

December 14, 2014

TO: The Board of Directors

FROM: Doreen Eberley
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SUBJECT: Review of Regulations Transferred from the Former Office of Thrift Supervision:
Part 391, Subpart B – Safety and Soundness Guidelines and Compliance
Procedures

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”) to rescind and remove 12 C.F.R. Part 391, Subpart B, entitled *Safety and Soundness Guidelines and Compliance Procedures*, and to amend 12 C.F.R. Part 364 (“Part 364”), entitled *Standards for Safety and Soundness*, including appendices and the supplement to the appendices, and 12 C.F.R. Part 308, Subpart R (“Part 308, Subpart R”), entitled *Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders to Correct Safety and Soundness Deficiencies*. Rescinding Part 391, Subpart B will serve to streamline the FDIC’s rules and eliminate unnecessary regulations.

The proposed rescission of Part 391, Subpart B, completes the FDIC’s review of this subpart of the former Office of Thrift Supervision (“OTS”) rules for rescission, amendment, or adoption. This subpart was included in the regulations that were transferred to the FDIC from the OTS on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ Upon removal of 12 C.F.R. Part 391, Subpart B, regulations applicable to all insured depository institutions for which the FDIC is the appropriate Federal banking agency will be found at 12 C.F.R. Part 364 and 12 C.F.R. Part 308, Subpart R.

The proposed rescission and amendments also fulfills the FDIC’s review of the sections of the FDIC rules and regulations impacted by the abolishment of the OTS and the transfer of supervisory responsibilities for state savings associations to the FDIC.

Further, 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.

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

Background

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,² 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 Act³ 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 Act⁴ 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 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.”⁵

Although Section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act,⁶ 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 Act⁷ (“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 FDI Act⁸ 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, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

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.⁹ 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.

Part 391, Subpart B – Safety and Soundness Guidelines and Compliance Procedures

One of the regulations transferred to the FDIC governs safety and soundness standards contained in Section 39 of the FDI Act, 12 U.S.C. Section 1831p--1 for state savings associations. The OTS’s regulation, formerly found at 12 C.F.R. Part 570, was transferred to the FDIC with only

² 12 U.S.C. § 5411.

³ 12 U.S.C. § 5414(b).

⁴ 12 U.S.C. § 5414(c).

⁵ 76 Fed. Reg. 39247 (July 6, 2011).

⁶ 12 U.S.C. § 5412(b)(2)(B)(i)(II).

⁷ 12 U.S.C. § 1811 *et seq.*

⁸ 12 U.S.C. § 1813(q).

⁹ 76 Fed. Reg. 47652 (Aug. 5, 2011).

nominal changes and is now found in the FDIC's rules at 12 C.F.R. Part 391, Subpart B. Since 1995, the FDIC rules have included Parts 364 and 308, Subpart R. Collectively, Parts 364 and 308, Subpart R govern safety and soundness guidelines, safety and soundness compliance plans, and issuance of orders to correct safety and soundness deficiencies for state nonmember banks and state-licensed insured branches of foreign banks. Parts 364 and 308, Subpart R were issued in 1995, as part of a joint interagency rulemaking among the FDIC, FRB, OCC, and OTS. The agencies issued substantially similar, though not identical, rules that implemented Section 39 of the FDI Act, which granted the agencies authority to establish rules governing safety and soundness standards.

After comparing Parts 364 and 308, Subpart R (collectively, "FDIC Safety and Soundness Standards") to Part 391, Subpart B, the FDIC has concluded that the FDIC Safety and Soundness Standards, with conforming amendments to make them applicable to state savings associations, fully and appropriately implement Section 39 of the FDI Act. Moreover, the transferred OTS rules found at Part 391, Subpart B are duplicative of Parts 364 and 308, Subpart R, which, after conforming amendments, will provide appropriate safety and soundness standards for all insured depository institutions for which the FDIC is the appropriate Federal banking agency. The FDIC finds it desirable to have all insured depository institutions for which the FDIC is the appropriate Federal banking agency be subject to the same substantive and procedural safety and soundness standards.

