

MEMORANDUM TO: The Board of Directors

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

SUBJECT: *Final Rule.* Removal of Transferred OTS Regulations Regarding Prompt Corrective Action Directives (Part 390 Subpart Y) and Conforming Amendments to Part 308 Subpart Q.

SUMMARY AND RECOMMENDATION:

Staff is presenting for approval of the FDIC Board of Directors (“Board”) and authorization for publication in the *Federal Register*, the attached final rule to rescind part 390, subpart Y, of title 12, Code of Federal Regulations (“part 390, subpart Y”), entitled *Prompt Corrective Action*, relating to prompt corrective action directives and enforcement at State savings associations. In addition, the final rule will amend sections of part 308, subpart Q of the FDIC’s existing regulations on the issuance and review of orders pursuant to the prompt corrective action provisions of the Federal Deposit Insurance Act to make it clear that part 308, subpart Q, applies to all insured depository institutions for which the FDIC is the appropriate Federal banking agency. Rescinding part 390, subpart Y will serve to streamline the FDIC’s regulations. The final rule rescinds part 390, subpart Y; reserves the subpart for future use; amends part 308, subpart Q; and becomes effective 30 days after publication in the *Federal Register*.

Concur:

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Nicholas J. Podsiadly
General Counsel

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),¹ 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 Office of Thrift Supervision (“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 (“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, P. Law 111-203, 124 Stat. 1367 (2010).

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 its authority under the Dodd-Frank Act, the FDIC’s Board reissued and re-designated certain transferring regulations of the former OTS.³ 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 them, or rescinding them, as appropriate. The final rule is part of that effort.

² 76 FR 39247 (July 6, 2011).

³ 76 FR 47652 (Aug. 5, 2011).

Part 390, Subpart Y—Prompt Corrective Action

Part 390, subpart Y (formerly OTS section 12 CFR part 565) was promulgated in 2011 as part of the transfer of a number of regulations from the former OTS pursuant to the Dodd-Frank Act. The OTS regulations, formerly found at 12 CFR part 565, sections 565.7, 565.8, 565.9, and 565.10, were transferred to the FDIC with only nomenclature changes and now comprise part 390, subpart Y.

Notice of Proposed Rule Making to Remove Part, 390, Subpart Y and Conforming Amendments to Part 308 Subpart Q.

Staff has conducted a careful review and comparison of part 390, subpart Y and has concluded that the provisions are substantially similar to similar regulations related to state non-member banks found in the FDIC's regulations at part 308, subpart Q. The FDIC proposed combining the regulations to make clear the same procedures apply to all FDIC-supervised institutions. After part 308, subpart Q is amended, part 390, subpart Y would be redundant and will be rescinded.

Part 390, subpart Y also references savings and loan holding companies. When the regulation was transferred from the OTS, the references to “any company that controls the State savings association” were not deleted with the other technical amendments. The FDIC is not the appropriate successor agency for supervision of savings and loan holding companies. Under the Dodd-Frank Act, supervision of savings and loan holding companies was transferred to the Federal Reserve Board.⁴ The provisions in the FDIC regulations relating to “any company that

⁴ 12 U.S.C. 5412(b)(1).

controls the State savings association” will therefore be set aside and not incorporated into the existing FDIC regulations at part 308, subpart Q addressing FDIC-supervised institutions.

The proposed rule explained the conforming changes to the FDIC’s existing rules regarding prompt corrective action directives and enforcement. These changes would clarify the administrative procedures relevant to State savings associations by amending certain parts of part 308 of the FDIC’s regulations to clarify that part 308, subpart Q applies to all insured depository institutions, including State savings associations, for which the FDIC is the appropriate Federal banking agency. To clarify that part 308, subpart Q applies to all institutions for which the FDIC is the appropriate Federal banking agency, the rule will amend sections 308.200 through 308.204 to replace the phrases “banks” and “insured branches of foreign banks” throughout subpart Q with the phrase “FDIC-supervised institution.” Under the rule, section 308.200 would be revised to add the definition of the term “FDIC-supervised institution” to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act.⁵

Additionally, the rule would make one additional change to conform the FDIC’s regulations relating to prompt corrective action directives that apply to banks and the former OTS regulations relating to State savings associations. Sections 308.202 and 390.457 describe procedures to reclassify an institution’s capital category based on an FDIC-supervised financial institution being in an unsafe or unsound condition or being engaged in unsafe or unsound practices and not corrected the deficiency. These two regulations differ in one respect. The FDIC regulation at 308.202(a)(6) provides that when a hearing is ordered, it will begin no later

⁵ 12 U.S.C. 1813(q).

than 30 days from the date of the request unless the bank requests a later date. The former OTS version of this regulation, incorporated by the FDIC at 390.457, provides that the hearing should be ordered within 30 days of request unless the FDIC allows further time at the request of the State savings association. While both of these provisions demonstrate that a hearing is likely to be delayed at the request of the institution, the former OTS version of the regulation is written with greater clarity that the FDIC will evaluate and may then provide consent to the request. The OTS version of the regulation makes it clear that there is no automatic extension granted to the institution. This language makes it the preferred choice when reconciling the two regulations into one regulation that applies to all FDIC-supervised institutions, and the changes to this aspect of the regulation will provide greater clarity to those institutions going forward.

On September 28, 2020, the FDIC published a notice of proposed rulemaking in the *Federal Register*,⁶ with a 30-day comment period on the proposed rescission of part 390, subpart Y and conforming amendments to part 308 subpart Q. No comments were received.

Final Rule

The final rule rescinds part 390, subpart Y, reserves the subpart for future use, makes conforming amendments to part 308 subpart Q, effective 30 days after the date of publication in the *Federal Register*.

Conclusion

Staff recommends that the Board approve the attached final rule and authorize its publication in the *Federal Register*, with an effective date of 30 days after the date of publication in the *Federal Register*.

⁶ 85 FR 60738 (Sept. 28, 2020).

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