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TO: The FDIC Board of Directors

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

Mark Pearce 
Director
Division of Depositor and Consumer Protection

Richard J. Osterman, Jr. 
Acting General Counsel
Legal Division

SUBJECT: Notice of Proposed Rulemaking on Fair Credit Reporting Regulations, Part 334 and Part 391, Subpart C: Review and Removal of Regulations Transferred from the Former Office of Thrift Supervision; Removal of Regulations Transferred to the Consumer Financial Protection Bureau; Amendment of Red Flag Identity Theft Rules

Summary of Recommendation

Staff recommends that the FDIC Board of Directors (“Board”) approve and authorize for publication in the *Federal Register* a notice of proposed rulemaking (“NPR”) covering the FDIC’s *Fair Credit Reporting* Regulations, 12 CFR Parts 334 and 391, Subpart C. The Fair Credit Reporting regulations implement provisions of the Fair Credit Reporting Act (“FCRA”).

The NPR covers three separate proposals. First, the NPR would rescind and remove the provisions of FDIC’s Part 334 for which the rule writing authority was transferred to the Consumer Financial Protection Bureau (“CFPB”). Second, the NPR would rescind and remove 12 CFR Part 391, Subpart C, previously a regulation of the Office of Thrift Supervision (“OTS”), and amend 12 CFR Part 334 of FDIC’s existing Rules and Regulations (“FDIC’s Part 334”), as described below. Third, the NPR would amend the definition of “creditor” in the Red Flag Identity Theft rule, 12 CFR 334.90, in order to implement the Red Flag Program Clarification Act of 2010.

Rescinding the provisions of Part 334 transferred to the CFPB and Part 391, Subpart C will serve to streamline the FDIC’s rules and eliminate unnecessary regulations.

Staff recommends that the action taken on this rulemaking be included as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”) review currently underway.

A. Removal of Fair Credit Reporting Regulations Transferred to the CFPB

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended a number of consumer financial protection laws, including the FCRA. In addition to substantive amendments, the Dodd-Frank Act transferred rulemaking authority from the FDIC and the other Federal banking agencies for several provisions of the Fair Credit Reporting regulations to the CFPB, effective July 21, 2011. These include the following regulations: medical information; affiliate marketing; address discrepancy; and duties of furnishers of information. Those regulations were covered under 12 CFR part 334 parts C, D, and E, as well as 12 CFR 334.82 in subpart I. The transfer also included the related Appendices, 12 CFR Part 334, Appendices C and E. On December 11, 2011, the CFPB issued as an interim final rule Regulation V, which implemented the Dodd-Frank Act amendments to the FCRA with regard to those regulations and appendices.

The Dodd-Frank Act did not transfer all rulemaking authority under the FCRA. Specifically, the Act did not transfer to the CFPB the authority to promulgate rules on the disposal of consumer information; rules on “identity theft red flags” and the corresponding interagency guidelines on identity theft detection, prevention, and mitigation; and rules on the duties of card issuers regarding changes of address. These existing provisions are not included in the Bureau’s new Regulation V.

As a result of the rule writing authority transferred to the CFPB, staff recommends that the FDIC propose to rescind and remove those regulations and appendices covered under the CFPB’s Regulation V. In addition to the specific regulations, the attached NPR would also propose rescinding and removing those parts of the Purpose and Definition provisions of the “Fair Credit Reporting” regulations that related to the substantive regulations transferred to the CFPB.

B. Removal and Transfer of OTS Regulations

Background

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,¹ 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 Act² 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 Act³ 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

¹ 12 U.S.C. § 5411.

² 12 U.S.C. § 5414(b).

³ 12 U.S.C. § 5414(c).

FDIC and the OCC, respectively. On June 14, 2011, the Board approved for issuance in the *Federal Register* 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.”⁴

On June 14, 2011, operating pursuant to this authority, the Board reissued and re-designated certain transferring regulations of the former OTS as new FDIC regulations.⁵ In the preamble to this interim rule, 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.

Parts 334 and 391, Subpart C – Fair Credit Reporting

One of the regulations transferred to the FDIC governs those regulations not transferred to the CFPB implementing the FCRA for state savings associations. The OTS’s regulation, formerly found at 12 CFR Part 571, was transferred to the FDIC with only nominal changes and is now found in the FDIC’s rules at 12 CFR Part 391, Subpart C.

The Fair Credit Reporting regulations not transferred to the CFPB were issued by the FDIC, OTS, the other Federal Banking Agencies and, in some instances, other Federal agencies from 2004 to 2007 to implement provisions of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”).⁶ These regulations were issued as part of joint rulemakings and, therefore, the Agencies’ regulations are substantively similar, other than the scope provisions for each Agency.

In order to provide comprehensive coverage, post-Dodd-Frank Act, for the FDIC’s Part 334, the NPR would amend the scope provisions at 12 CFR 334.1, 334.90, and 334.91 to cover state savings associations whose deposits are insured by the FDIC. The NPR would also add a definitional provision of “state savings association” to be consistent with the definition currently in the Federal Deposit Insurance Act.⁷ The proposed change in the scope provision at 12 CFR 334.1 should be sufficient to cover the disposal regulation at 12 CFR 334.83, which does not have a separate scope provision. To provide further coverage, staff, through a separate NPR, will be proposing express coverage of state savings associations through the Safety and Soundness regulation at 12 CFR 364.101(b), which has a direct cross-reference to the disposal regulation.

