

TO: The Board of Directors

FROM: Mark Pearce
Director
Division of Depositor and Consumer Protection

SUBJECT: Review of Regulations Transferred from the Former Office of Thrift Supervision:
Part 390, Subpart I – Consumer Protection in Sales of Insurance

Summary of Recommendation

Staff recommends that the Federal Deposit Insurance Corporation (“FDIC”) Board of Directors (“Board”) approve the attached resolution to adopt and authorize for publication in the *Federal Register* a notice of proposed rulemaking (“Proposed Rule”) to (1) rescind and remove 12 C.F.R. Part 390, Subpart I (“Part 390, Subpart I”), of the former Office of Thrift Supervision (“OTS”) entitled “Consumer Protection in Sales of Insurance” and (2) make conforming amendments to 12 C.F.R. Part 343 (“Part 343”), also entitled “Consumer Protection in Sales of Insurance.”

Part 390, Subpart I and its FDIC counterpart Part 343 were initially issued as part of a joint rulemaking among the OTS, the FDIC and the other federal banking agencies. After review, staff concluded that the two rules are substantively the same and that Part 390, Subpart I is redundant and unnecessary. Both rules address retail sales practices, solicitations, advertising, or offers of insurance products by depository institutions or persons engaged in these activities at an office of the institution or on behalf of the institution. Rescinding Part 390, Subpart I, will serve to streamline the FDIC’s rules and eliminate redundancy and unnecessary regulations.

Concur:


Charles Yi
General Counsel

Status of OTS Rules Review

The proposed rescission of Part 390, Subpart I, if adopted after notice and comment, will complete the FDIC's review of this subpart of the 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 This move was taken in connection with the transfer of the responsibility for the supervision of State savings associations from the OTS to the FDIC, pursuant to the Dodd-Frank Act. Upon removal of Part 390, Subpart I, the Consumer Protection in Sales of Insurance regulations applicable for all insured depository institutions, for which the FDIC has been designated the appropriate Federal banking agency, will be found at 12 C.F.R. Part 343, entitled "Consumer Protection in Sales of Insurance."

The proposed rescission and amendments also fulfill the FDIC's review of the Consumer Protection in Sales of Insurance sections of the FDIC rules and regulations affected by the abolishment of the OTS and the transfer of supervisory responsibilities for State savings associations and their subsidiaries to the FDIC.

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. 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 respectively 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 ("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

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*).

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, 2011.²

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 Act (“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 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 re-designated certain transferring regulations of the former OTS.³ These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011. In the preamble to the interim rule, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and may later recommend incorporation of the transferred OTS regulations into existing FDIC rules, amending or rescinding them, as appropriate.

Part 390, Subpart I – Consumer Protection in Sales of Insurance

One of the regulations transferred to the FDIC governed OTS implementation of the Consumer Protection in Sales of Insurance rule. This regulation governs a depository institution or any other person selling, soliciting, advertising, or offering insurance products or annuities to a consumer at an office of the institution or on behalf of the institution.

Since 2000, the FDIC’s rules have included Part 343, implementing the Consumer Protections for Depository Institution Sales of Insurance rule, and all State-chartered nonmember banks have been required to comply with it. Other depository institutions were subject to very similar requirements under the applicable counterpart regulation of their appropriate Federal supervisory agency. The OTS’s regulation, formerly found at 12 C.F.R. Part 563, was transferred to the FDIC with only nominal changes. It is currently located in the FDIC’s rules at 12 C.F.R. Part 390, Subpart I.

The Consumer Protections for Depository Institution Sales of Insurance rule was issued in 2000 as part of a joint interagency rulemaking among the FDIC, the FRB, the OCC, and the OTS (“Federal banking agencies”) to implement section 305 of the Gramm-Leach-Bliley Act (“GLB Act”),⁴ which added section 47 to the FDI Act,⁵ and is entitled “Insurance Consumer

² 76 Fed. Reg. 39247 (July 6, 2011).

³ 76 Fed. Reg. 47652 (Aug. 5, 2011).

⁴ Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

Protections.” Section 47 applies to retail sales practices, solicitations, advertising, or offers of insurance products by depository institutions or persons engaged in these activities at an office of the institution or on behalf of the institution.⁶ Section 47 directs the Federal banking agencies to include provisions specifically relating to sales practices, disclosures and advertising, the physical separation of banking and nonbanking activities, and domestic violence discrimination.⁷ As a result of this joint rulemaking, the federal banking agencies adopted very similar, though not identical, rules regarding consumer protections in financial institutions’ sales of insurance.⁸

After careful review and comparison of Part 343, the FDIC’s Consumer Protection in Sales of Insurance rule with the transferred OTS rule, Part 390, Subpart I, FDIC staff has concluded that the FDIC’s Part 343, with several technical amendments described below, will continue to provide appropriate oversight of the requirements for consumer protection in sales of insurance for all insured depository institutions for which the FDIC is the appropriate Federal banking agency. Where possible, it is desirable for reasons of regulatory policy that insured depository institutions for which the FDIC is the appropriate Federal banking agency are subject to the same (or very similar) substantive and procedural rules governing consumer protection in sales of insurance.