After reviewing the rules currently found in 12 C.F.R. Part 391, Subpart B, 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 B will serve to streamline the FDIC's rules and eliminate unnecessary regulations. If the proposal is adopted in final form 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 Safety and Soundness Guidelines.

Part 364 – Standards for Safety and Soundness

Part 364 entitled *Standards for Safety and Soundness*, 12 C.F.R. Parts 364.100-364.101, currently implements Section 39 of the FDI Act with respect to state nonmember banks and state-licensed insured branches of foreign banks. The modifications proposed herein mostly expand the scope of coverage of Subpart B to include state savings associations.

Part 364

Staff recommends that state savings associations be added to 364.101(a) and (b) to make Part 364 applicable to all institutions for which the FDIC is the Federal banking agency.

Appendix A to Part 364, Interagency Guidelines Establishing Standards for Safety and Soundness

Appendix A to Part 364 is interagency guidance that was issued jointly in 1995 by the FDIC, OTS, OCC, and FRB. The guidelines apply to all insured depository institutions, which includes state savings associations that were formerly regulated by the OTS. As such, staff recommends that Appendix A to Part 391, Subpart B be rescinded and four technical amendments be made to Appendix A to Part 364. Specifically, staff recommends that the reference in footnote 2 to the OTS and its regulation at 12 C.F.R. Part 570 be deleted from Appendix A to Part 364. In addition,

staff recommends that the three definitional references in I.B.(4), (5), and (6) to the terms director, executive officer, and principal shareholder contained in 12 C.F.R. Part 215.2 be updated to accommodate changes to Part 215.2 that have been made since Appendix A was adopted in 1995.

Appendix B to Part 364, Interagency Guidelines Establishing Information Security Standards

Appendix B to Part 364 is interagency guidance that was issued jointly as interim guidance by the FDIC, OCC, FRB, and OTS in 1998, and was substantively amended in 2001 into its current form. While the amendments in 2001 were issued as interagency guidelines, the FDIC, OCC, FRB, and OTS each issued its own appendix to each agency's equivalent of the FDIC's Part 364. As such, Appendix B to the OTS's Part 570, formerly 12 C.F.R. Part 570 and now Part 391, Subpart B, applied only to those entities over which the OTS was the Federal banking agency. When the former OTS's Appendix B was integrated into FDIC regulations as Appendix B to Part 391, Subpart B, the FDIC amended the Appendix to include "state savings associations whose deposits are FDIC-insured and any subsidiaries of such state savings associations, except brokers, dealers, persons providing insurance, investment companies, and investment advisers" as entities over which the FDIC has authority. However, Appendix B to the FDIC's Part 364 applies only to "banks," which does not include state savings associations.

The guidelines set forth in Appendix B in both Part 364 and Part 391, Subpart B are substantively the same. However, there are three slight differences between the two appendices, but these differences do not affect staff's recommendation to rescind Appendix B to Part 391, Subpart B.

First, the FDIC's Appendix B provides a reference to Section 621 of the Federal Credit Reporting Act (FCRA) (15 U.S.C. 1681s) in addition to the reference to Section 628 (15 U.S.C. 1681w) contained in both Appendices. Section 621 describes the Federal banking agency's enforcement authority under the FCRA through Section 8 of the FDI Act. This additional reference to Section 621 does not affect or alter the authority the FDIC already has under FCRA for state savings associations. As such, staff recommends leaving the reference within the FDIC's Appendix B, which will also be applicable to state savings associations.

Second, the FDIC's Appendix B provides a definition for "board of directors, in the case of a branch or agency of a foreign bank" while Appendix B to Part 391, Subpart B does not. This additional definition provides clarity, does not place additional burden upon state savings associations, and should not have an adverse impact on these state savings associations. Therefore, in order to have all of the insured depository institutions for which the FDIC is the primary Federal banking agency subject to the same safety and soundness definitions, staff recommends that the FDIC leave the definition of "board of directors" within the FDIC's Appendix B, which will also be applicable to state savings associations.

