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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303, 308, and 309

RIN -----

**Deposit Insurance Requirements After Certain Conversions; Definition of
“Corporate Reorganization;” Optional Conversions (“Oakar Transactions”);
Additional Grounds for Disapproval of Changes in Control; and Disclosure of
Certain Supervisory Information**

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final Rule.

SUMMARY: The FDIC is issuing a final rule that amends certain of its regulations by conforming them to Federal statutes amended by the Financial Services Regulatory Relief Act of 2006, the Federal Deposit Insurance Reform Act of 2005 and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005. On January 14, 2008, the FDIC adopted, an interim rule and requested public comment on, amendments to its regulations to implement such changes. Having received no comments on the interim rule, the FDIC is issuing a final rule that is identical to the interim rule.

First, the final rule amends the FDIC’s deposit insurance regulations to clarify that a deposit insurance application is required for each new bank that results from the conversion of certain Federal savings associations into multiple banks. Second, the final rule amends the definition of “corporate reorganization” in the FDIC’s merger

regulations to mean a merger that involves solely an insured depository institution and one or more of its affiliates. Third, the final rule amends the FDIC's merger regulations to remove any reference to "Optional Conversions" (sometimes referred to as "Oakar Transactions"). Fourth, the final rule adds, as an additional grounds for disapproval of a change in control notice, unfavorable future prospects of the institution to be acquired. Finally, the final rule authorizes the disclosure of examination reports and other confidential supervisory information to certain additional agencies and entities as the interim rule.

DATES: This Rule is effective: [insert date of publication in Federal Register]

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SUPPLEMENTARY INFORMATION:

I. Background

On October 13, 2006, the President signed into law the Financial Services Regulatory Relief Act of 2006 ("FSRRA").¹ The stated purpose of FSRRA is to reduce regulatory burden and improve productivity for financial institutions. Several provisions of FSRRA amend statutes that the FDIC has implemented through its Rules and Regulations

¹ Pub. L. 109-351, 12 STAT. 1966 (Oct. 13, 2006).

(“Rules”).² Additionally, Congress enacted the Federal Deposit Insurance Reform Act of 2005 (“Reform Act”)³ and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (“Amendments Act”),⁴ which consolidated the two former deposit insurance funds into a single deposit insurance fund.

In January of 2008, the FDIC adopted an interim rule, and requested public comment on, amendments to its rules to conform them to Federal statutes as amended by the FSRRA, the Reform Act and the Amendments Act. Having received no comments, the FDIC is now issuing a final rule that is identical to the interim rule.

II. Regulatory Amendments

A. Deposit Insurance Requirements After Certain Conversions

Section 5(i)(5) of the Home Owners’ Loan Act (“HOLA”)⁵ generally authorizes any Federal savings association that was chartered and in operation before November 12, 1999 and that had branches in one or more states, to convert into one or more national or state banks, each of which may encompass one or more of the existing branches. Section 608(a) of FSRRA amended section 5(i)(5) of the HOLA to require that if such a conversion results in more than one national or state bank, each resulting bank must obtain deposit insurance from the FDIC pursuant to section 5(a) of the Federal Deposit Insurance Act (“FDI Act”).⁶

² Chapter III of Title 12 of the Code of Federal Regulations.

³ Pub. L. 109-171, 120 STAT. 9 (Feb. 8, 2006).

⁴ Pub. L. 109-173, 119 STAT. 3601 (Feb. 15, 2006).

⁵ 12 U.S.C. 1464(i)(5).

⁶ 12 U.S.C. 1815(a).

Subpart B of Part 303 of the FDIC's Rules sets forth the procedures for applying for deposit insurance. Section 303.20 describes the scope of subpart B to include applications for deposit insurance for, among other institutions, proposed depository institutions. The final rule amends section 303.20 to expressly confirm the applicability of subpart B of Part 303 to banks that result from conversions of Federal savings associations under section 5(i)(5) of the HOLA.

B. Definition of Corporate Reorganization

Section 606 of the FSRRA made two changes to the Bank Merger Act⁷ with respect to mergers that solely involve an insured depository institution and one or more of its affiliates ("Affiliate Mergers"). First, for Affiliate Mergers, section 606 amended section 18(c)(4) of the FDI Act⁸ by eliminating the requirement that the appropriate Federal banking agency request competitive factors reports from either the other Federal banking agencies or the Attorney General of the United States.⁹ Prior to FSRRA the responsible Federal banking agency had to request competitive factors reports for Affiliate Mergers. Second, section 606 revised section 18(c)(6) of the FDI Act¹⁰ by eliminating the post-approval waiting period for Affiliate Mergers. Prior to FSRRA the applicant in an Affiliate Merger had to wait up to thirty days after obtaining the agency's approval before it could consummate the transaction.

