

October 8, 2019

MEMORANDUM TO: Board of Directors

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

Mark Pearce, Director
Division of Depositor and Consumer Protection

SUBJECT: *Notice of Proposed Rulemaking.* Rescission of regulations transferred from the Office of Thrift Supervision contained in 12 CFR part 390, subpart S, and conforming amendments to existing FDIC regulations.

Summary: Staff recommends that the FDIC Board of Directors (“Board”) approve and authorize for publication in the *Federal Register* with a 30-day public comment period, a notice of proposed rulemaking (“NPR”) to rescind and remove 12 CFR part 390, subpart S, entitled *State Savings Associations—Operations*, and amend the following FDIC regulations to make them applicable to State savings associations:

- 12 CFR part 303, subparts D (merger transactions), F (change of director or senior executive officer), and K (prompt corrective action);
- 12 CFR part 326, subpart B (procedures for monitoring Bank Secrecy Act compliance);
- 12 CFR 337.3 (limits on extension of credit to executive officers, directors, and principal shareholders of insured nonmember banks) and 337.11 (effect of other banking practices); and
- 12 CFR part 353 (Suspicious Activity Reports).

In addition, the NPR would include technical amendments to section 337.3 of the FDIC’s regulations to correct cross-references to the Board of Governors of the Federal Reserve’s Regulation O that are incorrect due to revisions to Regulation O.

Upon removal of part 390, subpart S and the conforming amendments, all FDIC-supervised institutions would follow substantially the same regulations and guidance regarding their operation.

Recommendation: Staff is requesting that the Board approve the notice of proposed rulemaking and authorize its publication in the *Federal Register* with a 30-day comment period.

Concur:

Nicholas J. Podsiadly
General Counsel

I. Background – OTS Rule Transfer to FDIC

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 Office of Thrift Supervision (“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 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

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁵ granted the OCC rulemaking authority relating to both State and federal savings associations, nothing in the Dodd-

¹ 12 U.S.C. § 5411.

² 12 U.S.C. § 5414(b).

³ 12 U.S.C. § 5414(c).

⁴ 76 FR 39247 (July 6, 2011).

⁵ 12 U.S.C. § 5412(b)(2)(B)(i)(II).

Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act⁶ ("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 Act⁷ 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 institutions.

On June 14, 2011, operating pursuant to this authority, the Board reissued and re-designated certain transferred regulations of the former OTS as new FDIC regulations.⁸ In the preamble to this interim rule, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS regulations into existing FDIC regulations, amending them, or rescinding them, as appropriate.

II. Section by Section Analysis

Part 390, subpart S covers a broad range of subjects over its 38 sections, including chartering documents, the issuance and sale of State savings association securities, mergers and consolidations, advertising, composition of the board of directors, tying restrictions, employment contracts, affiliate transactions, insider loans, pension plans, capital rules for subordinated debt securities and certain preferred stock, capital distributions, management and financial policies, examinations, financial derivatives, interest-rate-risk management, Bank Secrecy Act, fidelity bonds, conflicts of interest, and changes of directors or officers. The *Federal Register* notice contains full descriptions of the requirements of part 390, subpart S and the justifications for

⁶ 12 U.S.C. § 1811 *et seq.*

⁷ 12 U.S.C. § 1813(q).

⁸ 76 FR 47652 (Aug. 5, 2011).

rescinding and removing each section. Because summarizing each section and the justification for its removal would be lengthy, staff has prepared Appendix A, which contains a summary of each section and the justification for its rescission and removal.

