

February 6, 2018

TO: The Board of Directors

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

SUBJECT: Notice of Proposed Rulemaking: Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers

Recommendation: Staff recommends that the FDIC Board approve the proposed rule and authorize its publication in the *Federal Register* with a 60-day public comment period.

Summary

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) abolished the Office of Thrift Supervision (“OTS”) and transferred supervisory authority over State savings associations to the FDIC. As part of this transfer of supervisory responsibility, a number of regulations previously issued by the OTS and applicable to State savings associations were transferred to the FDIC. The Dodd-Frank Act prescribed that these transferred regulations would remain in effect until they were lawfully modified, terminated, set aside, or superseded by the FDIC. The proposed rule would remove one of the transferred OTS regulations. It also would provide clarification regarding the exercise of trust powers by State nonmember banks and require State savings associations to receive the FDIC’s consent before exercising trust powers so that, generally, a single set of regulations would apply to both for these purposes.

Specifically, the proposed rule would rescind and remove 12 CFR part 390 subpart J, entitled *Fiduciary Powers of State Savings Associations*. The proposed rule also would revise 12 CFR part 333 by: (1) adding a new section 333.3 to make explicit that State savings associations and State nonmember banks would be required to obtain the FDIC's prior written consent to exercise trust powers, and (2) revising section 333.101(b) to provide that neither State savings associations nor State nonmember banks would be considered to be exercising trust powers when acting as trustees or custodians of certain qualifying accounts. (Section 333.101(b) currently applies only to State nonmember banks.) In addition, the proposed rule would make conforming amendments to 12 CFR section 303.242 by: (1) inserting the term "State savings association" where appropriate, so that the FDIC's application procedures for obtaining consent to exercise trust powers would apply to both State nonmember banks and State savings associations and (2) further describing the information that should be submitted by applicants seeking to exercise trust powers.

CONCUR:

Charles Yi
General Counsel

Background

The Dodd-Frank Act¹, 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,² the powers, duties, and functions formerly performed by the OTS were 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 (“Federal Reserve Board”), 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 advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate Federal banking 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 OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by each agency.⁴ 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 Reform and Consumer

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

² 12 U.S.C. 5411.

³ 12 U.S.C. 5414(b).

⁴ 12 U.S.C. 5414(c).

Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011.⁵

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁶ 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 FDI Act and other laws as the “appropriate Federal banking agency” or under similar statutory authority. Pursuant to section 3(q) of the Federal Deposit Insurance Act, the FDIC is the appropriate Federal banking agency for State nonmember banks. In addition, Section 312(c) of the Dodd-Frank Act amended section 3(q) of the Federal Deposit Insurance Act,⁷ 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” for State savings associations and State nonmember banks, it is authorized to issue, modify and rescind regulations involving such institutions.

On June 14, 2011, pursuant to this authority, the Board reissued and redesignated certain regulations transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the *Federal Register* on August 5, 2011.⁸ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the

⁵ 76 FR 39247 (July 6, 2011).

⁶ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷ 12 U.S.C. 1813(q).

⁸ 76 FR 47652 (August 5, 2011).

transferred OTS regulations into FDIC rules that existed before the transfer, amending them, or rescinding them, as appropriate.

One of the regulations transferred to the FDIC governed the fiduciary powers (also known as trust powers) of State savings associations. The OTS regulation, formerly found at 12 CFR 550.10(b)(1), was transferred to the FDIC with only nominal changes and is now found in the FDIC's rules at 12 CFR part 390 subpart J ("subpart J").

Part 390 Subpart J: Trust Powers of State Savings Associations

Subpart J provides that a State savings association must conduct its fiduciary operations in accordance with applicable State law and must exercise its fiduciary powers in a safe and sound manner. Subpart J was derived from former OTS rule 12 CFR section 550.10(b)(1) regarding fiduciary operations of Federal savings associations.⁹ This section was added originally to recognize the OTS's interest in ensuring that State savings associations conduct their trust operations in a safe and sound manner and in accordance with State law.¹⁰

⁹ Generally, section 5(n) of HOLA authorizes the OCC (previously, the OTS) to grant special permits to Federal savings associations for the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located. 12 U.S.C. 1464(n).

¹⁰ Office of Thrift Supervision, Final Rule, 62 FR 67696-01 (Dec. 30, 1997).

