


March 12, 2014

TO: The Board of Directors

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

SUBJECT: Notice of Proposed Rulemaking to Make Certain FDIC Procedural Regulations Applicable to State Savings Associations and Rescind Corresponding Regulations Transferred from the Former Office of Thrift Supervision

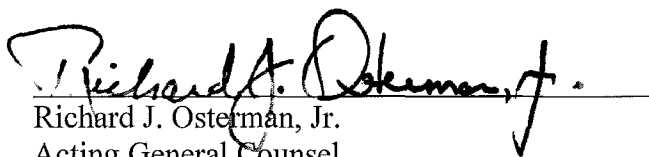
Summary of Recommendation

Staff recommends that the Board approve and authorize for publication in the *Federal Register*, amendments to portions of 12 C.F.R. Part 308 to expressly make those provisions applicable to State savings associations and to modify these FDIC regulations in minor ways that will improve enforcement practices and procedures. These changes will insure that all insured depository institutions for which the FDIC is the appropriate Federal banking agency (FBA), are subject to the same substantive and procedural rules governing administrative hearings. All items in this category are contained in Subpart A – Uniform Rules of Practice and Procedure, Subpart B – General Rules of Procedure, Subpart C – Rules of Practice and Procedure in Adjudicatory Proceedings, Subpart K – Procedures Applicable to Investigations Pursuant to 10(c) of the FDIA, and in Subpart N – Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged.

In addition, staff recommends that the Board propose rescinding the portions of 12 C.F.R. Part 390 containing identical and repetitive regulations – specifically, Subpart B – Removals, Suspensions, and Prohibitions Where a Crime Is Charged or Proven, Subpart C – Rules of Practice and Procedure in Adjudicatory Proceedings, Subpart D – Rules for Investigative Proceedings and Formal Examination Proceedings, and Subpart E – Practice Before the FDIC. Rescinding Part 390, subparts B through E will streamline the FDIC’s rules and eliminate unnecessary regulations.

Upon removal of 12 C.F.R. Part 390, subparts B, C, D, and E, the rules of practice and procedure applicable for all insured depository institutions for which the FDIC is the appropriate FBA will be found at 12 C.F.R. Part 308.

Concur:


Richard J. Osterman, Jr.
Acting General Counsel

Overview

This Notice of Proposed Rulemaking (NPR) is part of the ongoing effort to: (1) make appropriate existing FDIC regulations applicable to State savings associations, and (2) repeal what would consequently be redundant regulations transferred from the former Office of Thrift Supervision (OTS) to the FDIC in 2011. As part of this review process, FDIC staff reviewed OTS regulations and considered whether existing FDIC regulations would be improved by changes that correspond to provisions in the regulations transferred from the OTS. As part of this review, other useful technical or otherwise minor changes to the FDIC regulations may surface, as occurred here.

This NPR proposes to amend the FDIC's principal procedural rules, Part 308, by making five of its subparts expressly applicable to State savings associations, and making other minor changes to those subparts. The NPR also proposes to remove four subparts of Part 390. These are the corresponding provisions transferred from OTS.

The section-by-section discussion below briefly summarizes each of the OTS subparts recommended for deletion, and where the corresponding provisions are found in Part 308. Additionally, as discussed more fully below, staff recommends using this as an opportunity to solicit comments concerning possible improvements to these FDIC regulations as directed by the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning 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 formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), 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 other advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory materials 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.

Section 316(c) of the Dodd-Frank Act, 12 U.S.C. § 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's 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.” This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.¹

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 Federal Deposit Insurance (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 FDI Act, 12 U.S.C. § 1813(q), and designated the FDIC as the “appropriate Federal banking agency” for State savings associations. As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar authority) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

On June 14, 2011, operating pursuant to this authority, the FDIC’s Board reissued and re-designated certain transferred regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.² 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, amending them, or rescinding them, as appropriate.

