

December 14, 2014

TO: Board of Directors

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



SUBJECT: Final Rule Regarding Removal of Transferred OTS Regulations 12 C.F.R. Part 390, Subparts B, C, D, and E Relating to Rules of Practice and Procedure and Amendments to 12 C.F.R. Part 308, Subparts A, B, C, K, and N of the FDIC Rules and Regulations

### **Summary of Recommendation**

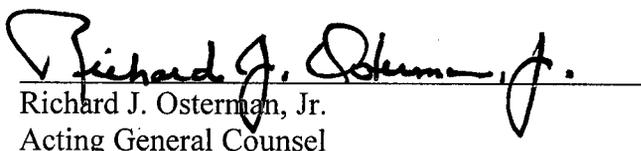
On April 8, 2014, the Board of Directors of the FDIC (Board) authorized for publication in the *Federal Register* a notice of proposed rulemaking (NPR or Proposed Rule) that proposed the removal of rules transferred to the FDIC from the former Office of Thrift Supervision (OTS): 12 CFR Part 390, subparts B, C, D, and E relating to the rules of practice and procedure applicable to administrative enforcement actions. The transferred rules would be consolidated with 12 CFR Part 308, subparts A, B, C, K, and N (Part 308), to expressly make Part 308 applicable to State savings associations and to modify these FDIC regulations in minor ways that will improve enforcement practices and procedures.

The NPR was published in the *Federal Register* on April 21, 2014. The public comment period expired on June 20, 2014, and no comments were received. Accordingly, staff recommends that the Board approve and issue a final rule for publication in the *Federal Register* (Final Rule) to adopt the Proposed Rule with no changes from the proposal.

In addition, staff recommends that the Board approve and issue a Final Rule that rescinds 12 C.F.R. Part 390, subparts B through E, which 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 Federal Banking Agency (FBA) will be found at 12 C.F.R. Part 308.

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.

Concur:



Richard J. Osterman, Jr.  
Acting General Counsel

## **Overview**

This Final Rule 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 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.

This Final Rule amends 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 Final Rule also removes four subparts of Part 390. These are the corresponding provisions transferred from OTS.

## **Background**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), signed into law on July 21, 2010<sup>1</sup>, 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.<sup>2</sup>

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

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

<sup>2</sup> 76 FR 39247 (July 6, 2011).

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 redesignated 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.<sup>3</sup> 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.

**Notice of Proposed Rule to Remove 12 CFR Part 390, subparts B, C, D, and E and Amend Part 308, subparts A, B, C, K, and N.**

On April 21, 2014, the FDIC published the NPR regarding the removal of Part 390, subparts B, C, D, and E, which govern the rules of practice and procedure for administrative enforcement proceedings for State savings associations.<sup>4</sup> The former OTS rules were transferred to the FDIC with only nominal changes. The Proposed Rule recommended removing Part 390, subparts B, C, D, and E 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, subparts B, C, D, and E, and compared it with Part 308, subparts A, B, C, K, and N, which are FDIC regulations that existed before the transfer of Part 390, subparts B, C, D, and E and that continue to remain in effect today. Like the transferred rule, Part 308 governs the rules of practice and procedure for administrative enforcement proceedings for insured State nonmember banks and their institution-affiliated parties (IAPs).

Although the two Parts were substantively the same, staff noted some distinctions and minor technical differences between the transferred OTS rule and Part 308.<sup>5</sup> A primary distinction between Part 390, subpart C and Part 308, subpart B is that the OTS rules permitted depositions during the discovery process, while the FDIC rules restrict discovery to document production only. The Proposed Rule also included a measure designed to clarify that Part 308 applies to all insured depository institutions for which the FDIC has been designated the appropriate FBA including, State savings associations. In addition, the Proposed Rule suggested minor technical amendments to Part 308 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.

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<sup>3</sup> 76 FR 47652 (Aug. 5, 2011).

<sup>4</sup> 79 FR 22056 (Apr. 21, 2014).

<sup>5</sup> *Id.* at 22057.

The FDIC issued the Proposed Rule with a 60-day comment period, which closed on June 20, 2014. The FDIC received no comments on the Proposed Rule, and consequently staff recommends that the Board adopt the Final Rule as proposed without any changes.

### **Final Rule**

As discussed in the Proposed Rule, Part 390, subparts B, C, D, and E are substantively similar to Part 308, subparts A, B, C, K, and N and the designation of Part 308 as a single authority with respect to rules of practice and procedure for administrative enforcement proceedings 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, subparts B, C, D, and E in their entirety.

Consistent with the Proposed Rule, if approved, the Final Rule will also amend Part 308, subparts A, B, C, K, and N to make minor technical changes including adding FDIC jurisdiction over State savings associations and certain statutes previously enforced by the former OTS.

### **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>6</sup> 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, subparts B, C, D, and E and amendments to Part 308, subparts A, B, C, K, and N 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 308, 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, subparts B, C, D, and E and amendment of Part 308, subparts A, B, C, K, and N 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.

### **Staff contacts:**

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<sup>6</sup> Pub. L. 104-208 (Sept. 30, 1996).

[Attachment: Proposed *Federal Register* document entitled, “Removal of Transferred OTS Regulations Regarding Rules of Practice and Procedure and Amendments to 12 CFR Part 308 of FDIC Rules and Regulations.”]