


MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson 
Director
Division of Risk Management Supervision

Michael H. Krimminger 
General Counsel

DATE: June 14, 2011

SUBJECT: Enforcement and Transfer of Regulations of the Office of Thrift Supervision Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

I. SUMMARY

Staff recommends that the Board of Directors (Board) authorize publication in the *Federal Register* of three documents, all dealing with the transfer of certain functions of the Office of Thrift Supervision (OTS) to the Federal Deposit Insurance Corporation (FDIC) as of the established OTS transfer date of July 21, 2011. The documents recommended for publication are (1) a Joint Notice of a List of Regulations of the Office of Thrift Supervision (OTS) that will be Enforced by the Office of Comptroller of the Currency (OCC) and the FDIC (Joint Notice); (2) an Interim Rule with request for comments concerning Disclosure of Information and the Privacy Act (Interim Rule A); and (3) an Interim Rule with request for comment concerning Transferring Rules of the OTS (Interim Rule B).

Discussion

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or the Act) generally transfers the powers, duties, and functions of the OTS to the FDIC (with respect to State savings associations), to the OCC (with respect to

Federal savings associations), and to the Board of Governors of the Federal Reserve System (FRB) (with respect to savings and loan holding companies.) Similarly, the Dodd-Frank Act specifically amended section 3 of the Federal Deposit Insurance Act (FDI Act), revising the definition of “appropriate Federal banking agency” to designate the FDIC as the “appropriate Federal banking agency” for State savings associations, the OCC for Federal savings associations, and the FRB for savings and loan holding companies. In the same manner, records, examination papers, and other property of the OTS are redistributed among the three agencies.

The Dodd-Frank Act provided rulemaking authority to the OCC, with respect to both State and Federal savings associations, and to the FRB with respect to savings and loan holding companies. Although the Dodd-Frank Act did not provide the FDIC with specific rulemaking authority over State savings associations, the FDIC retained the authority to issue regulations under the FDI Act and other existing laws as the “appropriate Federal banking agency” (or under similar statutory terminology). As a result, pursuant to those laws, the FDIC, as the newly-designated “appropriate Federal banking agency” for State savings associations, is authorized to issue regulations involving such associations. (For example, section 39 of the FDI Act, 12 U.S.C. § 1831p-1, permits the FDIC, as the “appropriate Federal banking agency,” to prescribe regulations applicable to State savings associations, as well as state nonmember banks, relating to “internal controls, information systems, and internal audit systems,” among other things.)

The three documents proposed for publication in the *Federal Register* are consistent with the OTS transfer provisions of Title III of the Dodd-Frank Act and with

the technical and conforming amendments to the FDI Act (and other laws) prescribed by that Title. Each proposed publication is described below.

The Joint Notice

The Joint Notice will provide, in chart form, a list of the former OTS regulations that will be enforced by the FDIC, in the case of State savings associations, and by the OCC, in the case of Federal savings associations. It is required by section 316(c) of Title III of the Dodd-Frank Act. That section requires the FDIC and the OCC, after consultation with one another, to identify former regulations of the OTS that will be enforced by each agency following the sunset of the OTS. Once each of the agencies has identified the rules that each will enforce, the section also requires the FDIC and the OCC to publish their respective lists in the *Federal Register* no later than the designated OTS transfer date of July 21, 2011. Staff notes that the FDIC does not have rulemaking authority for some of the rules that the FDIC is charged with enforcing. For example, although the FDIC will enforce the Community Reinvestment Act (CRA) as to State savings associations, section 358 of the Dodd-Frank Act authorizes the OCC -- and not the FDIC -- to issue CRA regulations applicable to both State and Federal savings associations.

Staff from the FDIC and the OCC believe that it would be beneficial to have a joint notice published in a single *Federal Register* document. In so doing, both regulated savings associations and the public will be alerted to a single document that will indicate which rules would be enforced by the OCC, as to Federal savings associations, and which would be enforced by the FDIC, as to State savings associations. The proposed *Federal Register* document relating to the Joint Notice is attached.

Interim Rule A

Section 312 of the Dodd-Frank Act transfers the functions of the OTS relating to State savings associations to the FDIC. Section 323 of the Act similarly transfers to the FDIC records, reports of examination, and other property of the OTS relating to State savings associations.

Staff has proposed Interim Rule A to amend the FDIC's Part 309 (Disclosure of Information) and Part 310 (Privacy Act Regulations). Although only technical changes will be made to Parts 309 and 310, the amendments will clarify that, as of the transfer date, the FDIC's procedural rules will apply to information transferred to the FDIC from the OTS and will serve to reduce confusion among those parties regarding this information. Because only technical amendments are being proposed to the FDIC's procedural rules and because it is important to emphasize that, as of the transfer date, the FDIC's regulations will govern transferred OTS records and information, staff recommends that the Board find good cause to issue the proposed amendments as an Interim Rule, effective immediately upon the transfer date. Public comment would be accepted for 30 days. The proposed *Federal Register* document relating to Interim Rule A is attached.

Interim Rule B

The FDIC has independent rulemaking authority for each of the transferred OTS rules that will be republished as FDIC rules as in proposed Interim Rule B. The rules republished in Interim Rule B would regulate only State savings associations, consistent with the Dodd-Frank Act's allocation to the FDIC of the duties and functions of the OTS relating to these associations. Similarly, the OCC and the FRB will republish former

OTS rules relating to the functions and duties of the OTS transferred to those agencies, respectively. Since the Dodd-Frank Act did not give the FDIC authority over Federal savings associations or savings and loan holding companies, the sections of the OTS rules that previously regulated those entities will not be republished by the FDIC.

The republished rules contained in proposed Interim Rule B will be transferred to the FDIC with only minor technical, conforming, or nomenclature changes. (For example, references in the former OTS rules to the “OTS,” the “Director,” and the “Office” [of Thrift Supervision] will be changed to the “FDIC” or the “Board of Directors” [of the FDIC].) No substantive changes are proposed to the former OTS rules at this time. FDIC staff will evaluate the transferred OTS rules and may later recommend incorporating the transferred rules into existing FDIC rules, amending them, or rescinding them, as appropriate.

Since the republished OTS rules previously were issued by the OTS pursuant to notice and comment rulemaking and since the FDIC’s proposed revisions to those rules involve only non-substantive technical, conforming, or nomenclature changes, staff recommends that the Board find good cause to issue the proposed amendments as an Interim Rule, effective immediately upon the transfer date. Public comment would be accepted for 60 days. The proposed *Federal Register* preamble relating to Interim Rule B is attached. Also attached is a redlined example of one of the approximately 30 transferring OTS rules that will add almost four hundred pages of additional text to the FDIC’s existing regulations when the OTS rules are republished as FDIC rules.

II. RECOMMENDATION

The Division of Risk Management Supervision and the Legal Division recommend that the Board approve the publication in the *Federal Register* of the Joint Notice, Interim Rule A, and Interim Rule B in substantially the form provided, and further recommends that the Board find good cause to make proposed Interim Rule A and Interim Rule B effective upon the transfer date.

Further, recognizing that consideration of nomenclature, numbering, and other non-substantive changes involving hundreds of pages of transferring rules is a ministerial activity, the Division of Risk Management Supervision and the Legal Division recommend that the Board delegate to the Executive Secretary, or his designee, the authority to make changes to the nomenclature, internal numbering, and non-substantive changes as necessary to transfer effectively those former OTS regulations into the FDIC's regulations and to publish such changes in the *Federal Register*, after consultation with the General Counsel, or his designee.

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