Part 390, Subpart B – Removals, Suspensions, and Prohibitions Where a Crime is Charged or Proven

Former Part 508 of the OTS regulations, 12 C.F.R. Part 508, addressed removals, suspensions, and prohibitions where a crime is charged or proven. The regulation was transferred to the FDIC with only nominal changes and republished as subpart B of 12 C.F.R. Part 390. The changes add state savings associations to the scope of the regulations, reflect the FDIC's internal organization, and revise internal cross-references to reflect new FDIC rule citations resulting from transfers of other OTS regulations.

After a careful review and comparison of 12 C.F.R. Part 390, subpart B, and the FDIC’s analogous regulation, 12 C.F.R. Part 308, subpart N, staff proposes to rescind Part 390, subpart B in full because it is substantially duplicative of Part 308, subpart N. Furthermore, all institution-affiliated parties (IAPs) of insured depository institutions, for which the FDIC is the appropriate Federal banking agency (FBA) should be subject to the same substantive and procedural rules governing suspension, removal, and prohibition proceedings. Staff recommends certain amendments to Part 308, subpart N, to: 1) include IAPs of insured state savings associations and 2) clarify certain rights and obligations of IAPs, FDIC enforcement counsel, and the hearing officer with respect to proceedings conducted pursuant to subpart N. The proposed amendments to Part 308, subpart N are included in the attached document.

¹ 76 FR 39247 (July 6, 2011).

² 76 FR 47652 (August 5, 2011).

Part 390, Subpart C – Rules of Practice and Procedure in Adjudicatory Proceedings

Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) required the FDIC, the FRB, the OCC, the OTS, and the National Credit Union Administration (NCUA) to adopt joint uniform rules of practice and procedures and “local rules” that govern administrative hearings. Since August 1991, the FDIC has been operating under uniform rules set forth at 12 C.F.R. Part 308, subpart A, 12 C.F.R. §§ 308.1 -308.41, as well as its own set of “local rules” set forth at 12 CFR Part 308, subpart B, 12 C.F.R. §§ 308.101-308.107.

The OTS’s rules of practice and procedure for adjudicatory proceedings, formerly found at 12 CFR Part 509, subparts A and B, were transferred to the FDIC and relocated with nominal changes to 12 C.F.R. Part 390, subpart C. Subpart C includes both the OTS’s uniform rules and local rules – the internal procedural rules that the OTS adopted to handle enforcement actions against thrifts and savings associations. The OTS local rules permitted depositions during the discovery process, which is consistent with the OCC, FRB, and NCUA’s practices. The FDIC local rules do not permit depositions and historically, the FDIC has only allowed document discovery during the administrative process. FDIC enforcement matters heavily rely on documents, such as Reports of Examination, which alert insured depository institutions to the FDIC’s issues and concerns well in advance of any formal enforcement action. Additionally, the FDIC relies on examiner expert testimony. The FDIC regularly submits examiner expert reports to the insured depository institution and/or IAP prior to any administrative hearing. Staff feels that this specific identification of the basis for the FDIC’s enforcement action, plus the opportunity to cross examine witness and counter expert testimony at the hearing, provides sufficient due process for any potential respondent.

After careful review and comparison of transferred OTS rules at 12 C.F.R. Part 390, subpart C to the FDIC’s uniform and local rules, staff recommends the complete rescission of Part 390, subpart C, because it essentially duplicates the uniform rules. To the extent that the OTS local rules permitted depositions during discovery, staff determined that depositions were not necessary or appropriate and does not recommend changing the FDIC local rules. Additionally, the OTS local rules also contained two provisions that formalized post-hearing procedures. The FDIC generally follows these practices when needed, but relies on the informal broad discretion of the Board and/or the Administrative Law Judge to make the appropriate rulings.

