

September 30, 2014

TO: The Board of Directors

FROM: Doreen R. Eberley
Director
Division of Risk Management Supervision

Richard J. Osterman, Jr.
Acting General Counsel

SUBJECT: Final Rule regarding Part 390 Subpart U and Part 335—Securities of State Nonmember Banks and State Savings Associations

Summary

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) abolished the Office of Thrift Supervision (“OTS”) and transferred supervisory authority over State savings associations to the FDIC.¹ As part of the transfer of supervisory responsibility for State savings associations, a number of regulations previously issued by the OTS and applicable to State savings associations were transferred to the FDIC. The Dodd-Frank Act prescribed that these transferred regulations would remain in effect until they were lawfully modified, terminated, set aside, or superseded by the FDIC. One of the regulations transferred to the FDIC was 12 CFR part 390 subpart U, which covers the disclosure and reporting requirements by State savings associations with securities registered pursuant to section 12(i) of the Securities Exchange Act of 1934 (“Exchange Act”).²

On April 8, 2014, the FDIC Board of Directors (“Board”) approved for publication in the *Federal Register*, a notice of proposed rulemaking (“NPR”) to rescind the transferred OTS rule, part 390 subpart U, entitled *Securities of State Savings Associations*, and to make conforming amendments to 12 CFR part 335, a corresponding FDIC rule that governs the disclosure and filing requirements for securities registered by insured State nonmember banks. The NPR was published on April 21, 2014, with a 60-day public comment period. No comments were received, and the FDIC staff recommends that the Board approve and adopt the NPR as a final rule with minor technical changes. The final rule rescinds 12 CFR part 390 subpart U in its entirety. The final rule also makes conforming amendments to a corresponding FDIC rule, 12 CFR 335, by inserting the term “State savings association” where appropriate so that both insured State nonmember banks and State savings associations are subject to the same FDIC rules governing the implementation of the securities registration and reporting requirements of the Exchange Act. Additionally, the final rule removes section 335.901, which contains the Board’s Delegation of Authority for part 335 matters and places them in the Board’s December

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 12 U.S.C. § 5301 *et seq.* (2010).

² 15 U.S.C. § 781(i).

3, 2002 Delegation of Authority Resolution No. 071098 to maintain consistent treatment of all FDIC delegations of authority.

Background

The Dodd-Frank Act, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,³ the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (“OCC”), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (“Federal Reserve Board”), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act,⁴ provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate Federal banking agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act⁵ further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by each agency. On June 14, 2011, the Board approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.⁶

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁷ granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC’s existing authority to issue regulations under the FDI Act and other laws as the “appropriate Federal banking agency” or under similar statutory authority. Section 312(c) of the Dodd-Frank Act amended section 3(q) of the Federal Deposit Insurance Act,⁸ and designated the FDIC as the “appropriate Federal banking agency” for State savings associations.

³ 12 U.S.C. § 5411.

⁴ 12 U.S.C. § 5414(b).

⁵ 12 U.S.C. § 5414(c).

⁶ 76 FR 39247 (July 6, 2011).

⁷ 12 U.S.C. § 5412(b)(2)(B)(i)(II).

⁸ 12 U.S.C. § 1813(q).

On June 14, 2011, operating pursuant to this authority, the Board reissued and redesignated certain regulations that were transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.⁹ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS regulations into FDIC rules that existed before the transfer, amending them, or rescinding them, as appropriate.

One of the transferred OTS regulations, 12 CFR part 390 subpart U, specifies the requirements for State savings associations that are issuers of securities subject to the provisions of the Securities Exchange Act of 1934.¹⁰ Section 12(i) of the Exchange Act grants authority to the Federal banking agencies to administer specific sections of the Exchange Act and the Sarbanes-Oxley Act of 2002 (“SOX Act”) with regard to depository institutions under the respective agency’s supervision. As part of the transfer of OTS authority to the OCC for Federal savings associations and the FDIC for State savings associations, section 376(2) of the Dodd-Frank Act amended section 12(i) of the Exchange Act to provide the FDIC with authority over both State nonmember banks and State savings associations to administer the enumerated provisions of the Exchange Act and the SOX Act as well as the authority to make such rules and regulations as may be necessary for the execution of the functions vested in the FDIC under section 12(i).¹¹