III. 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.

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Appendix A

12 CFR 390, Subpart S. State Savings Associations—Operations			
Section	Proposed Treatment	Rationale	NPR §
§390.330 Chartering documents.	Rescind	Since the FDIC is not a chartering authority, it defers to State law regarding chartering document requirements.	II.A.
§390.331 Securities: Statement of non-insurance.	Rescind	Statement that a security is not insured is not necessary because it is not a “deposit” or “insured deposit” under §3(l) or (m) of the FDI Act, and part 328 prohibits use of the FDIC seal in advertising nondeposit products.	II.B.
§390.332 Merger, consolidation, purchase or sale of assets, or assumption of liabilities	Rescind; amend subpart D of part 303 to apply to State savings associations (SSAs) and take into account Home Owners’ Loan Act (HOLA) provisions regarding SSA mergers	As amended, part 303, subpart D would provide the same requirements for SSAs and State nonmember banks (SNBs) while addressing certain SSA-specific requirements of HOLA.	II.C.
§390.333 Advertising	Rescind	§5 of the Federal Trade Commission (FTC) Act prohibits unfair or deceptive trade practices or acts; the FDIC enforces §5 under §8 of the FDI Act. §390.333 prohibitions would be redundant.	II.D.
§390.334 Directors, officers, and employees	Rescind	A regulation of board membership/service for an SSA is unnecessary as SNBs and SSAs must comply with the laws of their chartering authorities. The FDIC Pocket Guide for Directors highlights appropriate conduct for directors.	II.E.
§390.335 Tying restriction exception	Rescind	The transferred regulation refers to “the regulations issued by the Board of Governors of the Federal Reserve System.” The Dodd-Frank Act gave the FRB rulemaking authority for §5(q) of HOLA (12 U.S.C. 1464(q)) and Reg LL (12 CFR 238), but enforcement authority to the appropriate Federal banking agency.	II.F.

12 CFR 390, Subpart S. State Savings Associations—Operations				
Section		Proposed Treatment	Rationale	NPR §
§390.336	Employment contracts	Rescind	§§ 30 and 39 of the FDI Act and Appendix A to part 364 prohibit unsafe and unsound employment compensation practices.	II.G.
§390.337	Transactions with affiliates	Rescind	§18(j) of the FDI Act and §11 of HOLA apply §§ 23A and 23B of the Federal Reserve Act to SNBs and SSAs, respectively, in the same manner and to the same extent as if they were member banks. The FDIC has interpreted “in the same manner” to include the application of the FRB’s Reg W, which implements §§ 23A and 23B.	II.H.
§390.338	Loans by State savings associations to their executive officers, directors, and principal shareholders	Rescind §; amend 337.3 (1) to apply to FDIC-supervised institutions and (2) to correct cross-references necessitated by the FRB’s renumbering of Regulation O (3) to eliminate transition provisions of 337.3 that are no longer needed	§390.338 is redundant of §337.3 as amended	II.I.
§390.339	Pension plans	Rescind	The §364 Interagency Safety and Soundness Guidelines prohibits compensation practices that could lead to material loss or damage to the sponsor. ERISA and Internal Revenue Code recordkeeping provisions also are applicable.	II.J.
§390.340	Offers and sales of securities at an office of a State savings association	Rescind	The Interagency Statement on Retail Sales of Nondeposit Investment Products and the FDIC Statement of Policy Regarding the Use of Offering Circulars in Connection with Public Distribution of Bank Securities address the substance of this section.	II.K.
§390.341	Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital	Rescind	Many of the requirements of §390.341 are duplicative of the FDIC Statement of Policy Regarding the Use of Offering Circulars in Connection with Public Distribution of Bank	II.L.

12 CFR 390, Subpart S. State Savings Associations—Operations			
Section	Proposed Treatment	Rationale	NPR §
		Securities. Further, the criteria for tier 2 capital treatment are in the FDIC's capital rules in part 324.	
§390.342 Capital distributions by State savings associations	Rescind	With the rescission of 390.342-348, this scoping § is not necessary.	II.M.3.
§390.343 What is a capital distribution?	Rescind; amend part 303, subpart K (implementing §38 of the FDI Act (PCA)) to apply to SSAs.	Capital distributions are defined in §§ 18(i) and 38 of the FDI Act and in 12 CFR part 303, subpart K.	II.M.4.
§390.344 Definitions applicable to capital distributions	Rescind	Definitions applicable to this group of §§ are not necessary because we are rescinding this group of §§.	II.M.5.
§390.345 Must I file with the FDIC?	Rescind; amend §§ 303.203, 303.241 to make applicable to SSAs.	The four instances in which an application is required and the 2 instances where a notice is required generally are covered by §§ 303.203 and 303.241 (as amended). The revised treatment will apply the same obligations on SSAs as on SNBs.	II.M.6.
§390.346 How do I file with the FDIC?	Rescind	§390.346 provides filing instructions for capital distributions that are subject to application or notice requirements under §390.345, including instructions concerning a filing's content, schedules, and timing. Because staff proposes rescinding §390.345, these provisions would no longer be applicable. Filing requirements are in part 303 subpart K.	II.M.7.
§390.347 May I combine my notice or application with other notices or applications?	Rescind	With the rescission of §390.245, §390.247 is unnecessary. §§ 303.203 and 303.241 permit filings subject to those §§ as a single application or concurrently with other filings.	II.M.8.
§390.348 Will the FDIC permit my capital distribution?	Rescind	Because we propose to rescind §390.245, §390.348 is irrelevant. Applications under §18(i) of the FDI Act and §303.241 are subject to the statutory factors in §18(i)(4) of the FDI Act.	II.M.9.

