

November 26, 2019

TO: The Board of Directors

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

SUBJECT: Final Rule: Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations

**Summary:** Staff recommends that the FDIC Board of Directors (Board) approve and authorize for publication in the *Federal Register* the attached final rule entitled *Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations* (final rule). The final rule will rescind and remove 12 CFR part 390, subpart T, entitled *Accounting Requirements* (part 390, subpart T) because the additional financial disclosure requirements required by part 390, subpart T for State savings associations are substantially similar to, although more detailed than, otherwise applicable financial statement form and content requirements and disclosure requirements that State nonmember banks must satisfy under federal banking or securities laws or regulations. Upon the rescission and removal of part 390, subpart T, State savings associations will continue to use U.S. generally accepted accounting principles (GAAP) in the preparation of their financial statements and financial reports pursuant to section 37 of the Federal Deposit Insurance Act (FDI Act) and section 4 of the Home Owners Loan Act (HOLA) and State savings association filings under the Securities Exchange Act of 1934 (Exchange Act) will continue to be governed by 12 CFR part 335, entitled *Securities of State Nonmember Banks and State Savings Associations* (part 335). With respect to proxy solicitations and offering circulars to be used in a securities offering in connection with a mutual to stock conversion, a State savings association will continue to be subject to the Office of the Comptroller of the Currency's conversion rules at 12 CFR part 192 (OCC conversions regulations).

Concur:  
Nicholas J. Podsiadly, General Counsel

## I. Background

Effective July 21, 2011, section 311 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>1</sup> transferred to the FDIC the powers, duties and functions formerly performed by the Office of Thrift Supervision (OTS) with respect to State savings associations. Section 316(b) of the Dodd-Frank Act<sup>2</sup> provided that OTS regulatory issuances in effect as of the transfer date would continue in effect and be enforceable by and against the appropriate Federal banking agency until modified, terminated, set aside, or superseded. 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*.<sup>3</sup> When the transferred OTS regulations were subsequently published as new FDIC regulations,<sup>4</sup> the FDIC specifically noted that its staff 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 Act<sup>5</sup> granted the Office of the Comptroller of the Currency (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)<sup>6</sup> and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c)(1) of the Dodd-Frank Act<sup>7</sup> revised the definition of "appropriate Federal banking agency" contained in section 3(q) of the FDI Act,<sup>8</sup> to add State savings associations to the list of entities for which the FDIC is designated as the "appropriate

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<sup>1</sup> 12 U.S.C. 5411.

<sup>2</sup> 12 U.S.C. 5414(b).

<sup>3</sup> 76 FR 39246 (July 6, 2011).

<sup>4</sup> 76 FR 47652 (Aug. 5, 2011).

<sup>5</sup> 12 U.S.C. 5412(b)(2)(B)(i)(II).

<sup>6</sup> 12 U.S.C. 1811 *et seq.*

<sup>7</sup> 12 U.S.C. 5412(c)(1).

<sup>8</sup> 12 U.S.C. 1813(q).

Federal banking agency.” As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations. Further, section 376 of the Dodd-Frank Act<sup>9</sup> grants rulemaking and administrative authority to the FDIC over the Exchange Act<sup>10</sup> filings of State savings associations.

## II. The Proposed Rule

On October 2, 2019, the FDIC published a Notice of Proposed Rulemaking (NPR) with a 30-day comment period regarding the removal of part 390, subpart T (formerly OTS part 563c),<sup>11</sup> which addressed accounting requirements for State savings associations.<sup>12</sup> This subpart prescribes for State savings associations accounting requirements with respect to definitions, public accountant qualifications, and the form and content of financial statements pertaining to certain securities transaction documents.<sup>13</sup> These transaction documents include proxy statements and offering circulars in connection with a conversion, any offering of securities by a State savings association, and filings by State savings associations requiring financial statements under the Exchange Act.<sup>14</sup>

After a careful review of part 390, subpart T, the FDIC determined that the accounting requirements with respect to financial statements and disclosure forms and content set forth by part 390, subpart T are substantially similar to, although more detailed than, other requirements that a State savings association must satisfy under federal banking or securities laws or regulations. Therefore, the FDIC proposed to rescind and remove part 390, subpart T (including the Appendix to 12 CFR 390.384).

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<sup>9</sup> Section 376 of the Dodd Frank Act amended section 3(a) of the Exchange Act. *See*, 15 U.S.C. 78c(a)(34).

<sup>10</sup> 15 U.S.C. 78a *et seq.*

<sup>11</sup> 12 CFR Part 390, Subpart T.

<sup>12</sup> 84 FR 52387 (Oct. 2, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> 15 U.S.C. 78a *et seq.*

State savings association reports and financial statements are required to be uniform and consistent with GAAP pursuant to section 37 of the FDI Act and section 4(b) of the HOLA.<sup>15</sup> While securities issued by State savings associations are exempt from registration requirements of the Securities Act of 1933 (Securities Act),<sup>16</sup> the FDIC reviews for compliance with 12 CFR part 192, *Conversion from a Mutual to Stock Form*, offering circulars related to mutual-to-stock conversions involving securities offerings by State savings associations. The FDIC will not approve an offering circular until concerns regarding the adequacy or accuracy of the offering circular or the disclosures are satisfactorily addressed.<sup>17</sup> The FDIC is also responsible for administering and enforcing certain sections of the Exchange Act with respect to State savings associations with securities that are publicly traded.<sup>18</sup> As such, a State savings association that is an Exchange Act reporting company must file required periodic reports such as annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K with the FDIC pursuant to part 335.<sup>19</sup> With respect to the form and content requirements for offerings of mutual capital certificates and debt securities of State savings associations

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<sup>15</sup> 12 U.S.C. 1831n(a)(2); 12 U.S.C. 1463(b)(2).

