



July 2, 2014

TO: Board of Directors

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

Robert J. Fagan 
Ethics Program Manager

SUBJECT: Final Rule on the Removal of Transferred Office of Thrift Supervision (“OTS”)
Regulation 12 CFR Part 390, Subpart A—Restrictions on Post-Employment
Activities of Senior Examiners

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that these transferred regulations would remain in effect until they were lawfully modified, terminated, set aside, or superseded by the FDIC.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 that is the subject of this memorandum will consolidate 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 governing the restrictions on post-employment activities of senior examiners.

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 A (“Part 390, Subpart A”), *Restrictions on Post-Employment Activities of Senior Examiners*. 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.

Further, staff recommends that the Board approve the adoption of a conforming amendment to Part 336, Subpart B, as proposed in the NPR, deleting the reference to the Office of Thrift

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

Supervision in the definition of Federal banking agency in section 336.3(e) and adding the words “predecessors or” in front of the word “successors.”

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. That 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 OTS regulations that would continue and be enforced by each successor agency until the appropriate agency modified or removed the regulations in accordance with applicable law. 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.

Notice of Proposed Rule to Remove 12 CFR Part 390, Subpart A and Amend Part 336

On September 4, 2013, the FDIC published the Proposed Rule regarding the removal of Part 390, Subpart A (formerly OTS part 507), which governs the restrictions on post-employment activities of senior examiners.² The former OTS rule had been transferred to the FDIC with only nominal changes. The NPR proposed removing Part 390, Subpart A from the Code of Federal Regulations in an effort to streamline FDIC rules and eliminate unnecessary regulations. As discussed in the Proposed Rule, the FDIC had carefully reviewed the transferred rule, Part 390, Subpart A, and compared it with Part 336, Subpart C--an FDIC regulation that existed before the transfer of Part 390, Subpart A and that continues to remain in effect today. Part 336, Subpart C governs post-employment activities of senior examiners and is more appropriate for the FDIC because it applies to post-employment activities of senior examiners of all insured depository institutions, including savings associations, whereas the transferred OTS rule at Part 390,

² 78 FR 54401, 54402 (Sept. 4, 2013).

Subpart A applies only to former senior examiners of savings associations and their holding companies.³

In addition, the Proposed Rule also included a measure designed to clarify Part 336, Subpart B entitled *Minimum Standards of Fitness for Employment with the Federal Deposit Insurance Corporation*. Specifically, the NPR proposed amending section 336.3(e) to remove the obsolete reference to “the Office of Thrift Supervision” in the definition of “Federal banking agency” and adding “predecessors or” before the word “successors.”⁴ Under the Proposed Rule, it was noted that deleting the reference to the now defunct OTS would eliminate the potential for public confusion, while preserving the flexibility to consider OTS as a predecessor federal banking agency.⁵ By including predecessor agencies of the FDIC as Federal banking agencies for purposes of this part, the proposed rule would restrict a potential employee who had been associated with a State savings association from future FDIC employment if the potential employee had been subject to a final enforcement action by the former OTS.

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.

Final Rule

As discussed in the NPR, Part 390, Subpart A is substantively similar to Part 336, Subpart C, and the designation of Part 336, Subpart C as a single authority with respect to post-employment activities of senior examiners for insured depository 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 A in its entirety.

In addition, in the proposed Final Rule, the reference to the Office of Thrift Supervision has been deleted from the definition of Federal banking agency in Part 336.3(e) and has been replaced with the term “predecessors” to avoid reference to an agency that no longer exists.

Recommendation

Based on the above, staff recommends that the Board approve the rescission and removal of Part 390, Subpart A and amendment of Part 336 as described above, 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.

Legal Division Staff contacts:

Robert J. Fagan, (703) 562-2704

³ Id. at 54402.

⁴ Id.

⁵ Id.

Michelle Borzillo, (703) 562-6083
Randy Thomas, (703) 562-6454

[Attachment: Proposed *Federal Register* document entitled, “Removal of Transferred OTS Regulations Regarding Restrictions on Post-Employment Activities of Senior Examiners and Amendments to 12 CFR Part 336.”]