

February 19, 2015

TO: Board of Directors

FROM: Bret D. Edwards 
Director
Division of Resolutions and Receiverships

Charles Yi 
General Counsel

SUBJECT: Final Rule to Revise 12 C.F.R. Part 340, “Restrictions on Sale of Assets by the Federal Deposit Insurance Corporation”

RECOMMENDATION

On October 21, 2014, the Board approved a notice of proposed rulemaking (the “Proposed Rule”) to revise 12 C.F.R. Part 340, entitled “Restrictions on Sale of Assets by the Federal Deposit Insurance Corporation” (“Part 340”), in order to clarify the applicability of the rule, to make the rule more consistent with 12 C.F.R. section 380.13 (“Section 380.13”), which is the parallel provision in the FDIC’s Orderly Liquidation Authority regulations that places restrictions on sales of assets of a covered financial company by the FDIC, and to make certain technical and conforming changes. The Proposed Rule was published in the Federal Register on October 24, 2014 with a 60-day comment period ending on December 23, 2014. The FDIC received one comment letter that is supportive of the Proposed Rule and that does not request any changes. Staff has prepared a draft final rule (the “Final Rule”) that would revise Part 340 in substantially the same form as proposed and recommends that the Board adopt the Final Rule.

DISCUSSION

Part 340 implements section 11(p) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(p) (“Section 11(p)” of the “FDI Act”). Under Section 11(p), individuals or entities whose acts or omissions have, or may have, contributed to the failure of an insured depository institution are prohibited from buying the assets of that failed insured depository institution from the FDIC. As permitted by statute, the FDIC expanded the purchaser eligibility restriction when it promulgated Part 340 by precluding such individuals or entities from purchasing the assets of *any* failed insured depository institution, not only the particular institution affected by the actions of those individuals or entities. As provided in Section 11(p), Part 340 also prohibits the sale of assets involving FDIC financing to certain persons who have defaulted on obligations of \$1 million or more, in aggregate, owed to a failed insured depository institution or the FDIC and who have made fraudulent misrepresentations in connection with any of those obligations. Compliance with Part 340 is established through a self-certification process by which a prospective purchaser certifies that it is eligible to purchase an asset from the FDIC and that the FDIC’s sale of an asset to that prospective purchaser would not be restricted under Section 11(p) or Part 340.

Section 210(r) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5390(r) (“Section 210(r)” of the “Dodd-Frank Act”), places restrictions on sales of assets of a covered financial company and is substantially similar to Section 11(p). Because Section 210(r) and Section 11(p) share similar statutory language, Part 340 served as a model for the development of Section 380.13, which became effective on July 1, 2014. While many aspects of Part 340 were included in Section 380.13, FDIC staff identified new or different

concepts to include in Section 380.13 that were not already in Part 340. Incorporating these concepts into Part 340 will improve Part 340 and make it more consistent with Section 380.13.

The Proposed Rule detailed the revisions to Part 340 that the FDIC planned to make and that staff now recommends the Board adopt by approving the Final Rule. If the Final Rule is adopted, Part 340 will be revised as follows.¹

The title of Part 340 will be revised to clarify that Part 340 applies to sales of assets of a *failed institution*, which is defined in the rule as a failed insured depository institution. This change would help distinguish Part 340 from section 380.13, which applies to sales of assets of a covered financial company by the FDIC. While the two rules will preclude sales to certain prospective purchasers in a very similar manner, each pertains to a separate set of asset sales by the FDIC.

The stated purpose of Part 340, set forth in paragraph 340.1(b), will be revised to prohibit sales of assets of a failed insured depository institution to individuals or entities who would be prohibited from purchasing assets of a covered financial company under Section 210(r) and Section 380.13. A corresponding change will be made in section 340.4 to include a prospective purchaser's ineligibility to purchase assets from the FDIC under Section 380.13 as a basis for ineligibility to purchase assets from the FDIC under Part 340. This change will ensure consistency among Part 340 and Section 380.13 as Section 380.13 precludes individuals or entities that are prohibited from purchasing assets of a failed insured depository institution from purchasing assets of a covered financial company.