Third, the FDIC's Appendix B provides a reference to Part 323.3(h) and (n) to define to the words "customer" and "customer information," respectively. The definition of "customer" is the same in both Part 391, Subpart B's Appendix B and in the FDIC's Appendix B. The definition of "customer information" as outlined in Part 323.3(n) is more robust than the definition in Part 391, Subpart B Appendix B. The more robust defining of "customer information" does not appear to place additional burdens upon state savings associations and should not have an adverse impact on these institutions. Therefore, in order to have all of the insured depository institutions for which the FDIC is the primary Federal banking agency subject to the same safety and soundness

definitions, staff recommends that the FDIC make the “customer information” definition contained in Part 323.3(n) also applicable to state savings associations.

Staff recommends that Appendix B to Part 391, Subpart B be rescinded. Furthermore, staff recommends that the word “bank” be replaced in Appendix B to the FDIC’s Part 364 with “insured depository institution” or “institution,” as appropriate, and “state savings associations” be added to the definitional list of entities over which the FDIC has authority under the Appendix.

Supplement A to Appendix B to Part 364, Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice

Supplement A to Appendix B is interagency guidance that was issued jointly by the FDIC, OCC, FRB, and OTS in 2005. The guidelines already apply to all financial institutions, which includes state savings associations.

However, staff recommends minor technical amendments be made to Supplement A to Appendix B of Part 364 within footnotes 1, 2, 9, 11, and 12. Specifically, in footnote 1, staff recommends that the footnote clarify that the OTS is no longer a party to the interagency guidance. For footnote 2, staff recommends that the statutory reference to the OTS’s former “Interagency Guidelines Establishing Information Security Standards” at 12 CFR part 570, app. B (OTS) be deleted. For footnote 9, staff recommends that the reference to the OTS subpart I.C.2.c be deleted. For footnote 11, staff recommends that references to guidance issued separately by the Federal Reserve, OCC, and FDIC be updated, and references to OTS guidance be deleted. For footnote 12, staff recommends that a reference to the OCC’s SAR guidance be updated to include 12 CFR 163.180 for Federal savings associations; reference to the OTS’s SAR guidance at 12 CFR 563.180 be deleted; references to SR 97-28, FIL 48-2000, FIL 47-97 be deleted, as all have been rescinded without update; and reference to former OTS CEO Memorandum be deleted.

In summary, staff recommends that Supplement to Appendix B to Part 391, Subpart B be rescinded, and various technical amendments be made to the footnotes contained within the FDIC’s Supplement A to Appendix B.

Part 308, Subpart R – Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders to Correct Safety and Soundness Deficiencies

Part 308, Subpart R, entitled *Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders to Correct Safety and Soundness Deficiencies*, 12 C.F.R. Parts 308.300-308.305, currently implements procedures related to safety and soundness compliance plans and the FDIC’s authority to issue orders to correct safety and soundness deficiencies. Staff recommends amending the scope and references throughout Part 308, Subpart R to include state savings associations.

Staff notes one slight difference between the FDIC’s Part 308, Subpart R when compared to 12 C.F.R. Part 391, Subpart B. In the FDIC’s Part 308.303(d)(2), “extraordinary growth” is defined, while it is not defined in Part 391.12(d). The defining of “extraordinary growth” does not appear to be mandated by statute, but subjecting state savings associations to the definition contained in Part 308.303(d)(2) provides clarity, does not place additional burden upon state savings associations, and should not have an adverse impact on these state savings associations. Therefore, in order to have all of the insured depository institutions for which the FDIC is the

primary Federal banking agency subject to the same safety and soundness definitions, it is recommended that the FDIC make the “extraordinary growth” definition applicable to state savings associations.

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.¹⁰ 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 391, Subpart B and amendments to Part 364 and Part 308 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. Furthermore, staff recommends that the action taken on this rulemaking be included as part of the EGRPRA review that is currently underway.

Conclusion

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[Attachments: Federal Register Notice, 12 C.F.R. Part 391, Subpart B (including appendices); 12 C.F.R. Part 364 (including appendices); and 12 C.F.R. Part 308, Subpart R, all as proposed to be modified herein.]

¹⁰ Pub.L.104-208 (Sept. 30, 1996).