

June 6, 2019

TO: The Board of Directors

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

Mark E. Pearce
Director, Division of Depositor and Consumer Protection

SUBJECT: Final Rule: Removal of Transferred OTS Regulations Regarding Lending and Investment; and Conforming Amendments to Other Regulations

Recommendation: Staff recommends that the FDIC Board of Directors (“Board”) approve and authorize for publication in the *Federal Register* the attached final rule (“Final Rule”) entitled, “*Removal of Transferred OTS Regulations Regarding Lending and Investment; and Conforming Amendments to Other Regulations.*” The Final Rule will rescind and remove 12 CFR part 390, subpart P, entitled *Lending and Investment*, and amend 12 CFR part 365, subpart A, entitled *Real Estate Lending Standards*, to make it applicable to State savings associations. Further, the Final Rule will rescind and remove 12 CFR part 365, subpart B concerning registration requirements for residential mortgage loan originators because it is no longer necessary in light of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ The Final Rule also will make technical amendments to part 365 that are necessary to reflect its application to all FDIC-supervised institutions including State savings associations. The Final Rule will finalize, without change, a Notice of Proposed Rulemaking (“NPR”) published on February 5, 2019, which received no comments.

Concur:
Nicholas Podsiadly, General Counsel

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

I. Background

A. The Dodd-Frank Act

Effective July 21, 2011, section 311 of the Dodd-Frank Act² transferred to the FDIC the powers, duties and functions formerly performed by the Office of Thrift Supervision (“OTS”) with respect to state savings associations. Section 316(b) of the Dodd-Frank Act³ provided that OTS regulatory issuances in effect as of the transfer date would continue in effect and be enforceable by and against the appropriate Federal banking agency until modified, terminated, set aside, or superseded. 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 Protection Act.”⁴ When the transferred OTS regulations were subsequently published as new FDIC regulations,⁵ the FDIC noted that it would evaluate the transferred OTS regulations and might later incorporate them into other FDIC rules, amend them, or rescind them, as appropriate.

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 Federal Deposit Insurance Act (“FDI Act”) and other laws as the “appropriate Federal banking agency.” Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act⁷ to add State savings associations to the list of

² 12 U.S.C. 5411.

³ 12 U.S.C. 5414(b).

⁴ 76 FR 39246 (Jul. 6, 2011).

⁵ 76 FR 47652 (Aug. 5, 2011).

⁶ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷ 12 U.S.C. 1813(q).

entities for which the FDIC is designated the “appropriate Federal banking agency.”⁸ As a result, when the FDIC acts as the “appropriate Federal banking agency” for State savings associations it has the authority to issue, modify, and rescind regulations involving such associations as well as for State nonmember banks and insured U.S. branches of foreign banks.⁹

Finally, the Dodd-Frank Act amended the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“S.A.F.E. Act”),¹⁰ transferring the mortgage loan originator registration authority of the FDIC and certain other Federal agencies (the “S.A.F.E. Act Agencies”) to the Bureau of Consumer Financial Protection (“Bureau”).¹¹ On December 10, 2011, the Bureau published its Regulation G¹² which substantially duplicated the FDIC’s S.A.F.E. Act regulation at part 365, subpart B of the FDIC’s regulations.

B. Part 390, Subpart P – Lending and Investment

The lending and investment provisions applicable to State savings associations currently appear in part 390, subpart P of the FDIC’s regulations. The substantive provisions of the subpart are addressed below along with staff’s basis for rescission.

1. Section 390.260 – General

This section provides general authority and scope for safety-and-soundness based lending and investment activities for State savings associations. Staff proposed rescinding the section because it is substantively similar to FDIC’s existing rule, 12 C.F.R. § 364.101 (providing FDIC’s regulations for safety and soundness).

⁸ See 12 U.S.C. 5412 note.

⁹ See also 12 U.S.C. 5412(b)(2)(C)(ii) (“the Corporation shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision on the day before the transfer date relating to the functions transferred under clause (i).” [relating to State savings associations]).

¹⁰ 12 U.S.C. 5101, *et seq.*

¹¹ See section 1100 of the Dodd-Frank Act.

¹² See 12 CFR part 1007.

2. Section 390.262 – Definitions

Section 390.262, contains definitions that pertain to the provisions of part 390, subpart P such as “consumer loan,” “home loan,” and “real estate loans.” Staff concluded that the substantive provisions of part 390, subpart P were unnecessary, redundant, or otherwise duplicative of other FDIC regulations. Therefore, staff considered section 390.262 unnecessary and recommended that it be rescinded.

3. Sections 390.264 – Real estate lending standards, purpose and scope and 390.265-real estate lending standards

Sections 390.264 and 390.265 (including its appendix A) implement the Federal banking agencies’ joint rulemaking for real estate lending. Staff found that 12 C.F.R. §§ 390.264 and 390.265 were virtually identical with FDIC’s existing part 365, subpart A, and proposed to rescind sections 390.264 and 390.265. Additionally, in order to clarify that part 365, subpart A applies to all institutions for which the FDIC is the appropriate Federal banking agency, staff proposed to amend sections 365.1 and 365.2 to replace throughout the phrases “insured state nonmember banks (including state-licensed insured branches of foreign banks)” and “state nonmember bank” with the phrase “FDIC-supervised institution” or its plural form.

