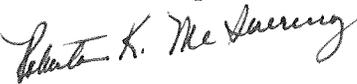


June 25, 2014

TO: The Board of Directors

FROM: Bret Edwards 
Director
Division of Resolutions and Receiverships

 Richard J. Osterman, Jr. 
Acting General Counsel

SUBJECT: Rescission and Removal of Regulations Transferred from the Office of Thrift Supervision: Part 390, Subpart N – *Possession by Conservators and Receivers for Federal and State Savings Associations*.

RECOMMENDATION

Staff recommends that the FDIC's Board of Directors ("Board") approve and authorize for publication in the *Federal Register* a notice of proposed rulemaking ("NPR") to rescind and remove from the Code of Federal Regulations certain regulations contained in 12 C.F.R. Part 390, Subpart N, entitled *Possession by Conservators and Receivers for Federal and State Savings Associations* ("Subpart N").

EXECUTIVE SUMMARY

Subpart N of 12 C.F.R. Part 390, entitled *Possession by Conservators and Receivers for Federal and State Savings Associations*, was incorporated into the FDIC's regulations following abolishment of the Office of Thrift Supervision ("OTS") and the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").¹ It contains two transferred OTS regulations: § 390.240, which sets forth procedures to be followed by a conservator or receiver upon taking possession of a Federal or State savings association; and § 390.241, which sets forth procedures regarding the notice of appointment of the conservator or receiver. Staff has concluded that these two regulations are unnecessary because the Federal

¹ Pub. L. 111-203, 12 U.S.C. § 5301, *et seq.* (2010).

Deposit Insurance Act (“FDI Act”) or FDIC policies and procedures provide for the same actions, or because the OCC or a state chartering authority already take the actions prescribed by the regulations under independent authority. Therefore Subpart N should be rescinded and removed.

DISCUSSION

I. 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. 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 provides the manner of treatment for all orders, resolutions, determinations, regulations, and other regulatory materials that were issued, made, prescribed, or allowed to become effective by the OTS.² This section provides that if such supervisory 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 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.³ On June 14, 2011 the Board approved a *“List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street*

² 12 U.S.C. § 5414(b).

³ 12 U.S.C. § 5414(c).

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, 2011.⁴

On June 14, 2011 the Board also reissued and re-designated certain regulations transferred from the OTS. These transferred OTS regulations were published as interim rules of the FDIC in the *Federal Register* on August 5, 2011.⁵ When it republished the transferred OTS regulations as FDIC interim rules, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend rescinding, amending, or incorporating the transferred OTS regulations into FDIC rules that existed before the transfer, as appropriate.

Two of the transferred OTS regulations set forth procedures to be followed by conservators and receivers for Federal and State savings associations upon taking possession and providing notice of the appointment of a conservator or receiver. These regulations, formerly found at 12 C.F.R. Part 558, were transferred to the FDIC with nominal changes and are now in Subpart N.

The FDIC’s authority to act as conservator or receiver and its powers and duties in those roles are set forth in the FDI Act⁶ and in regulations found in 12 C.F.R. Part 360. The Board has delegated authority to staff to establish policies and procedures for carrying out receivership operations. The FDI Act and the policies and procedures implemented and followed by staff subsume the responsibilities set forth in Subpart N.⁷

II. Analysis

Section 390.240 - Procedure upon taking possession.

Section 390.240 sets forth procedures to be followed by a conservator or receiver upon taking possession of a Federal or State savings association. Paragraph (a) requires the

⁴ 76 Fed. Reg. 39247 (July 6, 2011).

⁵ 76 Fed. Reg. 47652 (August 5, 2011).

⁶ 12 U.S.C. § 1811, *et seq.*

⁷ Such policies and procedures include the FDIC Division of Resolution and Receivership’s Failed Financial Institution Closing Manual.

conservator or receiver to take possession of the failed institution's principal office in accordance with the terms of the appointment. FDIC's procedure already provides that it takes coordinated simultaneous possession of all locations from which a failed institution operates. Moreover, the FDIC's powers and duties as conservator or receiver are set forth in the FDI Act, not pursuant to the "terms of the . . . appointment." This provision should be rescinded and removed as unnecessary.

Paragraphs (b)(1) and (b)(5), respectively, provide that the conservator or receiver shall immediately take possession of the institution's books, records, and assets, and shall succeed to rights, titles, powers and privileges of the savings association and its stockholders, members, account holders, depositors, officers, and directors. These provisions are redundant of the FDI Act, which already provides the same.⁸

Paragraphs (b)(2), (3), and (4), respectively, instruct the conservator or receiver to "notify in writing, served personally or by registered mail or telegraph" all parties known to be holding or in possession of assets of the failed institution that the conservator or receiver has succeeded to all rights, powers and privileges of the failed institution; file a statement with the Executive Secretary that the conservator or receiver took possession of the failed institution; and post a notice on the door of the principal and other offices of the failed institution in the form, if any, prescribed by the OCC or state bank supervisor. These provisions are unnecessary given existing FDIC policies and procedures. First, the FDIC's practice is to demand the return of assets of the failed institution in whatever manner and form that is appropriate under the circumstances. Second, the Executive Secretary is provided with a copy of all closing documents. Third, the OCC or state bank supervisor itself posts its order closing the institution on the door of the principal office.