⁷ 12 U.S.C. 1828(c).

⁸ 12 U.S.C. 1828(c)(4).

⁹ Notwithstanding this change, the responsible Federal banking agency retains the ability to request competitive factors reports if the circumstances warrant.

¹⁰ 12 U.S.C. 1828(c)(6).

The FDIC's regulations at 12 CFR 303.61(b), formerly provided a definition of "corporate reorganization" that identified a class of mergers that generally do not raise competitive concerns and, therefore, do not require the same level of competitive analysis as other mergers subject to the Bank Merger Act. Such mergers are less burdensome on applicants. 12 CFR 303.61(b) defined "corporate reorganization" to include (i) mergers between an insured institution and its subsidiary or its holding company and (ii) mergers between institutions and entities that were "commonly-owned." Institutions were "commonly-owned" if more than 50% of the voting stock of each is owned by the same entity. The changes made by section 606 of the FSRRA, however, indicate that there are no competitive concerns for a class of mergers that is broader than the class identified by the FDIC's Rule as corporate reorganizations. Specifically, FSRRA indicates that there are no competitive concerns for mergers that solely involve an insured depository institution and one or more affiliates. While the term "corporate reorganization" is only used in subpart D as one of several illustrative examples of the types of mergers covered by the Bank Merger Act, the definition could cause confusion as to how it relates to Affiliate Mergers.

The final rule amends the definition of "corporate reorganization" found at 12 CFR 303.61(b) in order to conform it to the changes made by FSRRA and to avoid confusion about the need for competitive analyses and post-approval waiting periods for any merger that solely involves an insured depository institution and one or more of its affiliates.

C. Optional Conversions

Before it was repealed, the former section 5(d)(3) of the FDI Act¹¹ generally authorized a member of one insurance fund to merge with a member of the other fund without changing the funds that insured the deposits of the two institutions. This type of merger was referred to as an “Optional Conversion” in both section 5(d)(3) of the FDI Act and in section 303.63(d) of the FDIC’s Rules; it was also commonly known as an “Oakar Transaction.” Section 303.63(d) of the FDIC’s Rules formerly required the applicant in an Optional Conversion to identify the merger as an “Optional Conversion” in its application.

On March 31, 2006, pursuant to the Reform Act and the Amendments Act, the former Savings Association Insurance Fund (“SAIF”) and the former Bank Insurance Fund (“BIF”) were consolidated into a single fund, the Deposit Insurance Fund. In addition, the Amendments Act repealed section 5(d)(3) of the FDI Act effective with the merger of the two funds.¹² Following the consolidation of the two funds into one by the Reform Act and the repeal of section 5(d)(3) of the FDI Act by the Amendments Act, Optional Conversions are no longer possible. The final rule amends section 303.63 by removing paragraph (d) *Optional conversions*. The removed paragraph formerly read as follows:

(d) *Optional conversions*. If the proposed merger transaction is an optional conversion, the merger application shall include a statement that the proposed merger transaction is a transaction covered by section 5(d)(3) of the FDI Act (12 U.S.C. 1815(d)(3)).

¹¹ 12 U.S.C. 1815(d)(3)(repealed 2006).

¹² See section 8(a)(4) of the Amendments Act, Pub. L. 109-173 (2006).

D. Additional Grounds for Disapproval of a Change in Control

Section 705 of FSRRA amended section 7(j)(7) of the FDI Act¹³ by adding an additional ground for the disapproval of a proposed acquisition of control of a bank. The additional ground for disapproval is if the future prospects of the institution might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank.

Section 308.111 of the FDIC's Rules lists the statutory grounds for disapproval of a proposed acquisition of control of an insured state nonmember bank. The final rule amends section 308.111(c) to reflect the addition of unfavorable future prospects of the institution as a ground for disapproval of a proposed acquisition under the FSRRA.

E. Disclosure of Certain Supervisory Information

Section 707 of FSRRA amended section 7(a)(2) of the FDI Act¹⁴ by adding a new subsection (C) that expanded the authority of the Federal banking agencies to furnish examination reports and other confidential supervisory information to (1) any other Federal and State agencies with supervisory or regulatory authority over the depository institution or entity, (2) officers, directors and receivers of such depository institution or entity, and (3) any other person that the Federal banking agency determines to be appropriate.

Part 309 of the FDIC's Rules governs the disclosure of confidential information.

Paragraph (b)(3) of section 309.6 entitled "Disclosure of exempt records," previously

¹³ 12 U.S.C. 1817(j)(7).

¹⁴ 12 U.S.C. 1817(a)(2).

authorized the disclosure of exempt records to Federal financial institution supervisory agencies and certain other agencies.