On April 21, 2014, the FDIC published in the *Federal Register* for a 60-day public comment period an NPR relating to the removal of part 390 subpart U from the Code of Federal Regulations.¹² In an effort to streamline FDIC regulations for all FDIC-supervised institutions, the NPR proposed to remove part 390 subpart U from the Code of Federal Regulations and all references to part 390 subpart U in the FDIC rules and regulations. The FDIC staff also compared part 390 subpart U with part 335, a substantively similar FDIC regulation that existed before the transfer of the OTS regulations. Similar to part 390 subpart U, part 335 governs the securities registration and reporting requirements of the Exchange Act for State nonmember banks. Although both rules implement identical provisions of the Exchange Act and SEC rules, part 335 provides more detailed guidance than subpart U by incorporating the SEC rules with greater specificity. As such, the NPR also proposed to expand the scope of part 335 to include State savings associations by inserting the term “state savings associations” where appropriate. The comment period for the NPR closed on June 20, 2014. The FDIC received no comments, and consequently, FDIC staff recommends that the Board adopt the final rule as proposed with minor technical changes.

⁹ 76 FR 47652 (August 5, 2011).

¹⁰ 15 U.S.C. § 781(i).

¹¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 376 (2), 124 Stat. 1376, 1569 (2010).

¹² 79 FR 22063 (April 21, 2014).

Final Rule

Under the final rule, 12 CFR part 335 applies to the securities of both State nonmember banks and State savings associations registered under the Exchange Act, and part 390 subpart U would be removed in its entirety. Part 390 subpart U is substantively similar to part 335, and the designation of part 335 as a single authority for the securities registration and reporting requirements for all FDIC-supervised institutions will serve to streamline the FDIC's rules and eliminate unnecessary regulations. To that effect, the final rule removes and rescinds 12 CFR Part 390 subpart U in its entirety as well as all references to Subpart U found in sections 390.321(b)(2) and 390.380(a)(3) of the FDIC rules and regulations.¹³

Consistent with the NPR, the final rule revises part 335 by inserting the term “state savings association” where appropriate and retitles the heading of part 335, currently entitled *Securities of Nonmember Insured Banks*, as *Securities of State Nonmember Banks and State Savings Associations*. The rewording of “Nonmember Insured Banks” to “State Nonmember Banks” reflects more consistent use of defined terms under section 3 of the FDI Act.¹⁴ Additionally, all references to the “Division of Supervision and Consumer Protection (DSC)” in part 335 are deleted and replaced with the words “Division of Risk Management Supervision (RMS)” to reflect an internal FDIC reorganization.

The final rule also removes section 335.901, which contains the Board's Delegation of Authority for Part 335 matters. Staff recommends that the Board revise its December 3, 2002 Delegation of Authority Resolution No. 071098 (“December 2002 Resolution”) by including the delegations of authority for Part 335 matters currently found in section 335.901. The purpose of this change is to remove the existing delegations from the Code of Federal Regulations and place them, instead, in the December 2002 Resolution. By moving the delegations of authority for Part 335 into this resolution, future changes to these delegations will continue to require Board action but will no longer require notice and comment rulemaking.

Recommendation

In order to provide consistent and streamlined implementation of the Exchange Act's requirements for State nonmember banks and State savings associations, based on the above, staff recommends that the Board adopt and issue the attached final rule and authorize its publication in the *Federal Register*.

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¹³ Both sections are also part of the transferred OTS regulations pursuant to the Dodd-Frank Act. Section 390.321 (part 390 subpart R) relates to regulatory reporting standards and section 390.380 (part 390 subpart T) relates to the form and content of financial statements.

¹⁴ 12 U.S.C. § 1813(e).

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Attachment:

The final rule entitled, “Removal of Transferred OTS Regulations Regarding Securities of State Savings Associations”