Trust Powers of State Nonmember Banks

Unlike the explicit requirement applicable to State savings associations in Subpart J, there is no express rule that requires State nonmember banks to conduct fiduciary operations in accordance with applicable State law and to exercise their fiduciary powers in a safe and sound manner. However, the FDIC has long recognized that State nonmember banks, like State savings associations, must comply with State law when exercising trust or fiduciary powers.¹¹ This reflects a widely understood industry principle that the trust powers of State chartered institutions are granted under State law and are primarily administered by the State chartering authority.¹²

State nonmember banks approved for Federal deposit insurance after December 1, 1950, are generally required to file an application for consent to exercise trust powers.¹³ Therefore, if a State nonmember bank seeks to change the nature of its current business to include trust activities, section 333.2 requires the bank to obtain the FDIC's prior written consent.¹⁴ Under section 333.101(b), however, prior written consent is not required when a State nonmember bank seeks to act as trustee or custodian of certain qualified retirement, education, and health savings accounts, or other similar accounts in which the bank's duties are essentially custodial or

¹¹ FDIC Trust Examination Manual, available at: http://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html#B1 (The trust powers of state nonmember banks are granted under state law and that the administration of trust powers primarily goes to the state as the state nonmember bank's chartering authority.)

¹² *Id.*

¹³ Banks granted trust powers by statute or charter prior to December 1, 1950, are considered grandfathered from the requirement to obtain consent to exercise trust powers.

¹⁴ 12 CFR 333.2 requires a State nonmember bank to obtain the FDIC's prior written consent before the bank changes its general character or type of business.

ministerial in nature and the acceptance of such accounts without trust powers is not contrary to applicable State law.

Section 303.242 contains application procedures that a State nonmember bank must follow to obtain the FDIC's prior written consent before engaging in trust activities.¹⁵ Prior to granting such consent, the FDIC considers whether the bank will conduct operations in a safe and sound manner, consistent with State law.

Proposed Rule

After careful review, staff has concluded that the retention of part 390 subpart J is unnecessary and that the rescission of subpart J in its entirety would streamline the FDIC rules and regulations. Consistent with its legal authority to issue and modify regulations as the appropriate Federal banking agency under section 3(q) of the Federal Deposit Insurance Act, staff also proposes to amend and revise certain provisions of parts 333 and 303 to clarify and state explicitly that both State savings associations and State nonmember banks are required to obtain the FDIC's prior written consent to exercise trust powers. The FDIC, as the appropriate Federal banking agency for State savings associations and State nonmember banks, is responsible for ensuring that they engage in the safe and sound exercise of their trust powers and in accordance with applicable state law.¹⁶ State nonmember banks and State savings associations are required

¹⁵ Pursuant to section 303.242, State nonmember banks must file an application for prior written consent to exercise trust powers unless (1) the bank received authority to exercise trust powers by its chartering authority prior to December 1, 1950; or (2) where an insured depository institution ("IDI") continues to conduct trust activities pursuant to the authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System.

¹⁶ 12 U.S.C. 1813(q).

to comply with State laws governing the administration of trusts, such as State law implementation of the Uniform Trust Code, Uniform Prudent Investor Act, and Uniform Probate Code, as well as applicable Federal laws, such as the Employee Retirement Income Security Act of 1974. Moreover, State savings associations and State nonmember banks are subject to potential liability for breaches of fiduciary duty as provided for under State law. Accordingly, the proposed rule will further ensure the consistent exercise of the FDIC's supervisory authority with regard to trust activities of both State savings associations and State nonmember banks and provide for the safe and sound exercise of trust powers in accordance with applicable law.¹⁷

The proposed revisions would add a new section 333.3 to clarify that State savings associations and State nonmember banks must seek prior written consent from the FDIC to exercise trust powers. For State nonmember banks, § 333.3 would make explicit the FDIC's existing requirement that State nonmember banks receive the FDIC's consent before exercising trust powers as a change in the general character of business under 12 CFR § 333.2. However, § 333.3 would represent a change for State savings associations, which are not currently required to receive FDIC's consent before exercising trust powers granted by their chartering authorities. Section 333.3 would explicitly state that both State nonmember banks and State savings associations would be required to follow the application procedures set forth in section 303.242. Section 333.101(b) would also be revised to permit State savings associations to act as custodians of certain qualifying accounts without obtaining prior written consent from the FDIC, in the same manner as is currently permitted for State nonmember banks.

¹⁷ 12 U.S.C. 1819(a)(Tenth); 12 U.S.C. 1818; 12 U.S.C. 1831p-1.

As noted above, the proposed rule would make section 303.242 applicable to State savings associations in addition to State nonmember banks. Similar to State nonmember banks, under the proposed rule, State savings associations would not be required to receive the FDIC's prior written consent to exercise trust powers in the following circumstances: (1) where the institution received authority to exercise trust powers from its chartering authority prior to December 1, 1950; or (2) where the institution continues to conduct trust activities pursuant to authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System. In order to provide more information to State nonmember banks and State savings associations, section 303.242 would also be amended to provide a more complete description of the application's required documentation, such as identification of key parties and servicing arrangements, proof of approval by State authorities, and financial performance projections.

Recommendation

In order to provide consistent and streamlined implementation of the prior written consent and application requirements for State nonmember banks and State savings associations seeking to exercise trust powers, staff recommends that the Board issue the attached proposed rule and authorize its publication in the *Federal Register* with a 60-day public comment period.

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Attachments:

Notice of Proposed Rulemaking entitled, “Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers”