

November 20, 2018

TO: The Board of Directors

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

SUBJECT: Final Rule: Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers

Recommendation: Staff recommends that the FDIC Board of Directors (FDIC Board) approve and authorize for publication in the *Federal Register* the attached final rule (Final Rule) entitled, “*Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers.*” The Final Rule would rescind the former OTS regulation related to the fiduciary powers of State savings associations at 12 C.F.R. Part 390, Subpart J, and would make State nonmember banks and State savings associations subject to the same requirements for the exercise of trust powers. The Final Rule would state explicitly that both State nonmember banks and State savings associations must seek the FDIC’s consent to exercise trust powers, subject to certain exceptions, and would make State savings associations subject to the same application procedures that currently apply to State nonmember banks. The Final Rule would finalize as proposed a Notice of Proposed Rulemaking (NPR) published on April 10, 2018, which received no comments, except that the Final Rule would not adopt the list of required application documents originally proposed in the NPR.

CONCUR:

Charles Yi
General Counsel

I. Background

A. *The Dodd-Frank Act*

Effective July 21, 2011, section 311 of the Dodd-Frank Act¹ transferred to the FDIC the powers, duties, and functions formerly performed by the OTS with respect to State savings associations. Section 316(b) of the Dodd-Frank Act provided that OTS regulatory issuances in effect as of the transfer date would continue in effect and be enforceable by or against the appropriate Federal banking agency until modified, terminated, set aside, or superseded. On June 14, 2011, the FDIC 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.”² When the transferred OTS regulations were subsequently published as new FDIC regulations,³ the FDIC specifically noted that it would evaluate the transferred OTS regulations and might later incorporate them into other FDIC rules, amend them, or rescind them, as appropriate.

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁴ 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 Federal Deposit Insurance Act (FDI Act) and other laws as the “appropriate Federal banking agency.” Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act to add State savings associations to the list of entities for which the FDIC is designated as the “appropriate Federal banking agency.”⁵ Because the FDIC is the “appropriate Federal banking agency” for State savings associations and

¹ 12 U.S.C. 5411.

² 76 Fed. Reg. 39247 (July 6, 2011).

³ 76 Fed. Reg. 47652 (Aug. 5, 2011).

⁴ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁵ 12 U.S.C. 1813(q).

State nonmember banks, it is authorized to issue, modify, and rescind regulations involving such institutions.

B. *Subpart J: Trust Powers of State Savings Associations*

One of the OTS regulations transferred to the FDIC governs the fiduciary powers (also known as trust powers) of State savings associations. This regulation, formerly 12 CFR section 550.10(b)(1), is now found in the FDIC's rules at 12 CFR Part 390, Subpart J (Subpart J). Subpart J provides that a State savings association must conduct its fiduciary operations in accordance with applicable State law and must exercise its fiduciary powers in a safe and sound manner.

C. *Trust Powers of State Nonmember Banks*

Unlike the explicit requirement applicable to State savings associations in Subpart J, there is no express rule requiring State nonmember banks to conduct fiduciary operations in accordance with applicable State law and to exercise their fiduciary powers in a safe and sound manner. However, the FDIC has long recognized that State nonmember banks, like State savings associations, must comply with State law when exercising trust or fiduciary powers, as their trust powers are granted under State law and primarily administered by the State chartering authority.⁶

Under the FDIC regulations, State nonmember banks are generally required to file an application to obtain the FDIC's consent before exercising trust powers,⁷ as a change in the nature of a bank's current business requiring the FDIC's prior written consent under 12 CFR § 333.2.

⁶ FDIC Trust Examination Manual, *available at*: http://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html#B1 (Trust powers of State nonmember banks are granted under State law, and the State, as the State nonmember bank's chartering authority, is the primary administer of such trust powers.).

⁷ Banks granted trust powers by statute or charter prior to December 1, 1950, are considered grandfathered from the requirement to obtain consent to exercise trust powers. *See* 12 CFR § 303.242(a).

Section 303.242 contains the application procedures to obtain the FDIC's prior written consent before engaging in trust activities.⁸ Prior to granting such consent, the FDIC considers the information provided with the application and whether the bank will conduct trust operations in a safe and sound manner, consistent with State law. Under section 333.101(b), however, a State nonmember bank is not deemed to exercise trust powers, and therefore is not required to obtain the FDIC's prior written consent, when it acts as a trustee or custodian of certain qualified retirement, education, and health savings accounts, or other similar accounts in which the bank's duties are essentially custodial or ministerial in nature and acceptance of such accounts without trust powers is not contrary to applicable State law.⁹

II. NPR to Rescind Subpart J and Amend Parts 303 and 333

On April 10, 2018, the FDIC issued the NPR entitled, "*Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers.*"¹⁰ The NPR proposed to:

- (1) rescind the former OTS regulation in part 390, Subpart J in its entirety;
- (2) add a new section 333.3 explicitly providing that State savings associations and State nonmember banks must obtain the FDIC's prior written consent before exercising trust powers, by following the procedures contained in section 303.242;
- (3) revise section 333.101 to provide that State savings associations, as well as State nonmember banks, are not considered to be exercising trust powers when acting as trustees or

⁸ State nonmember banks must file an application to obtain the FDIC's prior written consent to exercise trust powers unless: (1) the bank received authority to exercise trust powers by its chartering authority prior to December 1, 1950; or (2) where an insured depository institution continues to conduct trust activities pursuant to the authority granted to it by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System. See 12 C.F.R. § 303.242(a).

⁹ 12 CFR § 333.101(b).

¹⁰ 83 FR 15327-01 (April 10, 2018).

custodians for certain qualified retirement, education, and health savings accounts, or other similar accounts as described above; and

(4) revise section 303.242 to make the trust powers application procedures applicable to both State savings associations and State nonmember banks and incorporate a list of documents required to be submitted with the application for consent to exercise trust powers.

In addition to streamlining the FDIC's rules and regulations, the NPR was intended to ensure the consistent exercise of the FDIC's supervisory authority over the trust activities of State savings associations and State nonmember banks, while providing for the safe and sound exercise of trust powers in accordance with applicable law.¹¹ The FDIC requested comment on all aspects of the proposal, including whether Subpart J should be retained and what positive or negative impacts could result from the proposed revisions to parts 333 and 303, including the impact on State savings associations not currently exercising trust powers that would need to obtain the FDIC's consent if they chose to do so in the future. The FDIC received no comments on the NPR.

III. The Final Rule

As proposed in the NPR, the Final Rule would remove and rescind Subpart J in its entirety. The Final Rule would also add new section 333.3, unchanged from the NPR, explicitly requiring State savings associations and State nonmember banks to obtain the FDIC's prior written consent before exercising trust powers. For State nonmember banks, new section 333.3 codifies the requirement to obtain the FDIC's consent before exercising trust powers, which the FDIC has required as a change in the bank's general character or business under 12 CFR § 333.2. In addition, the Final Rule would make section 333.3's requirement applicable to State savings associations.

¹¹ 12 U.S.C. 1819(a)(Tenth); 12 U.S.C. 1818; 12 U.S.C. 1831p-1.

The Final Rule, like the NPR, also would revise section 333.101(b) to extend to State savings associations the permission to act as custodians for qualifying retirement, education, and health savings accounts, or other similar accounts without being deemed to exercise trust powers, and therefore without obtaining the FDIC's prior written consent.

The Final Rule, like the NPR, would make conforming changes to section 303.242 to make the existing application procedures for State nonmember banks applicable to State savings associations. Originally, the NPR proposed to amend section 303.242(c) to list specific documents typically filed as part of the application for consent to exercise trust powers. Upon further consideration, however, FDIC staff recommends that those documents not be listed in the Final Rule. This change is intended to avoid duplication and possible confusion with the listing of required documents already included in the instructions to the application form available on the FDIC website,¹² and to lessen the likelihood for corresponding changes to section 303.242(c) if that list is updated in the future. Accordingly, in the Final Rule proposed for the FDIC Board's approval, section 303.242(c) would continue to provide that the required filing shall consist of the completed application form (which would include the documents listed on the form itself).

IV. Impact and Effective Date

In accordance with the requirements of the Riegle Community Development and Regulatory Improvement Act (RCDRIA)¹³ and the Administrative Procedure Act (APA),¹⁴ the Final Rule will be effective on the first day of the calendar quarter that is at least 30 days following the date of the Final Rule's publication in the *Federal Register*. Section 302(a) of RCDRIA requires each Federal banking agency, in determining the effective date and

¹² See Application for Consent to Exercise Trust Powers, available at <https://www.fdic.gov/formsdocuments/6200-09.pdf>.

¹³ 12 U.S.C. 4802(a).

¹⁴ 5 U.S.C. 553.

administrative compliance requirements for a new regulation that imposes additional reporting, disclosure, or other requirements on insured depository institutions, to consider any administrative burdens that such regulation would place on depository institutions and the benefits of such regulation. Section 302(b) of RCDRIA¹⁵ generally requires such regulations to take effect on the first day of a calendar quarter that begins on or after the date on which the regulation is published in final form. Section 553(d) of the APA generally requires that a final rule may not become effective less than 30 days after publication.

As discussed above, the Final Rule imposes a new requirement on State savings associations, in that they would need to obtain the FDIC's consent should they decide in the future to exercise trust powers granted to them by their State chartering authorities. Based on Call Report data as of June 30, 2018, there are forty-one State savings associations. One State savings association currently exercises trust powers. The other forty State savings associations would need to obtain the FDIC's consent if they changed their business model to exercise trust powers in the future and did not satisfy one of the exceptions set forth in 12 C.F.R. § 303.242(a). However, the application primarily requires submission of pre-existing documentation and is not expected to be burdensome for depository institutions or their customers.¹⁶ The Final Rule provides greater clarity for FDIC-supervised institutions seeking to exercise trust powers and a consistent application process for both State nonmember banks and State savings associations.

¹⁵ 12 U.S.C. 4802(b).

¹⁶ The Federal Reserve and OCC require the submission of similar information in connection with the exercise of trust powers.

Conclusion

Staff recommends that the FDIC Board approve the attached Resolution to adopt the Final Rule, and authorize its publication in the *Federal Register*, to be effective on the first day of the calendar quarter that is at least 30 days after the date of such publication.

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Attachments

Final Rule entitled, *Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers*; and
FDIC Board Resolution