After comparing the FDIC’s Part 334 with the transferred OTS rule, the staff has concluded that the FDIC’s Part 334, with the amendments addressed above, will continue to provide appropriate recordkeeping and confirmation requirements for all insured depository institutions for which the FDIC is the appropriate Federal banking agency. Further, the transferred OTS rules found at 12 CFR Part 391, Subpart C are redundant and it is desirable to have all insured depository institutions for which the FDIC is the appropriate federal banking agency be subject to the same substantive rules governing recordkeeping and confirmation requirements for securities transactions.

⁴ 76 Fed. Reg. 39247 (July 6, 2011).

⁵ 76 Fed. Reg. 47652 (Aug. 5, 2011).

⁶ Pub. L. No. 108-159, 117 Stat. 1952 (2003).

⁷ 12 U.S.C. 1813(b)(3).

After reviewing the rules currently found in 12 CFR Part 391, Subpart C, staff recommends that the FDIC, as the appropriate Federal banking regulator for state savings associations, propose rescinding these regulations in their entirety, as described in the attached NPR. Rescinding Part 391, Subpart C will also serve to streamline the FDIC's rules and eliminate unnecessary regulations. If the proposal is adopted in final form with amendment to Part 344 to include State savings associations within its scope, all of the banks and state savings associations supervised by the FDIC would be subject to the FDIC's Part 344.

C. Amendment to the "Creditor" Definition in 12 CFR 334.90

In 2007, the FDIC and other Federal financial agencies (including the Federal Trade Commission ("FTC")) issued final rules and guidelines to implement the provisions of section 114 of the FACT Act covering Identity Theft Red Flags. That provision directed the covered Agencies to issue joint regulations and guidelines requiring "financial institutions" and "creditors" to develop and implement a written identity theft program to identify, detect, and respond to possible risks of identity theft relevant to them.

The 2007 final interagency rule (the "Red Flags Rule") included a definition of "financial institution," as set forth in section 603(t) of the FCRA, as amended in section 111 of the FACT Act. That term includes "a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer."

The Red Flags Rule also included a definition of "creditor," as set forth in section 603(r)(5) of the FCRA, as amended in section 111 of the FACT Act. That definition referenced the definition of "creditor" in section 702 of the Equal Credit Opportunity Act ("ECOA"). The ECOA defines the term "creditor" broadly as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew or continue credit."

The vast majority of the entities covered by the FDIC's Red Flag Rule fall under the "financial institutions" definition. In contrast, the vast majority of the entities supervised by the FTC's rule would be covered by the statutory "creditor" definition. The breadth of the "creditor" definition as interpreted by the FTC led to a law suit brought by the American Bar Association against the FTC alleging that the application of the rules to attorneys exceeded FTC's authority. Similar complaints were brought by the American Medical Association and other professionals.

In December 2010, Congress enacted the Red Flag Program Clarification Act ("Clarification Act"), 15 U.S.C. 1681m(e)(4), which narrowed the scope of entities covered as "creditors" under the Red Flags Rule.⁸ The Clarification Act retained the ECOA definition of "creditor," but generally limited the application of the Red Flags Rule to those ECOA creditors that "regularly and in the ordinary course of business" engaged in at least one of the following three types of conduct:

⁸ Pub. L. No. 111-319, 124 Stat. 3457 (2010).

1. Obtaining or using consumer reports, directly or indirectly, in connection with a credit transaction;
2. Furnishing information to consumer reporting agencies in connection with a credit transaction; or
3. Advancing funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person.

The Clarification Act also expressly excluded creditors that advanced funds on behalf of a person for expenses incidental to a service provided by the creditor to that person. Finally, in addition to limiting the scope of coverage for “creditors” by creating these specified categories, the Clarification Act empowered the Agencies to determine through a future rulemaking whether to include any other type of creditor that offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.

Staff recommends that the FDIC propose to amend the “creditor” definition in its Red Flags Rule to expressly cite to the Clarification Act statutory provision, 15 U.S.C. 1681m(e)(4). This is consistent with action taken by the other Agencies covered by the rule.

D. EGRPRA

Under section 2222 of the 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.⁹ The FDIC’s review is ongoing and must be completed by 2016. As such, the attached NPR solicits comments on whether the proposed rescission of Part 390, Subpart K and amendments to Part 344 would impose any outdated or unnecessary regulatory requirements on any insured depository institutions.

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.

Staff contacts:

Jeffrey Kopchik, Division of Risk Management Supervision, (703) 254-0459
Sandra S. Barker, Division of Depositor and Consumer Protection (202) 898-3615
Richard M. Schwartz, Legal Division, (202) 898-7424

⁹ Pub.L.104-208 (Sept. 30, 1996).