritize examinations of financial intermediaries such as registered investment advisers ("RIAs") and registered investment companies, broker-dealers and dually-registered or affiliated firms. These examinations will focus on investments and services marketed to retail investors.

[19] See the ARRC announcement at: https://nyfed.org/3fpNKqM and the related FAQs at: https://nyfed.org/39HwvOn.

[20] See the Bloomberg notice at: https://bit.ly/3m055bk.

[21] Synthetic USD LIBOR would be a rate published as USD LIBOR, but would not be based on an interbank offered rate. For example, synthetic USD LIBOR could be Term SOFR or Compounded SOFR, plus a spread adjustment, but published as "USD LIBOR." This is the equivalent of pulling the handle marked "vanilla" on the soft serve ice cream machine, getting chocolate, and calling it vanilla.

[22] This Report is available at: https://www.sec.gov/files/2021-exam-priorities.pdf. On December 17, 2020, the Commission renamed the Office of Compliance Inspections and Examinations (OCIE) the Division of Examinations.

## REGULATION BEST INTEREST

The Division plans to expand the scope of examinations of Regulation Best Interest. While prior examinations focused on the implementation of Regulation Best Interest by broker-dealers, future examinations will evaluate the processes used for compliance and alterations made to product offerings, as well as question the recommendations made by broker-dealers to customers, including whether such recommendations are in the customers' best interests.[23] Additionally, the Division will also conduct enhanced transaction testing by "evaluating firm policies and procedures designed to meet additional elements of Regulation Best Interest, the recommendation of rollovers and alternatives considered, complex product recommendations, assessment of costs and reasonably available alternatives, how sales-based fees paid to broker-dealers and representatives impact recommendations, and policies and procedures regarding how broker-dealers identify and address conflicts of interest."[24]

## REGISTERED INVESTMENT ADVISER FIDUCIARY DUTY AND FORM CRS

The Division's restated its commitment to examine the fiduciary duties of care and loyalty that RIAs owe to their clients, and the Division will focus on, among other items:

- RIA advice on whether account or program types are in the best interest of the client;
- RIA disclosure of all conflicts of interests "which might incline RIAs—consciously or unconsciously—to render advice which is not disinterested such that their clients can provide informed consent to the conflict;"[25] and
- Risks associated with "fees and expenses, complex products, best execution, and undisclosed or inadequately disclosed, compensation arrangements" and the risk associated with each.[26]

With respect to ensuring compliance with Form CRS, the Division plans to prioritize examinations of broker-dealers and RIAs.

## FRAUD, SALES PRACTICES, AND CONFLICTS

Examinations will focus on conduct related to retail investors, with a particular emphasis on: "(1) seniors, including recommendations and advice made by entities and individuals targeting retirement communities; (2) teachers; (3) military personnel; and (4) individuals saving for retirement."[27] The Division also plans to hone in on the following:

- Recommendations regarding account type, conversions, and rollovers;
- The sales practices used for each product type, including structured products;
- Whether broker-dealers are meeting their legal and compliance obligations when providing retail customers access to complex strategies;

[23] See the Report at 20.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] See Report at 21.

- How firms are complying with recent changes to the definition of accredited investor when recommending and selling certain private offerings;
- Whether fees, expenses and revenue sharing arrangements are adequately disclosed, encompassing revenue sharing arrangements between a registered firm and issuer, service providers, and others, and direct or indirect compensation to personnel for executing client transactions; and
    - Examination of RIA fee calculation will include: "(1) advisory fee calculation errors, including but not limited to, failure to exclude certain holdings from management fee calculations; (2) inaccurate calculations or tiered fees, including failure to provide breakpoints and aggregate household accounts; and (3) failures to refund prepaid fees for terminated accounts."
- RIAs operation and use of turnkey asset management platforms.[28]

## RETAIL-TARGETED INVESTMENTS

The Division restated its commitment to monitor securities products that can pose increased risks to retail investors such as mutual funds and ETFs, municipal securities, microcap securities and other fixed income securities. With respect to mutual funds and ETFs, the Division will focus on:

- The incentives provided to financial services firms and professionals that may cause them to select a higher cost mutual fund when a similar lower cost option is available.
- "Financial intermediaries' recommendations and disclosures involving ETFs, including adequacy of risk disclosure, and suitability, particularly in niche or leveraged/inverse ETFs."[29]

With respect to municipal securities and other fixed income securities, the Division will examine broker-dealers, underwriters and municipal advisors in order to determine whether each is meeting their obligations under municipal issuer disclosure. The Division will further examine "broker-dealer trading activity in municipal and corporate bonds for compliance with best execution obligations; fairness of pricing, mark-ups and mark-downs, and commissions; and confirmation disclosure requirements, including disclosures related to mark-ups and mark-downs."[30]

With respect to microcap securities, the Division restated its commitment to deterring fraud and cited concerns over false claims made by these companies regarding the pandemic, to which the Commission responded to by suspending trading in various securities. The Division plans to hone in on:

- "Transfer agent handling of microcap distributions and share transfers;
- Broker-dealer sales practices and their consistency with Regulation Best Interest; and
- Broker-dealer compliance with certain regulatory requirements, including the locate requirements of Regulation SHO, penny stock disclosures under Rules 15g-2 through 15g-6 of the Securities Exchange Act of 1934, and the obligation to monitor for and report suspicious activity and other anti-money laundering obligations."[31]

[28] See Report at 22.

[29] *Id.*

[30] See Report at 23.