12 CFR 390, Subpart S. State Savings Associations—Operations			
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§390.349 Management and financial policies	Rescind	§390.349 implements §4 of HOLA, requiring that SSAs be operated in a safe and sound manner and encouraging SSAs to provide housing credit safely and soundly. Pursuant to §39 of the FDI Act (which requires the federal banking agencies to prescribe safety and soundness standards) the FDIC has promulgated the Interagency Safety and Soundness Guidelines at 12 CFR part 364, App. A. §390.349 is duplicative of the Interagency Safety and Soundness Guidelines.	II.N.
§390.350 Examinations and audits; appraisals; establishment and maintenance of records	Rescind	§390.350(a) provides for periodic examinations, which is redundant of §337.12. §390.350(a) and (b) allow the FDIC to require an appraisal of real estate in connection with an examination. §323.3(c) allows the FDIC to require an appraisal whenever the FDIC believes it is necessary to address safety and soundness concerns. Thus, the appraisal provisions of 390.350(a) and (b) are not necessary. §390.350(c) provides for maintenance of accurate and complete records similar to the requirements of the Interagency Safety and Soundness Guidelines at 12 CFR part 364, App. A. §390.350(d) requires prior notice of relocating records, but there is no similar provision that applies to SNBs. Staff recommends rescission to reduce burden. §390.350(e) provides for the same notification of performance of bank services requirements found in §304.3(d).	II.O.
§390.352 Financial derivatives	Rescind	§28(a) of the FDI Act and 12 CFR part 362 allow an SSA to engage in activities permissible for a Federal savings association, subject to conditions. §163.172 of the OCC's regulations governs the financial derivatives actions of	II.P.

12 CFR 390, Subpart S. State Savings Associations—Operations			
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		FSAs, rendering §390.352 unnecessary.	
§390.353 Interest-rate-risk-management procedures	Rescind	The FDIC has existing regulations regarding interest rate risk management (IRRM). Part 364 App. A, promulgated pursuant to §39 of the FDI Act, contains recommendations re IRRM policies and procedures. Since those regulations may be directly applied to SSAs, staff recommends rescission and removal of §390.353.	II.Q.
§390.354 Procedures for monitoring Bank Secrecy Act (BSA) compliance	Rescind; amend §§326.1 and .8 to apply to FDIC-supervised institutions.	§326.8 contains nearly identical BSA procedures for SNBs to those in §390.354. Staff recommends amending §326.8 to apply to all FDIC-supervised institutions	II.R.
§390.355 Suspicious Activity Reports and other reports and statements	Rescind; amend §§ 353.1 and .3 to apply to FDIC-supervised institutions	<p>Subsection (a) requires SSAs to make periodic reports to the FDIC in such a manner and on such forms as the FDIC may prescribe. Various statutes and regulations require reporting to the FDIC, making §390.355(a) unnecessary.</p> <p>Subsection (b) prohibits SSAs from making false or misleading statements or omissions. The OCC rule applies to all savings associations, and FDIC can enforce that rule.</p> <p>Subsection (c) requires a SSA maintaining bond insurance coverage to promptly notify its carrier and file a proof of loss concerning any covered losses more than twice the deductible amount. Staff has not identified a direct need for this provision, and there is no analogous provision in Federal or state banking law. Parity and burden reduction justify rescission and removal.</p> <p>Subsection (d) requires SSAs to file a Suspicious Activity Report (“SAR”) when they detect a known or suspected violation of Federal law or a suspicious transaction related</p>	II.S.

