

November 25, 2013

TO: The Board of Directors

FROM: Doreen R. Eberley  
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SUBJECT: Notice of Proposed Rulemaking regarding Part 390 Subpart U—Securities of State Savings Associations and Part 335—Securities of Nonmember Insured Banks

### Summary

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) abolished the Office of Thrift Supervision (“OTS”) and transferred supervisory authority over State savings associations to the FDIC.<sup>1</sup> 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that these transferred regulations would remain in effect until they were lawfully modified, terminated, set aside, or superseded by the FDIC. The proposed rule would 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.

Specifically, staff recommends that the Board approve and authorize for publication in the *Federal Register* a notice of proposed rulemaking (“NPR”) to rescind and remove 12 CFR Part 390 Subpart U, entitled *Securities of State Savings Associations*, which was included in the regulations transferred to the FDIC from OTS. In addition, the NPR would make conforming amendments to 12 CFR Part 335, currently entitled *Securities of Nonmember Insured Banks*, (“Part 335”) to insert the term “State savings association” where appropriate so that both insured State nonmember banks and State savings associations will be subject to the same FDIC rules governing the implementation of the securities registration and reporting requirements of the Securities Exchange Act of 1934 (“Exchange Act”). The NPR provides a 60-day comment period.

The proposed rescission and Part 335 amendments fulfill the FDIC’s role in implementing the securities registration and reporting requirements under the Exchange Act for State savings associations impacted by the abolishment of the OTS and the transfer of supervisory responsibilities for State savings associations to the FDIC.

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

## **Background**

The 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,<sup>2</sup> the powers, duties, and functions formerly performed by the 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 (“Federal Reserve Board”), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act,<sup>3</sup> 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 issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate Federal banking 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<sup>4</sup> 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 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.<sup>5</sup>

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act<sup>6</sup> 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,<sup>7</sup> and designated the FDIC as the “appropriate Federal banking agency” for State savings associations.

On June 14, 2011, operating pursuant to this authority, the Board reissued and redesignated certain regulations that were transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.<sup>8</sup>

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<sup>2</sup> 12 U.S.C. § 5411.

<sup>3</sup> 12 U.S.C. § 5414(b).

<sup>4</sup> 12 U.S.C. § 5414(c).

<sup>5</sup> 76 Fed. Reg. 39247 (July 6, 2011).

<sup>6</sup> 12 U.S.C. § 5412(b)(2)(B)(i)(II).

<sup>7</sup> 12 U.S.C. § 1813(q).

<sup>8</sup> 76 Fed. Reg. 47652 (August 5, 2011).

When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS regulations into FDIC rules that existed before the transfer, amending them, or rescinding them, as appropriate.

One of the transferred OTS regulations, 12 CFR Part 390 Subpart U, specifies the requirements for State savings associations that are issuers of securities subject to the provisions of the Exchange Act.<sup>9</sup>

### **The Securities Exchange Act of 1934**

The Exchange Act governs sales of securities offered by an issuer on the secondary market and establishes a mandatory periodic disclosure process that is designed to require companies to make public the information that investors would find pertinent in making investment decisions.<sup>10</sup> Section 12(i) of the Exchange Act grants authority to the Federal banking agencies to administer specific sections of the Exchange Act and the Sarbanes-Oxley Act of 2002 (“SOX Act”) with regard to depository institutions under the respective agency’s supervision.<sup>11</sup>

Prior to the Dodd-Frank Act, section 12(i) of the Exchange Act provided the FDIC with the powers, functions, and duties vested in the Securities and Exchange Commission (“SEC”) to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and sections 302-304, 306, 401(b), 404, 406, and 407 of the SOX Act with respect to State nonmember banks. Also, pursuant to section 12(i), the OTS had the same vested authority with respect to Federal and State savings associations. As part of the transfer of OTS authority to the OCC for Federal savings associations and the FDIC for State savings associations, section 376(2) of the Dodd-Frank Act amended section 12(i) of the Exchange Act to provide the FDIC with authority over both State nonmember banks and State savings associations to administer the enumerated provisions of the Exchange Act and the SOX Act as well as the authority to make such rules and regulations as may be necessary for the execution of the functions vested in the FDIC under section 12(i).<sup>12</sup>

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<sup>9</sup> 15 U.S.C. § 781(i).

