



July 24, 2013

TO: The Board of Directors

FROM: Richard J. Osterman, Jr. 
Acting General Counsel

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SUBJECT: Review of Regulations Transferred from the Former Office of Thrift Supervision:
Part 390, Subpart A – Restrictions on Post-Employment Activities of Senior
Examiners

Recommendation

Staff recommends that the FDIC Board of Directors (Board) approve and authorize for publication in the *Federal Register* a notice of proposed rulemaking (NPR) to rescind and remove the regulation at 12 CFR Part 390, Subpart A, entitled *Restrictions on Post-Employment Activities of Senior Examiners*, issued by the former Office of Thrift Supervision (OTS). In addition, staff recommends that the Board approve and authorize for publication in the *Federal Register* a conforming amendment to 12 CFR Part 336, Subpart B, of the FDIC rules and regulations, entitled *Minimum Standards of Fitness for Employment with the Federal Deposit Insurance Corporation*.

Part 390, Subpart A was among the regulations that were transferred to the FDIC from the OTS on July 21, 2011, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ Part 390, Subpart A originally was adopted by the OTS in implementing section 10(k) of the Federal Deposit Insurance Act (12 U.S.C. 1820(k)), which prohibits senior examiners from accepting compensation from certain companies following the termination of their employment. After the transfer of OTS employees to the OCC or the FDIC in accordance with the Dodd-Frank Act, former OTS senior examiners who transferred to the FDIC are now FDIC examiners covered by FDIC’s regulation at Part 336, Subpart B. The OTS regulation at Part 390, Subpart A is no longer needed.

The rescission of Part 390, Subpart A and adoption of a conforming amendment to Part 336 will allow the FDIC to complete its review of this aspect of the former OTS rules for rescission, amendment, or adoption while maintaining strong and effective post-employment rules for all FDIC senior examiners under the FDIC’s existing regulation at 12 CFR Part 336, Subpart C. The proposed conforming amendment would not change the substance of 12 CFR Part 336, Subpart C but would simply delete a reference to the Office of Thrift Supervision in the

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

definition of Federal banking agency contained in Part 336.3(e) and add the words “predecessors or” in front of the word “successors.” In this connection, it may prove useful that the OTS is viewed as a predecessor *federal banking agency* for purposes of the FDIC’s Part 336 rule regarding minimum standards for appointment to a position with the FDIC, so as to bar a person from providing any service for or on behalf of the FDIC if that person had been subject to a final OTS removal or prohibition order. *See* 12 CFR § 336.4(a)(2).

The current proposal is one of a number that will be presented to the Board for consideration in connection with the review of the transferred regulations contained in Parts 390 and 391 for rescission, amendment, or adoption. Staff anticipates that a consistent and thoughtful review process will streamline the FDIC’s rules and reduce regulatory burden.

Background

Section 316(c) of the Dodd-Frank Act (12 U.S.C. 5414(c)) directed the FDIC and the OCC to consult with one another and to publish a list of OTS regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC’s Board of Directors 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, 2011.²

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act (12 U.S.C. 5412(b)(2)(B)(i)(II)), 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 (12 U.S.C. 1813(q)), and designated the FDIC as the “appropriate Federal banking agency” for State savings associations. As a result, for State savings associations, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

Operating pursuant to this authority, the FDIC’s Board of Directors reissued and re-designated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.³ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into FDIC rules that existed before the transfer, or amending them, or rescinding them, as appropriate.

Part 390, Subpart A – Restrictions on Post-Employment Activities of Senior Examiners

One of the regulations transferred to the FDIC covered OTS restrictions on the post-employment activities of its senior examiners. The OTS’s regulation, formerly found at 12 CFR Part 507,

² 76 FR 39247 (July 6, 2011).