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		<p>to a money laundering activity or a violation of law or regulation. Part 353 and 31 U.S.C. § 5813(g) provide the basis for the FDIC with respect to SNBs and are sufficient for SSAs.</p> <p>Subsection 390.355(e) requires SSAs within the jurisdiction of a Federal Home Loan Bank (FHLB) to provide data from the Call Report upon the request of the FHLB. The FHLB has discontinued the report for which the information collection was designed and relies on another index. Thus, 390.355(e) is moot.</p>	
§390.356	Bonds for directors, officers, employees, and agents; form of and amount of bonds	Rescind	II.T.
§390.357	Bonds for agents	Rescind	II.U.
§390.358	Conflicts of interest	Rescind	I.V.
§390.359	Corporate opportunity	Rescind	II.W.
§390.360	Change of director or senior executive officer	Rescind; amend part 303, subpart F to apply to SSAs	II.X.1
§390.361	Applicable definitions	Rescind; amend part 303, subpart F to apply to SSAs	II.X.2

12 CFR 390, Subpart S. State Savings Associations—Operations			
Section	Proposed Treatment	Rationale	NPR §
§390.362 Who must give prior notice?	Rescind; amend part 303, subpart F to apply to SSAs	After amending subpart F of part 303 so that it applies to SSAs, section 390.362 is redundant of section 303.102 with one exception. Section 390.362(b) permits an individual not nominated by management and seeking election to the board to file an advance notice <i>or</i> the notice required by section 390.368. FDIC does not believe the advance notice option is necessary for prudent supervision and, therefore, in the interest of supervisory consistency between SNBs and SSAs, recommends that section 390.362 be rescinded.	II.X.3
§390.363 What procedures govern the filing of my notice?	Rescind	Section 390.363 references sections 390.103 through 390.110 for filing procedures. These sections are substantively similar to the rules found in subpart A of part 303 that prescribe the general procedures for submitting filings to the FDIC.	II.X.4
§390.364 What information must I include in my notice?	Rescind	Section 390.364 is substantively similar to section 303.102, but section 303.102 does not specifically require fingerprints to be obtained.	II.X.5
§390.365 What procedures govern the FDIC's review of my notice for completeness?	Rescind; amend part 303, subpart F to apply to SSAs	Section 390.365 refers to procedures and timelines the FDIC will follow in reviewing a notice and is substantively similar to section 303.11 and subsection 303.103(a). Section 303.11 applies to all filings and after amending subpart F of part 303 so that it applies to SSAs, section 390.365 will be unnecessary.	II.X.6
§390.366 What standards and procedures will govern the FDIC review of the substance of my notice?	Rescind; amend part 303, subpart F to apply to SSAs	After amending subpart F of part 303 so that it applies to SSAs, section 390.366 is redundant of section 303.103(c).	II.X.7
§390.367 When may a proposed director or senior executive officer begin service?	Rescind; amend part 303, subpart F to apply to SSAs	Section 390.367 is substantively similar to subsections 303.103 (a) and (b). After amending subpart F of part 303 so that it applies to SSAs, section 390.367 will be	II.X.8

12 CFR 390, Subpart S. State Savings Associations—Operations			
Section	Proposed Treatment	Rationale	NPR §
		unnecessary and duplicative of subsections 303.103 (a) and (b).	
§390.368 When will the FDIC waive the prior notice requirement?	Rescind; amend part 303, subpart F to apply to SSAs	Section 390.398 is substantively similar to paragraph (c) of section 303.102. There is a minor difference in the timing for filing a notice for directors elected without the nomination of management (7 days versus 2 business days). Because maintaining alternative procedures for SSAs and SNBs would be confusing and burdensome and because section 390.398 is otherwise substantively similar to paragraph (c) of section 303.102, after amending subpart F of part 303 so that it applies to SSAs, FDIC staff proposes to rescind section 390.398.	II.X.9