<sup>10</sup> An issuer that is a bank or savings association is subject to the registration requirements of the Exchange Act if, in general, it has securities listed on a national exchange or, as of the last day of its last fiscal year, it has total assets exceeding \$10 million and a class of equity securities held of record by 2,000 or more persons. *See* sections 12(b) and 12(g)(1)(B) of the Exchange Act. A bank or savings association issuer will become exempt from the Exchange Act reporting requirements if it is no longer listed on a national exchange or, if it is not listed, the number of record holders falls below 1,200 persons. *See* sections 12(d) and 12(g)(4) of the Exchange Act.

<sup>11</sup> 15 U.S.C. § 781(i). The specifically enumerated sections relate to sections 10A(m) (audit committee listing standards), 12 (securities registration), 13 (periodic reporting), 14(a) (proxies and proxy solicitation), 14(c) (information statements), 14(d) (tender offers), 14(f) (election of directors contests), and 16 (beneficial ownership and reporting) of the Exchange Act, and sections 302-304 and 306 (corporate responsibilities) and 401(b), 404, 406, and 407 (enhanced financial disclosures) of the SOX Act.

<sup>12</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 376 (2), 124 Stat. 1376, 1569 (2010).

## **Part 390 Subpart U—Securities of State Savings Associations**

As noted above, the regulations governing OTS implementation of the securities registration and reporting requirements of the Exchange Act, formerly found at 12 CFR Part 563d, were transferred in their entirety to the FDIC as they relate to State savings associations, with only non-substantive changes and are now found in the FDIC's rules at 12 CFR Part 390 Subpart U. Part 390 Subpart U incorporates the SEC rules regarding the filing and processing of forms;<sup>13</sup> the form and content of financial statements;<sup>14</sup> reporting requirements of issuers;<sup>15</sup> and the SEC's interpretations of the rules. The FDIC's corresponding rules for State nonmember banks are found in 12 CFR Part 335. While both Part 390 Subpart U and Part 335 implement identical provisions of the Exchange Act and SEC rules, Part 335 does so with greater specificity by incorporating the SEC rules regarding: the certification, suspension of, and removal from listing by exchanges;<sup>16</sup> unlisted trading;<sup>17</sup> forms for notification of action taken by national securities exchanges;<sup>18</sup> exemptions from and termination of registration of securities;<sup>19</sup> forms, reports, and acquisition statements of securities issuers and the maintenance of such reports;<sup>20</sup> solicitation of proxies and tender offers;<sup>21</sup> and beneficial ownership statements.<sup>22</sup>

After careful review and comparison of 12 CFR Part 390 Subpart U and Part 335, FDIC staff proposes to rescind 12 CFR Part 390 Subpart U and remove all such references from the Code of Federal Regulations.<sup>23</sup> This subpart is substantively similar to Part 335 as both State nonmember banks and State savings associations are subject to the same provisions of the Exchange Act and the SOX Act. Part 335, with minor revisions, will appropriately and sufficiently implement the requirements of section 12(i) of the Exchange Act for both State nonmember banks and State

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<sup>13</sup> 17 CFR Part 249.

<sup>14</sup> 17 CFR Part 210.

<sup>15</sup> 17 CFR Part 229.

<sup>16</sup> 17 CFR Part 240.

<sup>17</sup> *Id.*

<sup>18</sup> 17 CFR Part 249.

<sup>19</sup> 17 CFR Part 240.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The FDIC incorporates section 16 of the Exchange Act and SEC rule 17 CFR Part 240 on beneficial ownership of securities, but requires the filing of FDIC-specific forms in lieu of the SEC's forms. 12 CFR §§ 337.601, 611-613.