³ 76 FR 47652 (August 5, 2011).

was transferred to the FDIC with only nominal changes and is now found in the FDIC's rules at 12 CFR Part 390, Subpart A. Before the transfer of the OTS rules (and continuing today), the FDIC had its own analogous rule at 12 CFR Part 336, Subpart C, covering restrictions on the post-employment activities of FDIC senior examiners. After careful review and comparison of 12 CFR Part 390, Subpart A—*Restrictions on Post-Employment Activities of Senior Examiners* and 12 CFR Part 336, Subpart C—*One-Year Restriction on Post-employment Activities of Senior Examiners*, staff proposes to rescind 12 CFR, Part 390, Subpart A (the former OTS rule), because this subpart is largely duplicative of 12 CFR Part 336, Subpart C.

The FDIC's rules found at 12 CFR Part 336, Subpart C, and the former OTS rules at 12 CFR Part 507 were issued in 2005, as part of a joint interagency rulemaking among the FDIC, the FRB, the OCC, and the OTS. The federal banking agencies issued substantially similar rules that implemented section 6303(b) of the Intelligence Reform and Terrorism Prevention Act of 2004.⁴ This Act added a new section 10(k) to the FDI Act (12 U.S.C. 1820(k)), which imposed post-employment restrictions on senior examiners of depository institutions and their holding companies.

As a result of that joint rulemaking, the four federal banking agencies at the time adopted very similar, though not identical, rules that outlined the post-employment restrictions on their senior examiners. After comparing the relevant FDIC rule with the transferred OTS rule relating to post-employment restrictions for senior examiners, staff has concluded that Part 336, Subpart C fully and appropriately implements section 10(k) of the FDIA for all FDIC senior examiners of insured depository institutions and that the transferred OTS rules found at Part 390, Subpart A are redundant and should be rescinded. Specifically, the Part 336, Subpart C rule is more appropriate for the FDIC because it focuses on employees serving as senior examiners of insured depository institutions, whereas the transferred OTS rules at Part 390, Subpart A are not as useful to the FDIC because they are narrowly drawn to include only senior examiners of savings associations and their holding companies. For example, the Part 336, Subpart C rule prohibits an FDIC examiner who has served as a senior examiner of an insured institution for at least 2 months during the last 12 months of employment with the FDIC from knowingly accepting compensation as an employee, officer, director, or consultant from such insured institution or any company that controls that institution. 12 C.F.R. § 336.12(a).

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act (12 U.S.C. 5414(c)), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules regarding restrictions on post-employment activities of senior examiners currently found in 12 CFR Part 390, Subpart A, staff of the FDIC, as the appropriate federal banking agency for State savings associations, proposes to rescind these regulations in their entirety. Staff believes that the rules found at 12 CFR Part 336, Subpart C should apply to the post-employment activities of senior examiners who examine either insured State banks or insured State savings associations and that the rules found at 12 CFR Part 390, Subpart A are essentially duplicative to those found in Part 336,

⁴ 70 FR 45323 (August 5, 2005).

Subpart C. Rescinding Part 390, Subpart A will serve to streamline the FDIC's rules, preclude any confusion over applicable post-employment restrictions for senior examiners, and eliminate unnecessary regulations.

Part 336, Subpart B – Minimum Standards of Fitness for Employment with the Federal Deposit Insurance Corporation

Part 336, Subpart B, entitled *Minimum Standards of Fitness for Employment with the Federal Deposit Insurance Corporation*, includes various definitions used in this part. Specifically, the definition described in section 336.3(e) states, for the purposes of this part: “*Federal banking agency* means the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Directors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, or their successors.”

As described above, the OTS was abolished on July 21, 2011. Therefore, the proposed amendment to Part 336, Subpart B, would delete an obsolete reference to “the Office of Thrift Supervision” in the definition of “Federal banking agency” contained in Part 336.3(e) and add the words “predecessors or” before the word “successors.” By deleting the reference to the now defunct OTS, the potential for public confusion is eliminated, but the amendment preserves the flexibility if needed to consider OTS as a predecessor federal banking agency.

Conclusion and Recommendation

Staff recommends that the Board approve the attached Resolution to adopt and authorize the publication in the *Federal Register* of the referenced Notice of Proposed Rulemaking for public comment for 60 days.