[31] *Id.*

### FINANCIAL TECHNOLOGY (FINTECH) AND INNOVATION, INCLUDING DIGITAL ASSETS

The Division restates its commitment to staying updated on recent fintech innovations and plans to focus its efforts on:

- Implementation and integration of RegTech in firms' compliance programs
- Implementation of controls and compliance around the creation, receipt, and use of alternative data
- Examining digital asset market participants for: "(1) whether investments are in the best interests of investors; (2) portfolio management and trading practices; (3) safety of client funds and assets; (4) pricing and valuation; (5) effectiveness of compliance programs and controls; and (6) supervision of representatives' outside business activities."[32]

### THE LIBOR TRANSITION

The Division intends to examine the risks of "market participants such as RIAs, broker-dealers, investment companies, municipal advisors, transfer agents and clearing agencies in order to assess their understanding of any exposure to LIBOR, their preparations for the expected discontinuation of LIBOR and the transition to an alternative reference rate, in connection with the registrants' own financial matters and those of their clients and customers."[33]

# Events

### IN CASE YOU MISSED IT…

- **REVERSEinquiries Workshop: ISDA 2020 IBOR Fallbacks Protocol** (January 2021). *Watch this webinar*
- **4th Debt Capital Markets Seminar** (January 2021). *View the presentation materials*
- **REVERSEinquiries Workshop: Proprietary Indices, US and European Considerations** (February 2021). *Watch this webinar*
- **REVERSEinquiries Workshop: Bank Regulatory Development Recap** (March 2021). *Watch this webinar*

[32] See Report at 26.

[33] See Report at 27.

**Mayer Brown is pleased to have been shortlisted for Americas Law Firm of the Year (Overall), US Law Firm of the Year – Transactions and US Law Firm of the Year – Regulatory for *GlobalCapital*'s Americas Derivatives Awards 2021.**

**This follows our win as European Law Firm of the Year – Transactions and US Law Firm of the Year – Transactions for *GlobalCapital*'s Americas and Global Derivatives Awards 2020, respectively. We would like to thank *GlobalCapital* for its continued recognition and thank our friends and our colleagues for their trust in our work.**

## ANNOUNCEMENTS


**Capital Markets Tax Quarterly.** Mayer Brown's Capital Markets Tax Quarterly provides capital markets-related US federal tax news and insights. In our latest issue, we cover tax plans in the new administration, US tax considerations for SPACs, guidance on the settlement payments to REMIC regular interest holders, extended relief for mortgages, and more.

**LinkedIn Group.** Stay up to date on structured and market-linked products news by joining our LinkedIn group.

**Suggestions?** *REVERSEinquiries* is committed to meeting the needs of the structured and market-linked products community, so you ask and we answer. Send us questions that we will answer on our LinkedIn anonymously or topics for future issues.

To request to join the LinkedIn group or send us suggestions/comments, please scan the QR code, which will notify us via email at REVERSEinquiries@mayerbrown.com.

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## MAYER BROWN'S IBOR TRANSITION RESOURCES

The final countdown to the LIBOR cessation date has begun. With fewer than 500 days left until December 31, 2021, rely on Mayer Brown to assist you.

With our global presence, deep knowledge of the affected markets and products, participation in trade and industry groups and considerable experience in using technology solutions (including artificial intelligence and other technology-assisted review tools), Mayer Brown is uniquely positioned to advise financial institutions and other affected market participants.

Our IBOR Transition Task Force, composed of nearly 100 partners globally, is perhaps the best reflection of our strength and depth.

Below we provide a sampling of our resources:

IBOR Transition Digest: A compendium of global regulatory and market news as well as insights on the complex issues confronting financial market participants as they transition from LIBOR and its variants to replacement benchmark interest rates.

Recent publications, include:

FINRA LIBOR Phase-Out Preparedness Survey (August 2020)

"Comparable" Alternative Reference Rates to LIBOR: The Low Bar for Official Designation, the Much Higher Hurdle of "Fit for Use" and Implementation for Market Participants (August 2020)

IBOR Transition: It's Later Than You Think! (August 2020)

IBOR Transition Webinar Series: Detailed discussions and insights—in 30 minutes or less—on a range of topics from setting and executing an effective IBOR Transition strategy to assessing the impact of IBOR issues on specific financial products.

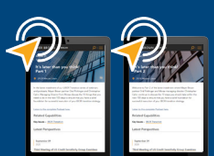
Subscribe on:

Recent webinars, include:

Part 5.1 Part 5.2

LIBOR Transition: Issues impacting Floating Rate Notes, Preferred Stock, Depositary Shares, and Capital Securities (Part 5.1 & Part 5.2) (August / September 2020)

Issues impacting Floating Rate Notes, Preferred Stock, Depositary Shares, and Capital Securities: Part 1 (August 2020)



Part 1 Part 2

It's later than you think! (Part 1 & Part 2) (August 2020)

We are collaborating with Morae Global Corporation, a leading provider of legal and compliance technology solutions, to assist clients in the transition from the IBORs to alternative risk-free reference rates. To more effectively serve our client, Mayer Brown has teamed up with Morae, to offer clients data analytics and remediation, technology enablement, repapering and program management capabilities.

Our firm and our partners are ranked as leaders for capital markets, structured finance and securitization, derivatives, structured products, financial services and bank regulatory, litigation, and tax by:

"Esteemed firm with excellent securitisation, structured finance and derivatives capital markets practices. Regularly sought after for advice on cross-border and transatlantic securitisation and structured finance transactions"

"A strong global reach allows the team to handle cross-border cases with ease, while the presence of several former regulatory officials provides insight into the most cutting-edge matters."

"The firm routinely leads on cross-border offerings from the US but it can also draw on its extensive network of offices for support on complex, multi-jurisdictional transactions... Among its industry sweet spots, the group is most prominent in the financial services…"

"Mayer Brown has leading structured finance, project development and project finance practices, as well as additional strengths in debt and equity capital markets."

Question? Please contact Marlon Paz, mpaz@mayerbrown.com, or see our Global IBOR Transition Task Force contacts.