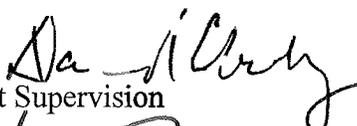


December 10, 2013

TO: Board of Directors

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

Mark Pearce, Director 
Division of Depositor and Consumer Protection

Richard J. Osterman Jr., Acting General Counsel 
Legal Division

SUBJECT: Final Rule on the Removal of Transferred Office of Thrift Supervision (“OTS”)
Regulation 12 CFR Part 390, Subpart K—Recordkeeping and Confirmation
Requirements for Securities Transactions and Amendments to 12 CFR Part 344

Summary of Recommendation

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) abolished the OTS and transferred supervisory authority over State savings associations to the Federal Deposit Insurance Corporation (“FDIC”).¹ As part of the transfer of supervisory responsibility for State savings associations, a number of regulations previously issued by the OTS and applicable to State savings associations were transferred to the FDIC. The Dodd-Frank Act prescribed that these transferred regulations would remain in effect until they were lawfully modified, terminated, set aside, or superseded by the FDIC. If approved, the proposed Final Rule will consolidate and incorporate one of the transferred OTS rules with an existing FDIC regulation on the same subject in such a manner as to provide, to the maximum extent possible, a single set of regulations that apply to both State savings associations and state nonmember banks.

On August 28, 2013, the Board of Directors of the FDIC (“Board”) authorized for publication in the *Federal Register* a notice of proposed rulemaking (“NPR” or “Proposed Rule”) that proposed the removal of a rule transferred to the FDIC from the OTS: 12 CFR Part 390, Subpart K (“Part 390, Subpart K”), *Recordkeeping and Confirmation Requirements for Securities Transaction*. The transferred rule would be consolidated with 12 CFR Part 344 (“Part 344”), also entitled *Recordkeeping and Confirmation Requirements for Securities Transactions*. The NPR was published in the *Federal Register* on September 4, 2013. The public comment period expired on November 4, 2013, and no comments were received. Accordingly, staff recommends that the Board approve and authorize the publication in the *Federal Register* of a Final Rule to adopt the Proposed Rule with no changes from the proposal.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

Further, staff recommends that the action taken on this rulemaking be considered part of the FDIC's decennial regulatory review required by section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), a review process that currently is underway.

Background

On July 21, 2011 (the transfer date established by section 311 of the Dodd-Frank Act, 12 U.S.C. 5411) the powers, duties, and functions of the former OTS were divided among the FDIC as to State savings associations, the Office of the Comptroller of the Currency ("OCC") as to Federal savings associations, and the Board of Governors of the Federal Reserve System as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

The Dodd-Frank Act directed the FDIC and the OCC to consult with one another and to publish a list of continued OTS regulations to be enforced by each respective agency that would continue to remain in effect until the appropriate successor agency modified or removed the regulations in accordance with the applicable laws. The list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011, and shortly thereafter, the FDIC published its transferred OTS regulations as new FDIC regulations in 12 CFR parts 390 and 391. 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 other FDIC rules, amending them, or rescinding them, as appropriate.

Further, 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 the "appropriate 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 in the proposed Final Rule, it has the authority to issue, modify, and rescind regulations involving such associations as well as for State nonmember banks and insured branches of foreign banks.²

Notice of Proposed Rule to Remove 12 CFR Part 390, Subpart K and Amend Part 344

On September 4, 2013, the FDIC published the Proposed Rule regarding the removal of Part 390, Subpart K (formerly OTS part 551), which governs recordkeeping and confirmation requirements for securities transactions effected for customers by State savings associations. The former OTS rule was transferred to the FDIC with only nominal changes.³ The NPR

² 12 U.S.C. 5412(b)-(c).

³ 78 FR 54403, 54408 (Sept. 4, 2013).

proposed removing Part 390, Subpart K from the Code of Federal Regulations in an effort to streamline FDIC regulations for all FDIC-supervised institutions. As discussed in the Proposed Rule, the FDIC carefully reviewed the transferred rule, Part 390, Subpart K, and compared it with Part 344, an FDIC regulation that existed before the transfer of Part 390, Subpart K and that continues to remain in effect today. Like the transferred rule, Part 344 governs recordkeeping and confirmation requirements for securities transactions effected for customers by insured State nonmember banks and insured branches of foreign banks.⁴

Although the two rules were substantively the same, staff noted some distinctions and minor technical differences between the transferred OTS rule and Part 344.⁵ A primary distinction between Part 390, Subpart K and Part 344 concerned the number of securities transactions that could be effected by an insured depository institution operating under these parts without triggering certain reporting and confirmation requirements (“Small Transaction Exception”). Specifically, the threshold for Part 390, Subpart K’s Small Transaction Exception is an average of 500 or fewer transactions for customers per year over the three prior calendar years, while the threshold under Part 344 is fewer than an average of 200 transactions during the same time period.

To reconcile the difference between the two thresholds, the NPR proposed amending 12 CFR 344.2(a)(1) to increase the threshold for the Small Transaction Exception applicable to all FDIC-supervised institutions effecting securities transactions for customers from an average of 200 transactions to 500 transactions per calendar year over the prior three calendar year period.⁶ As stated in the Proposed Rule, the FDIC believes that increasing the number of securities transactions to which the Small Transaction Exception would apply will not only ensure parity for all FDIC-supervised institutions, but recognizes that the securities activities of FDIC-supervised institutions have increased over the three decades since the FDIC established the original scope of the Small Transaction Exception.⁷

In addition, the Proposed Rule also included a measure designed to clarify that Part 344 applies to all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency. Specifically, the Proposed Rule proposed amending section 344.3 to remove the definition of “bank” and add the defined term “FDIC-supervised institution” to the list of defined terms.⁸ The new term, “FDIC-supervised institution,” would mean “any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).” Under the Proposed Rule, the term “FDIC-supervised institution” and its plural form would replace “bank,” “banks,” “state nonmember insured bank (except a District bank)” and “foreign bank having an insured branch” throughout Part 344.⁹

The FDIC issued the Proposed Rule with a 60-day comment period, which closed on November 4, 2013. The FDIC received no comments on its Proposed Rule, and consequently staff recommends that the Board adopt the Final Rule as proposed without any changes.

⁴ Id. at 54406.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

Final Rule

As discussed in the NPR, Part 390, Subpart K is substantively similar to Part 344, and the designation of Part 344 as a single authority with respect to recordkeeping requirements for all FDIC-supervised institutions will serve to streamline the FDIC's rules and eliminate unnecessary regulations. If approved, the Final Rule will remove and rescind 12 CFR Part 390, Subpart K in its entirety.

Consistent with the Proposed Rule, if approved, the Final Rule will also amend section 344.2(a)(1) to increase the threshold from an average of fewer than 200 transactions to an average of fewer than 500 transactions for all FDIC-supervised institutions availing themselves of the Small Transaction Exception.

In addition, in the proposed Final Rule, the definition of the term "bank" has been deleted from section 344.3 of Part 344 and has been replaced with the term "FDIC-supervised institution." As discussed in the NPR, "FDIC-supervised institution" will be defined in section 344.3(h) as "any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q)." In the Final Rule, if approved, the term "FDIC-supervised institution" and its plural form will replace the terms "bank," "banks," "state nonmember bank (except a District bank)" and "foreign bank(s) having an insured branch" as used in sections 344.1 through 344.9. Section 344.10 will remain unchanged.

EGRPRA

Under section 2222 of EGRPRA, the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured depository institutions.¹⁰ The FDIC's review of its regulations is underway and is expected to be completed by 2016. The NPR solicited comments on whether the proposed rescission of Part 390, Subpart K and amendments to Part 344 would impose any outdated or unnecessary regulatory requirements on insured depository institutions. No comments on this issue were received. Upon review, staff does not believe that Part 344, as amended, imposes any outdated or unnecessary regulatory requirements on any insured depository institutions. Rather, staff believes that such action will harmonize FDIC's regulations and ensure uniform treatment of all FDIC-supervised institutions.

Recommendation

Based on the above, staff recommends that the Board approve the rescission and removal of Part 390, Subpart K and amendment of Part 344 and authorize publication of the attached proposed Final Rule in the *Federal Register*, to be made effective no earlier than 30 days after its publication. Further, staff recommends that the action taken on this rulemaking be considered a part of the FDIC's decennial EGRPRA regulatory review process.

¹⁰ Pub. L. 104-208 (Sept. 30, 1996).

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[Attachment: Proposed *Federal Register* document entitled, “Removal of Transferred OTS Regulations Regarding Recordkeeping and Confirmation Requirements for Securities Transactions Effected by State Savings Associations and Amendments to 12 CFR Part 344.”]