The Final Rule will change Part 340's scope of coverage in three ways to make it more consistent with Section 380.13. First, it will clarify that, consistent with existing practice, sales

¹ A redline demonstrating staff's proposed changes to Part 340 can be found in Attachment C hereto.

of assets by a subsidiary of a failed insured depository institution or by a bridge depository institution would be covered if the FDIC controls the terms of the sale of assets of such subsidiary or bridge depository institution by agreement or as shareholder. Second, it will clarify that Part 340 is not applicable to certain types of transactions involving marketable securities and other financial instruments that customarily are traded through a financial intermediary and where the FDIC, as seller, cannot control selection of the purchaser according to market convention. Third, it will clarify that Part 340 is not applicable to a judicial sale or a trustee's sale of property securing an obligation because the sale is not conducted or controlled by the FDIC in such settings.

The Final Rule will change the definitions of certain terms used in part 340. The definition of "associated person" will be revised to include limited liability companies of which the prospective purchaser is a member if the prospective purchaser is an individual and, if the prospective purchaser is a limited liability company, to include the manager of the limited liability company. This updates the regulation, which was adopted before limited liability companies were in common use. The definition of "failed institution" will be revised to remove reference to entities "owned and controlled" by the failed institution because the scope of coverage is revised, as discussed above, to explicitly states that sales of subsidiary assets are covered under Part 340 if the FDIC controls the terms of the sale by agreement or in its role as shareholder. Also, references to the Resolution Trust Corporation, or RTC, are removed in favor of generically referencing the FDIC's predecessor agencies. Additionally, a new term, "financial intermediary," will be added to Part 340 to aid in identifying the types of transactions involving marketable securities and other financial instruments that Part 340 would not cover.

The Final Rule will revise Part 340 to explicitly require a prospective purchaser to certify that it is not using a straw purchaser or other subterfuge that would enable it to purchase an asset from the FDIC or benefit from such transaction if such person would otherwise be ineligible to purchase assets from the FDIC under Part 340. The form certification presently in use² includes such a statement, but a comment submitted in response to the notice of proposed rulemaking to adopt Section 380.13 suggested that proposal be strengthened by including such language in the regulatory text itself. The Final Rule will make a corresponding change to Part 340.

From time to time, bridge depository institutions are used as a resolution method by the FDIC and they purchase assets of failed insured depository institutions. To address the question of whether a bridge depository institution must comply with the certification requirement, the Final Rule will revise Part 340 to include bridge depository institutions among the list of entities excepted from the self-certification requirement because a bridge depository institution will be in compliance with Part 340 while subject to control or oversight by the FDIC.

Finally, the Final Rule will revise section 340.8, which provides that Part 340 does not apply if the sale resolves or settles a person's obligation to the FDIC, to also except a sale that resolves a claim that the FDIC has asserted against a person. This is not a substantive change but rather more closely tracks Section 11(p), which excepts sales that resolve or settle either claims or obligations. This revision will ensure that the regulation cites both bases for exception set forth in the statute. It would also ensure consistency with the equivalent provision in Section 380.13.

The Final Rule will clarify the restrictions on sales of assets of failed insured depository institutions by the FDIC and will ensure consistency among Part 340 and Section 380.13, which

² The Purchaser Eligibility Certification, FDIC Form 7300/06.

will allow the FDIC to more efficiently administer the two rules and will help the public better understand the two rules.

CONCLUSION

It is recommended that the Board of Directors approve the Final Rule and authorize its publication in the Federal Register.³

Staff Contacts

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ATTACHMENTS

A – Resolution

B – Final Rule for Publication in the Federal Register

C – Part 340 Blackline Demonstrating Changes

³ See Attachment A for model resolution and Attachment B for proposed Federal Register publication.