<sup>23</sup> Two references to Subpart U are made in Sections 390.321(b)(2) and 390.380(a)(3) of the FDIC rules and regulations. After review, the FDIC finds that these sections would not be substantively affected by the removal of Subpart U from the Code of Federal Regulations and therefore proposes to remove such references from each section.

savings associations now under FDIC supervision. As discussed above, Part 335 provides more detailed guidance than Part 390 Subpart U by incorporating the SEC rules with greater specificity. Furthermore, State savings associations would benefit from greater clarity and guidance under Part 335 with regard to FDIC-specific procedures for the submission of securities filings and forms as well as other FDIC-specific administrative practices that are not provided for in Part 390 Subpart U.<sup>24</sup>

Additionally, at the time of the transfer of the former OTS regulations to the FDIC, there were no registered State savings associations affected by the transfer. Currently, there is only one registered State savings association that would be subject to Part 335. Any FDIC-supervised banks and State savings associations that register under section 12(i) of the Exchange Act in the future would benefit from a consistent and streamlined application of the Federal securities disclosure and filing requirements that would be facilitated through the proposed changes. If the proposed rule is adopted as a final rule, all State nonmember banks and State savings associations supervised by the FDIC and subject to the registration and reporting requirements of the Exchange Act will be subject to the same FDIC rules, as modified herein.

### **Part 335—Securities of Nonmember Insured Banks**

The FDIC's Part 335 currently implements the registration and reporting provisions of sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. §§ 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78(p)), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the SOX Act (15 U.S.C. §§ 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding insured State nonmember banks and insured branches of foreign banks with one or more classes of securities subject to the registration provisions of sections 12(b) and 12(g) of the Exchange Act, as authorized by section 12(i) of the Exchange Act.

Staff recommends expanding the scope of coverage of Part 335 to include State savings associations by inserting the term "State savings association" where appropriate (12 CFR §§ 335.101; 221; 311; 801). Additionally, the heading of Part 335, currently entitled *Securities of Nonmember Insured Banks*, will be revised to *Securities of State Nonmember Banks and State Savings Associations*, to reflect the expanded scope of the Part and provide more consistent use of the statutory term "State nonmember bank" pursuant to Section 3 of the FDI Act.

Staff also proposes technical amendments, unrelated to the OTS rule transfer, to amend 12 CFR §§ 335.701 and 801 by replacing all references to the "Division of Supervision and Consumer Protection (DSC)" with "Division of Risk Management Supervision (RMS)" to reflect an internal FDIC reorganization.

Staff also proposes to remove § 335.901, which contains the Board's Delegation of Authority for Part 335 matters. When the subject NPR is issued as a final rule, staff intends to recommend that the Board revise the Board's December 3, 2002 Delegation of Authority Resolution No. 071098 ("December 2002 Resolution") by including the delegations of authority for Part 335 matters currently found in § 335.901. The purpose of this change is to remove the existing delegations from the Code of Federal Regulations and place them, instead, in the December 2002 Resolution.

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<sup>24</sup> 12 CFR §§ 335.701-901 (Addressing confidentiality requests, filing procedures, and delegations of authority).

By moving the delegations of authority for Part 335 into this resolution, future changes to these delegations would no longer require notice and comment rulemaking. However, any changes to the Part 335 delegations themselves would require Board action.

### **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.<sup>25</sup> The FDIC's review of its regulations is underway and is expected to be completed by 2016. The NPR solicits comments on whether the proposed rescission of Part 390 Subpart U would impose any outdated or unnecessary regulatory requirements on insured depository institutions.

### **Recommendation**

In order to provide consistent and streamlined implementation of the Exchange Act's requirements for State nonmember banks and State savings associations, based on the above, staff recommends that the Board issue the attached Resolution to adopt and authorize publication of the referenced NPR in the *Federal Register* for public comment.

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#### **Attachments:**

The Notice of Proposed Rulemaking entitled, "Removal of Transferred OTS Regulations Regarding Securities of State Savings Associations and Amendments to 12 CFR Part 335 of the FDIC's Rules and Regulations"

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<sup>25</sup> Pub. L. 104-208 (Sept. 30, 1996).