<sup>16</sup> 15 U.S.C. 77a *et seq.* Section 3(a)(5) of the Securities Act exempts from registration requirements securities issued by State savings associations. 15 U.S.C. 77c(a)(5).

<sup>17</sup> 12 CFR 192.300.

<sup>18</sup> 12 CFR 335.101. Part 335, issued by the FDIC under section 12(i) of the Exchange Act, applies to all securities of State savings associations that are subject to the registration requirements of section 12(b) or section 12(g) of the Exchange Act. The FDIC is vested with the powers, functions, and duties of the Securities and Exchange Commission (SEC) to administer and enforce Exchange Act sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78j-1, 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding State savings associations with one or more classes of securities subject to the registration provisions of sections 12(b) or 12(g) of the Exchange Act.

<sup>19</sup> Pursuant to section 12(a) of the Exchange Act, an issuer must register as an Exchange Act reporting company if it elects to list a class of securities (debt or equity) on a national securities exchange. 15 U.S.C. 78l(a). Generally, an issuer must register pursuant to section 12(g) of the Exchange Act if a class of its equity securities (other than exempted securities) is held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors and, on the last day of the issuer's fiscal year, its total assets exceed \$10 million. 12 CFR part 335. However, for banks, bank holding companies, and savings and loan holding companies, the threshold is 2,000 or more holders of record; the separate registration trigger for 500 or more non-accredited holders of record does not apply. A list of FDIC-supervised depository institutions currently reporting to the FDIC under the Exchange Act and part 335 can be accessed at <https://www.fdic.gov/bank/individual/part335/index.html>.

set forth in part 390, subpart T,<sup>20</sup> the FDIC has determined that the additional disclosures required by part 390, subpart T, may be more detailed than otherwise applicable financial statement form and content and disclosure requirements that a State savings association must satisfy under GAAP, the Exchange Act, FDIC regulations, and state regulations, as appropriate. While there may be situations where the disclosures required under GAAP, FDIC regulations, and state regulations, as appropriate, with respect to the offerings of mutual capital certificates and debt securities are less detailed than the requirements under part 390, subpart T, there have been no recent filings by State savings associations to the FDIC related to the offerings of mutual capital certificates and debt securities. Therefore, the FDIC has concluded that the practical impact of the differences in level of disclosure detail is negligible and does not justify maintaining separate disclosure regulations applicable solely to State savings associations.

### **III. The Final Rule**

The FDIC received no comments on the NPR. Consequently, the proposed rule is adopted as final without change, and part 390, subpart T will be rescinded in its entirety.

As discussed in the NPR, part 390, subpart T is being rescinded, in its entirety, because the financial statement and disclosure requirements set forth in part 390, subpart T are substantially similar to, although more detailed than, otherwise applicable financial statement form and content requirements and disclosure requirements that a State savings association must satisfy under federal banking or securities laws or regulations. The FDI Act has long required that reports and statements to be filed with the FDIC by insured depository institutions, including insured State saving associations, be uniform and consistent with GAAP. Moreover, the HOLA has required that savings association reports and financial statements be consistent with GAAP since the Competitive Equality Banking Act of 1987<sup>21</sup> was enacted.

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<sup>20</sup> 12 CFR 390.384(c).

<sup>21</sup> Pub. L. 100-86, 101 Stat. 552 (1987).

State savings associations with securities traded in the secondary market are subject to the registration provisions and reporting requirements of the Exchange Act as implemented by the FDIC, pursuant to the authority granted by Section 12(i) of the Exchange Act. As a result, a State savings association, like a State nonmember bank, is required to file reports and other filings containing generally the same information that would be included in Exchange Act reports with the FDIC pursuant to part 335, instead of filing with the SEC.

The form and content of financial statements used in connection with proxy solicitations and offering circulars for the conversion of a State savings association from mutual to stock form remain subject to the OCC conversion regulations and offering materials for the issuance of mutual capital certificates remain subject to the OCC regulations at 12 CFR 163.74, in addition to GAAP and any applicable Exchange Act requirements. While State savings association public offerings of securities are exempt from Securities Act registration requirements, the FDIC reviews offering circulars to ascertain that they were prepared in compliance with the anti-fraud provisions of the federal securities laws, which require full and adequate disclosure of material facts, meet the needs of investors and depositors, and are uniform and consistent with GAAP, including financial statement disclosure requirements. Removing part 390, subpart T will streamline the FDIC's regulations and will not increase regulatory burden for FDIC-supervised institutions.

#### **IV. Conclusion**

Staff recommends that the Board adopt the attached final rule and authorize its publication in the *Federal Register* with an effective date 30 days from the publication date.

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