Since section 707 of FSRRA authorized additional disclosures of certain supervisory information, the final rule amends section 309.6(b)(3) to add those additional disclosures to the disclosures previously authorized.

III. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (“GLBA”)¹⁵ requires the FDIC to use “plain language” in all proposed and final rules published after January 1, 2000. The FDIC invited comments on whether the interim rule is clearly stated and effectively organized, and how the FDIC might make the text easier to understand. The FDIC received no comments addressing how the proposed rule might be changed to reflect the requirements of GLBA.

B. Administrative Procedure Act

The final rule takes effect upon publication in the Federal Register. The final rule conforms the FDIC’s regulations to several statutory provisions that were amended by FSRRA on October 13, 2006 and by the Reform Act and the Amendments Act effective on March 31, 2006. The statutory amendments made by FSRRA, the Reform Act, and the Amendments Act continue in effect. The amendments to the FDIC’s regulations

¹⁵ 12 U.S.C. 4809.

made by the final rule are identical to those made by the interim rule, effective January 14, 2008.

The amendments to the FDIC's regulations made by the interim rule, and adopted in this final rule, generally reflect the language contained in the amended statutes without interpretation. The amendments made by the final rule effect no substance changes beyond those already effected by Federal statute. Although solicitation of public comment prior to the effectiveness of these regulatory amendments was unnecessary, the FDIC nonetheless requested public comment on the interim rule. The FDIC received no comments.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment.¹⁶ However, pursuant to section 603(a) of the RFA a regulatory flexibility analysis is only required when an agency is required to publish a notice of proposed rulemaking for a proposed rule. Since the regulatory amendments made by the final rule are effective upon publication in the Federal Register, and since no notice of proposed rulemaking is required to be published, no regulatory flexibility analysis is required.

¹⁶ See 5 U.S.C. 603.

D. Paperwork Reduction Act

No new collections of information pursuant to the Paperwork Reduction Act¹⁷ are contained in the final rule.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Bank deposit Insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties.

12 CFR Part 309

Banks, banking, Credit, Freedom of Information, Privacy.

Authority and Issuance

■ For the reasons set forth in the preamble, parts 303, 308, and 309 of Chapter III of the title 12 of the Code of Federal Regulations are amended as follows:

PART 303—FILING PROCEDURES

¹⁷ 44 U.S.C. 3501.

- 1. The authority citation for part 303 is revised to read as follows:

Authority: 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

- 2. Add the following sentence at the end of § 303.20 to read as follows:

§ 303.20 Scope.

* * * Each bank that results from the conversion of a Federal savings association into multiple banks pursuant to section 5(i)(5) of the Home Owners’ Loan Act, 12 U.S.C. 1464(i)(5), is treated as a proposed depository institution or a de novo institution, as appropriate, for purposes of this subpart.

- 3. Amend § 303.61 by revising paragraph (b) to read as follows:

§ 303.61 Definitions.

* * * * *

(b) *Corporate reorganization* means a merger transaction that involves solely an insured depository institution and one or more of its affiliates.

* * * * *

§ 303.63 [Amended]

- 4. In § 303.63, remove paragraph (d).

PART 308—RULES OF PRACTICE AND PROCEDURE

- 5. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12

U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i,

1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717;

15 U.S.C. 78(h) and (i), 78o–4(c), 780–5, 6805(b)(1); 28

U.S.C. 2461 note, 31 U.S.C. 330, 5321; 42

U.S.C. 4012a; Sec. 3100(s) Pub. L. 104–134, 110 Stat. 1321–358.

■ 6. Amend § 308.111 by revising paragraph (c) to read as follows:

§ 308.111 Grounds for disapproval.

* * * * *

(c) Either the financial condition of any acquiring person or the future prospects of the institution might jeopardize the financial stability of the bank or prejudice the interest of the depositors of the bank.

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PART 309—DISCLOSURE OF INFORMATION

■ 7. The authority citation for part 309 continues to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 1819(a) “Seventh” and “Tenth.”

■ 8. Amend § 309.6 by adding the following new sentence at the end of paragraph (b)(3) to read as follows:

§ 309.6 Disclosure of exempt records.

* * * * *

(b) * * *

(3) * * * Finally, the Director, or designee, may in his or her discretion and for good cause, disclose reports of examination or other confidential supervisory information concerning any depository institution or other entity examined by the Corporation under authority of Federal law to: any other Federal or State agency or authority with supervisory or regulatory authority over the depository institution or other entity; any officer, director, or receiver of such depository institution or entity; and any other person that the Corporation determines to be appropriate.

By Order of the Board of Directors

Dated at Washington, DC, the ___ Day of July 2008

FEDERAL DEPOSIT INSURANCE CORPORATION

Executive Secretary