⁸ 12 U.S.C. § 1821(d)(2)(A)(i)-(ii).

Section 390.241-- Notice of Appointment

Section 390.241 sets forth requirements regarding notice of appointment of a conservator or receiver for a Federal or State savings association. It should be rescinded and removed because it is unnecessary. Specifically, paragraph (a) requires the FDIC to designate the persons or entities who are to (1) give notice of the appointment to any officer or employee of the failed institution who is present and appears to be in charge at the principal office; (2) serve a copy of the order of appointment by (i) leaving a certified copy at the principal office, or (ii) handing a certified copy to any previous conservator or officer or employee who is present and appears to be in charge at the principal office; and (3) file with the Executive Secretary a statement of the date and time that notice of appointment was given and service was made. It is not necessary to include these provisions among the FDIC's regulations because the OCC or state chartering authority is responsible for providing or serving notice of the appointment of the FDIC as conservator or receiver on a Federal or State savings association. Further, the FDIC's Executive Secretary maintains records of the appointment of the FDIC as conservator or receiver. Paragraph (b), which instructs the FDIC to cause a notice of the appointment of the conservator or receiver to be published in the *Federal Register*, is unnecessary because the FDIC causes such a publication regarding any institution for which it is appointed as conservator or receiver in accordance with its policy and procedures.

III. Proposal

For the reasons discussed above, staff recommends that the Board propose to remove and reserve Subpart N. The Division of Resolutions and Receiverships recommends that the Board approve and adopt the attached notice and authorize its publication in the *Federal Register* with a 60-day comment period.

Staff Contacts

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Attachments:

Attachment A – Model Board Resolution

Attachment B – Part 390, Subpart N – Possession by Conservators and Receivers for Federal and State Savings Associations.

Attachment C – Notice of Proposed Rulemaking – Repeal and Removal of Transferred OTS Regulations Regarding Possession by Conservators and Receivers for Federal and State Savings Associations.

Attachment B

12 CFR Part 390, Subpart N

76 FR 47652 (August 5, 2011) at 47710 - 47711

§ 390.240 *Procedure upon taking possession.*

(a) The conservator or receiver for a Federal or State savings association shall take possession of the savings association by taking possession of the principal office of the Federal or State savings association in accordance with the terms of the OCC's or State bank supervisor's, as appropriate, appointment.

(b) Upon taking possession, the conservator or receiver shall immediately:

(1) Take possession of the savings association's books, records and assets.

(2) Notify in writing, served personally or by registered mail or telegraph, all persons and entities that the conservator or receiver knows to be holding or in possession of assets of the savings association, that the conservator or receiver has succeeded to all rights, titles, powers and privileges of the savings associations.

(3) File with the Executive Secretary a statement that possession was taken, including the time of the taking, which statement shall be conclusive evidence thereof.

(4) Post a notice on the door of the principal and other offices of the savings association in the form, if any, prescribed by the OCC or State bank supervisor, as appropriate.

(5) By operation of law and without any conveyance or other instrument, act or deed, succeed to the rights, titles, powers and privileges of the savings association, and to the rights, powers, and privileges of its stockholders, members, accountholders, depositors, officers, and directors. No stockholder, member, accountholder, depositor, officer or director shall thereafter have or exercise any right, power, or privilege, or act in connection with any of the savings association's assets or property.

§ 390.241 *Notice of appointment.*

(a) When the OCC or State bank supervisor, as appropriate, issues an order for the appointment of a conservator or receiver, the FDIC will designate the persons or entities whose employees or agents must, before the conservator or receiver takes possession of the savings association:

(1) Give notice of the appointment to any officer or employee who is present in and appears to be in charge at the principal office of the savings association as determined by the FDIC.

(2) Serve a copy of the order for the appointment upon the savings association or upon the conservator by:

(i) Leaving a certified copy of the order of appointment at the principal office of the savings association as determined by the FDIC; or

(ii) Handing a certified copy of the order of appointment to the previous conservator of the savings association, or to the officer or employee of the savings association, or to the previous conservator who is present in and appears to be in charge at the principal office of the savings association as determined by the FDIC.

(3) File with the Executive Secretary of the FDIC a statement that includes the date and time that notice of the appointment was given and service of the order of appointment was made.

(b) If the OCC or State bank supervisor, as appropriate, appoints a conservator or receiver under this subpart, the FDIC will immediately file a notice of the appointment for publication in the Federal Register.