4. Sections 390.267 – Letters of credit and other independent undertakings to pay against documents and 390.268 – Investment in State housing corporations

Section 390.267 provides standards and restrictions for all savings associations that issue letters of credit or other independent undertakings that have been recognized in law or approved by the FDIC. Section 390.268 addresses investments in or loans to state housing corporations. Staff found that the FDIC had no substantively similar rules. However, both underlying activities are permissible for Federal savings associations¹³ and are therefore permissible

¹³ Letters of credit or other independent undertakings are permissible for Federal savings associations by virtue of 12 CFR 160.50 and 160.120. Investments in state housing corporations are permissible for Federal savings associations by section 5(c)(1)(P) of HOLA, 12 U.S.C. 1464(c)(1)(P).

activities for State savings associations pursuant to subpart C of part 362 of the FDIC's regulations, eliminating the need to maintain separate FDIC regulations for State savings associations.

5. Section 390.269 – Prohibition on loan procurement fees

Section 390.269 addresses loan procurement fees. Staff determined that the FDIC had no substantively similar regulation. However, rather than identify and prohibit particular types of compensation or fees on a case-by-case basis, the FDIC's approach has been to act against compensation practices that are unsafe or unsound, or that represent a breach of an officer's or director's duty not to place his or her own interests ahead of those of the institution; where necessary, the FDIC can take action under section 8 of the FDI Act.¹⁴ Therefore, staff proposed to rescind section 390.269 as unnecessary.

6. Section 390.270 – Asset classification

Section 390.270 requires, among other things, that State savings associations classify assets on a regular basis in a manner consistent with the classification system used by the FDIC and to establish adequate valuation allowances or charge-offs, consistent with generally accepted accounting principles ("GAAP") and the practices of the Federal banking agencies. Because safety and soundness principles require all insured depository institutions for which the FDIC is the appropriate Federal banking agency – including State savings associations – to provide timely and accurate financial, operational, and regulatory reports in accordance with GAAP, staff proposed to rescind section 390.270 as unnecessary.

7. Section 390.271 – Records for lending transactions

Section 390.271 governs records for lending transactions, requiring State savings associations to establish and maintain loan documentation practices. Because the lending

¹⁴ 12 U.S.C. § 1818.

documentation practices and requirements contained in section 390.271 are contained in part 364 and its appendix A, staff proposed to rescind section 390.271 as unnecessary.

8. Section 390.272 – Re-evaluation of real estate owned

Section 390.272 addresses re-evaluation of assets and, among other things, requires a savings association to appraise each parcel of real estate owned at the earlier of in-substance foreclosure or at the time of the savings association’s acquisition, and at such times thereafter as directed by prudent management policy or as required by the appropriate regional director. Staff found that this rule was not duplicative of any other existing FDIC regulation. However, the FDIC relies on part 364, which directs FDIC-supervised institutions to “establish and maintain a system that is commensurate with the institution’s size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets”¹⁵ and also directs such State-chartered institutions to follow State law with respect to the initial and subsequent valuations of other real estate.¹⁶ Therefore, staff recommended that section 390.272 be rescinded as unnecessary.

C. Part 365, Subpart B – Registration of Residential Mortgage Loan Originators

The FDIC issued part 365, subpart B¹⁷ to implement the Federal registration requirements for mortgage loan originators required by the S.A.F.E. Act. However, the Dodd-Frank Act amended the S.A.F.E. Act, transferring that authority from the S.A.F.E. Act Agencies to the Bureau. In December of 2011, the Bureau published an interim final rule incorporating the S.A.F.E. Act requirements into its Regulation G. On April 28, 2016, the Bureau finalized the interim final rule, which is substantially duplicative of the FDIC’s S.A.F.E. Act regulation at part

¹⁵ 12 CFR 364, app. A., sec. II.G.

¹⁶ See FIL-62-2008.

¹⁷ 12 CFR 365.101-105.

365, subpart B. The Bureau's Regulation G addresses Federal registration requirements for mortgage loan originators and applies to all FDIC-supervised institutions.¹⁸ Thus, staff proposed to rescind part 365, subpart B because it was no longer necessary.

II. NPR to rescind Subpart P and Amend Part 365

On February 5, 2019, the FDIC issued the NPR entitled, "*Removal of Transferred OTS Regulations Regarding Lending and Investment; and Conforming Amendments to Other Regulation.*"¹⁹ The NPR proposed to:

- (1) rescind the former OTS regulation in part 390, subpart P in its entirety;
- (2) amend part 365, subpart A to make it applicable to all FDIC-supervised insured depository institutions; and
- (3) rescind part 365, subpart B in its entirety.

The FDIC requested comment on all aspects of the proposal, including negative impacts that could be foreseen in the FDIC's proposal to rescind part 390, subpart P and part 365, subpart B and remove them from the Code of Federal Regulations. The FDIC received no comments on the NPR.

III. The Final Rule

The Final Rule will rescind and remove 12 CFR part 390, subpart P and amend 12 CFR part 365, subpart A to make it applicable to State savings associations. Further, the Final Rule will rescind and remove 12 CFR part 365, subpart B concerning registration requirements for residential mortgage loan originators because it is no longer necessary in light of Title X of the Dodd-Frank Act.

¹⁸ 12 CFR § 1007.101(c).

¹⁹ 84 FR 1653 (February 5, 2019).

Conclusion: Staff recommends that the Board adopt the attached final rule and authorize its publication in the Federal Register with an effective date thirty days from such publication.

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