Moreover, it is important that all insured depository institutions for which the FDIC is the appropriate FBA are subject to the same substantive and procedural rules governing administrative hearings. Rescinding Part 390, subpart C will streamline the FDIC’s rules and eliminate unnecessary regulations. Consequently, staff recommends that 12 C.F.R. Part 390, subpart C be rescinded in its entirety and that certain provisions in 12 C.F.R. Part 308, subparts A and B be amended to: 1) include insured state savings associations, and 2) add additional statutory authority such as the Home Owners’ Loan Act (HOLA).

Since 12 C.F.R. Part 308, subpart A are the uniform rules held by all of the FBAs, staff provided recommended changes to the uniform rules to OCC, FRB, and NCUA. They had no objections

to the proposed changes. The proposed amendments to Part 308, subpart A are included in the attached document.

Part 390, Subpart D – Rules for Investigative Proceedings and Formal Examination Proceedings

The OTS rules for investigative proceedings and formal examination proceedings, formerly found at 12 C.F.R. Part 512, were transferred to the FDIC and relocated with nominal changes to 12 C.F.R. Part 390, subpart D. Part 390, subpart D governed the OTS's procedures for conducting its formal investigations under Section 10(c) of the FDI Act, 12 U.S.C. § 1820(c).

After a careful review and comparison of 12 C.F.R. Part 390, subpart D, and the FDIC's analogous regulation, 12 C.F.R. Part 308, subpart K, staff proposes to rescind Part 390, subpart D in full because it is substantially duplicative of Part 308, subpart K. Staff recommends certain amendments to Part 308, subpart K, that: 1) include additional statutory authority applicable to insured state savings associations, 2) reflect the FDIC's internal organization, 3) clarify conduct standards for counsel, and 4) ensure the confidentiality of investigations. All insured depository institutions for which the FDIC is the appropriate FBA should be subject to the same substantive and procedural rules governing investigations. The proposed amendments to Part 308, subpart K are included in the attached document.

Part 390, Subpart E – Practice Before the FDIC

The OTS rules for practice before the FDIC, formerly found at 12 C.F.R. Part 513, were transferred to the FDIC and relocated with nominal changes to 12 C.F.R. Part 390, subpart E. Subpart E is repetitive of the FDIC's rules of practice before the FDIC and standards of conduct found at 12 C.F.R. Part 308, subpart C, and certain of the FDIC's uniform rules found 12 C.F.R. Part 308, subpart A.

After a careful review and comparison of 12 C.F.R. Part 390, subpart E, and the FDIC's analogous regulation, 12 C.F.R. Part 308, subpart C, staff proposes to rescind Part 390, subpart E in its entirety because it is repetitive of Part 308, subparts A and C. Staff recommends an amendment to 12 C.F.R. Part 308, subpart C requiring legal counsel to disclose any professional disciplinary actions to the FDIC so that the Board can determine whether counsel is fit to represent individuals in an administrative proceeding. The proposed amendments to Part 308, subparts A and C are included in the attached document.

EGRPRA

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (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 institutions.³ The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule

³ Pub.L.104-208 (Sept. 30, 1996).

will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. The Federal Register document would request that EGRPRA related comments be specific and provide alternatives whenever appropriate.

Recommendation

Based on the foregoing, staff recommends that the Board approve the attached Resolution to adopt and authorize the publication in the *Federal Register* of the referenced NPR for public comment. Further, staff recommends that the action taken on this rulemaking be included as part of the EGRPRA review that is currently underway.

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[Attachments: Part 390, subparts B - E; and Part 308, Subpart A – Uniform Rules of Practice and Procedure, 12 CFR §§ 308.1 – 308.41, Subpart B – General Rules of Procedure, 12 CFR §§ 308.101 – 308.107, Subpart C – Rules of Practice Before the FDIC and Standards of Conduct, 12 CFR §§ 308.108 – 308.109. Subpart K – Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA, 12 CFR §§ 308.144 – 308.150, and Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged, 12 CFR §§ 308.161 – 308.164, all as proposed to be modified herein].