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Attachment: Part 390, Subpart A – Restrictions on Post-Employment Activities of Senior Examiners

SOURCE: The provisions of this Part 390 appear at 76 Fed. Reg. 47665, August 5, 2011, effective July 22, 2011.

Subpart A—Restrictions on Post-Employment Activities of Senior Examiners

§ 390.1 What does this subpart do?

This subpart implements section 10(k) of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1820(k)), which prohibits senior examiners from accepting compensation from certain companies following the termination of their employment. Except where otherwise provided, the terms used in this subpart have the meanings given in section 3 of the FDIA (12 U.S.C. 1813).

[Codified to 12 C.F.R. § 390.1]

§ 390.2 Who is a senior examiner?

An individual is a senior examiner for a particular savings association or savings and loan holding company if--

- (a) The individual was an officer or employee of the Office of Thrift Supervision (OTS) (including a special government employee) who was authorized by the OTS to conduct examinations or inspections of savings associations or savings and loan holding companies;
- (b) The individual was assigned continuing, broad and lead responsibility for the examination or inspection of that savings association or savings and loan holding company; and
- (c) The individual's responsibilities for examining, inspecting, or supervising that savings association or savings and loan holding company:
 - (1) Represented a substantial portion of the individual's assigned responsibilities at the OTS; and
 - (2) Required the individual to interact on a routine basis with officers and employees of the savings association, savings and loan holding company, or its affiliates.

[Codified to 12 C.F.R. § 390.2]

§ 390.3 What post-employment restrictions apply to senior examiners?

(a) *Prohibition.* (1) *Senior examiner of savings association.* An individual who served as a senior examiner of a savings association for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from--

- (i) The savings association; or
- (ii) A savings and loan holding company, bank holding company, or any other company that controls the savings association.

(2) *Senior examiner of a savings and loan holding company.* An individual who served as a senior examiner of a savings and loan holding company for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from--

(i) The savings and loan holding company; or

(ii) Any depository institution that is controlled by the savings and loan holding company.

(b) [Reserved].

(c) *Definitions.* For the purposes of this section--

Consultant. An individual acts as a consultant for a savings association or other company only if he or she directly works on matters for, or on behalf of, the savings association or company.

Control. Control has the same meaning given in 12 CFR part 391, subpart E.

[Codified to 12 C.F.R. § 390.3]

§ 390.4 When will the FDIC waive the post-employment restrictions?

The post-employment restriction in § 390.3 will not apply to a senior examiner if the Chairperson, or his or her designee, certifies in writing and on a case-by-case basis that a waiver of the restriction will not affect the integrity of the FDIC's supervisory program.

[Codified to 12 C.F.R. § 390.4]

§ 390.5 What are the penalties for violating the post-employment restrictions?

(a) *Penalties.* A senior examiner who violates § 390.3 shall, in accordance with 12 U.S.C. 1820(k)(6), be subject to one or both of the following penalties:

(1) An order--

(i) Removing the person from office or prohibiting the person from further participating in the conduct of the affairs of the relevant depository institution, savings and loan holding company, bank holding company or other company for up to five years, and

(ii) Prohibiting the person from participating in the affairs of any insured depository institution for up to five years.

(2) A civil money penalty not to exceed \$250,000.

(b) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a)(1) of this section shall be subject to 12 U.S.C. 1818(e)(6) and (7) in the same manner and to the same extent as a person subject to an order issued under 12 U.S.C. 1818(e).

(c) *Procedures.* 12 U.S.C. 1820(k) describes the procedures that are applicable to actions under paragraph (a) of this section and the appropriate Federal banking agency authorized to take the action, which may be an agency other than the FDIC. Where the FDIC is the appropriate Federal banking agency, it will conduct administrative proceedings under subpart C of this part.

(d) *Other penalties.* The penalties under this section are not exclusive. A senior examiner who violates the restriction in § 390.3 may also be subject to other administrative, civil, or criminal remedy or penalty as provided by law.

[Codified to 12 C.F.R. § 390.5]