After reviewing Part 390, Subpart I, staff recommends that the FDIC, as the appropriate Federal banking agency for State savings associations and their subsidiaries, propose to rescind the former OTS rule in its entirety. Rescinding Part 390, Subpart I, will also serve to streamline the FDIC’s rules and eliminate unnecessary regulations. Staff also recommends several technical amendments to Part 343. If the Proposed Rule is adopted, all of the insured depository institutions and State savings associations and their subsidiaries supervised by the FDIC would be subject to the FDIC’s Part 343, as modified.

Section 343.10 – Purpose and Scope

Section 343.10 currently defines the scope of Part 343 only with respect to FDIC-insured state nonmember banks that are required to adhere to certain consumer protections in sales of insurance. Although the former OTS rule included savings and loan holding companies within its scope, section 312 of the Dodd-Frank Act transferred jurisdiction over savings and loan holding companies to the FRB. For this reason, although the former OTS rule references savings and loan holding companies, proposed changes to the scope of the existing Part 343 do not include savings and loan holding companies.

⁵ 12 U.S.C. § 1831x.

⁶ 12 U.S.C. § 1831x(a)(1)(A).

⁷ 12 U.S.C. § 1831x.

⁸ 65 Fed. Reg. 75822 (Dec. 4, 2000).

Moreover, section 343.10 applies to “[a]ny bank”⁹ or “[a]ny other person that is engaged in such activities at an office of the bank or on behalf of the bank.”¹⁰ In the context of the FDIC’s scope provisions, “[a]ny other person” includes subsidiaries,¹¹ because “only subsidiaries that are selling insurance products or annuities at an office of the institution or acting ‘on behalf of’ the depository institution as defined in the rules would be subject to the requirements of the rules.”¹² Therefore, staff recommends the FDIC propose modifications to the scope of Part 343 to include State savings associations and their subsidiaries to conform to and reflect the scope of FDIC’s current supervisory responsibilities as the appropriate Federal banking agency.

Part 390, Subpart I, contains a similar provision that applies to subsidiaries. Specifically, the OTS regulation states that “[a] subsidiary is subject to this subpart only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a State savings association or on behalf of a State savings association.”¹³ Because the OTS provision is duplicative of the FDIC’s section 343.10, the Proposed Rule would not transfer it to section 343.10. Therefore, staff recommends that the OTS provision regarding “[a]pplication to subsidiaries” be left out, because it is redundant and unnecessary.

Section 343.20 – Definitions

Section 343.20 currently contains a definition of “bank” that is defined as an “FDIC insured, state chartered commercial or savings bank that is not a member of the Federal Reserve System and for which the FDIC is the appropriate federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).” Since this definition does not include State savings associations and their subsidiaries, the Proposed Rule would include a definition of “FDIC-supervised insured depository institution or institution,” which would encompass both State nonmember insured banks as well as State savings associations and their subsidiaries to reflect the scope of FDIC’s current supervisory responsibilities as the appropriate Federal banking agency. Accordingly, an “FDIC-supervised insured depository institution or institution” is defined in the Proposed Rule as “any State nonmember insured bank or State savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).”

In addition, section 343.20 currently contains no definition of “State savings association.” Accordingly, staff recommends in the proposal to add a definition of “State savings association”

⁹ “Bank” means “an FDIC-insured, state-chartered commercial or savings bank that is not a member of the Federal Reserve System and for which the FDIC is the appropriate federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).” 12 C.F.R. § 343.20(b).

¹⁰ 12 C.F.R. § 343.10.

¹¹ See 65 Fed. Reg. 75822, 75823 (Dec. 4, 2000).

¹² 65 Fed. Reg. 75822, 75823 (Dec. 4, 2000) (footnote omitted).

¹³ 12 C.F.R. § 390.180(b).

as having “the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)).”

Section 343.30 – Prohibited Practices

Section 343.30 currently prohibits FDIC-regulated institutions from engaging in any practice that would lead a consumer to believe that an extension of credit, in violation of the Bank Holding Company Act Amendments of 1970,¹⁴ is conditional upon either: (1) the purchase of an insurance product or annuity from the institution or any of its affiliates; or (2) an agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity. Part 390, Subpart I, also has a parallel prohibition for State savings associations that is derived from the Home Owners’ Loan Act (“HOLA”).¹⁵ Therefore, staff recommends in the Proposed Rule to transfer the HOLA prohibition for State savings associations to section 343.30.

Appendix A to Part 343—Consumer Grievance Process

The Proposed Rule also would change the contact information for the consumer grievance process. The new contact information is: Division of Depositor and Consumer Protection, Consumer Response Center, Federal Deposit Insurance Corporation, 1100 Walnut Street, Box #11, Kansas City, MO 64106; telephone 1-877-275-3342; FDIC Electronic Customer Assistance Form <http://www5.fdic.gov/starsmail/index.asp>.

EGRPRA

Section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”) requires the FDIC 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.¹⁶ The FDIC’s review is ongoing. The attached Proposed Rule solicits comments on whether the proposed rescission of Part 390, Subpart I, and amendments to Part 343 would impose any outdated or unnecessary regulatory requirements on any insured depository institutions.

Staff members knowledgeable about this case

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¹⁴ See section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972).

¹⁵ See section 5(q) of the Home Owners’ Loan Act (12 U.S.C. § 1464(q)).

¹⁶ Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).