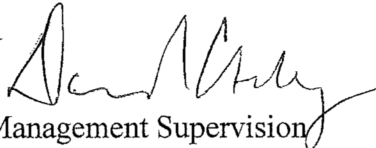
TO: The Board of Directors

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



DATE: June 16, 2014

SUBJECT: Review of Regulations Transferred from the Former Office of Thrift Supervision: Part 390, Subpart L – Electronic Operations

Recommendation

Staff recommends that the Federal Deposit Insurance Corporation ("FDIC") Board of Directors ("Board") approve the attached resolution to adopt and authorize for publication in the *Federal Register* a notice of proposed rulemaking ("NPR") to rescind and remove 12 C.F.R. Part 390, Subpart L ("Part 390, Subpart L"), entitled *Electronic Operations*. Rescinding Part 390, Subpart L, will serve to streamline the FDIC's rules and eliminate obsolete, unnecessary, and burdensome regulations.

Status of OTS Rules Review

The proposed rescission of Part 390, Subpart L, completes the FDIC's review of this subpart of the former Office of Thrift Supervision ("OTS") rules for rescission, amendment, or adoption. This subpart was included in the regulations that were transferred to the FDIC from the OTS on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1]

The proposed rescission also fulfills the FDIC's review of the Electronic Operations section of the FDIC rules and regulations impacted by the abolishment of the OTS and the transfer of supervisory responsibilities for state-chartered savings associations ("State savings associations") to the FDIC.

Background

The Dodd-Frank Act, 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, ("Transfer Date"), the powers, duties and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*).

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 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 this authority, 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, or rescinding them, as appropriate.

Part 390, Subpart L –Electronic Operations

In 1999, the former OTS issued its Electronic Operations rule, 12 C.F.R. Part 555, Subpart B ("Part 555, Subpart B"), which required savings associations to file a written notice with the OTS at least 30 days before establishing a transactional website.[4] At the time the OTS issued its

[2] 76 Fed. Reg. 39247 (July 6, 2011).
[3] 76 Fed. Reg. 47652 (Aug. 5, 2011).
[4] 12 C.F.R. § 555.310.

Electronic Operations rule, the FDIC, OCC,[5] and the FRB issued no similar rule or requirement. Pursuant to the Dodd-Frank Act, the former OTS rule was transferred to the FDIC with only technical and nomenclature changes and is currently located in the FDIC's rules at 12 C.F.R. Part 390, Subpart L.

In issuing its Electronic Operations rule, the OTS sought to "monitor adequately savings associations' technological innovations and to assess security, compliance, and privacy risks."[6] The OTS reasoned that the notice requirement would aid the agency in assisting savings associations "that are contemplating or already conducting Internet operations to identify and address the risks that accompany such activities" and would "help institutions avoid problems and protect consumers."[7] At the time, the OTS concluded that a requirement that each savings association must provide advance notice to the OTS of the association's intent to establish a transactional website would assist the OTS in evaluating safety and soundness, compliance, and other risks.

Significantly, the OTS noted that "[a]s technologies mature and the industry and OTS gain additional experience, the OTS may revise the rule to no longer require notice before establishing a transactional website."[8] In a 2001 review of its regulations regarding electronic delivery of financial products and services, the OTS suggested that a goal of the Electronic Operations rule was to impose a notice requirement in lieu of specific operational standards as the least burdensome way to regulate savings associations. The OTS also stated that it "designed its regulations to help ensure that it would have sufficient information to understand developing technologies, to provide appropriate guidance on these technologies, and to supervise electronic operations effectively."[9]

After careful consideration of the former OTS's general prior notice requirement, the FDIC has reached the same conclusion it has in the past, particularly in light of continuing advancements in electronic banking and related technology. Specifically, the FDIC concludes there is no supervisory value in a requirement that an insured depository institution ("IDI") give prior notification to the FDIC about its establishment of a transactional website. Given the rapid evolution, innovation and current state of technological products and interfaces with customers, the FDIC relies on dynamic, in-depth supervisory means to evaluate an IDI's information technology ("IT") systems. Instead of a general notice requirement for the establishment of a

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[5] The OCC has an Electronic Activities rule that "identifies the criteria that the OCC uses to determine whether an electronic activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24 (Seventh) or other statutory authority." 12 C.F.R. § 7.5000. However, this rule does not contain a prior notice requirement before establishing a transactional website.

[6] 63 Fed. Reg. 65673, 65678 (Nov. 30, 1998).

[7] 63 Fed. Reg. 43327, 43328 (Aug. 13, 1998). The OTS articulated concerns about "protecting the privacy of individuals" and "other operational and compliance risks presented by Internet banking" and noted its intent to "increase its monitoring of websites for compliance with disclosure laws and regulations." *Id.*

[8] 63 Fed. Reg. 43327, 43329 (Aug. 13, 1998).

[9] 66 Fed. Reg. 31186, 31187 (June 11, 2001).

transactional website, the FDIC has developed and relies upon more useful and ongoing sources of information to evaluate the financial condition, risks and regulatory compliance by FDIC-supervised institutions. Prior notification that an institution is establishing a transactional website is an outdated and unnecessary requirement.

Currently, the FDIC receives information about an IDI's IT systems, including its transactional websites, from various examinations and other sources of information that render a general prior notice requirement such as the former OTS rule for savings associations, outdated and unnecessary for the FDIC's supervisory purposes of risk management and compliance. For example, the FDIC's IT pre-examination questionnaire to IDIs requires information about the IDI's technological developments, including whether there were any changes in technology that were implemented since the previous FDIC examination.

Changes in technology include, for example, any "new service provider relationships, new software applications and/or service offerings."[10] The IT pre-examination questionnaire also asks whether the IDI plans to "deploy new technology within the next 12 months," which would include the implementation of a transactional website. If the answer is "yes," the questionnaire asks whether the risks associated with the new technology were reviewed by the IDI during the institution's most recent risk assessment.[11] The FDIC then reviews the IDI's risk assessment at each examination. The questionnaire also asks whether the IDI has "identified and reported its service provider relationships (both domestic and foreign-based) to the FDIC,"[12] which would include those with Technology Service Providers ("TSPs"). This information is also required to be reported by the IDI to the FDIC pursuant to the Bank Service Company Act ("BSCA").[13]

As part of its examination process, the FDIC also monitors technology developments and TSPs. In periodic on-site IT examinations, FDIC examiners obtain information regarding the establishment of transactional websites and any other technological developments the institution has implemented. Through the Federal Financial Institutions Examination Council ("FFIEC"), the FDIC, jointly with other Federal banking agencies, also participates in examinations of all of the major TSPs. In these examinations, the FDIC obtains customer lists of all financial institutions that have contracted for services from the particular service provider. These lists are more up to date than a point-in-time notice that the Electronic Operations rule offers and they also provide the FDIC with notice of any changes in TSPs.

During the FDIC's compliance examinations, IDIs are also routinely examined for compliance with applicable consumer protection laws and regulations, such as the Truth in Lending Act, Regulation Z; the Electronic Funds Transfer Act, Regulation E; the Equal Credit Opportunity Act, Regulation B; the Truth in Savings Act, Regulation DD; and Section 5 of the Federal Trade

[10] Information Technology Officer's Questionnaire, Part 1(h) (Dec. 2007).
[11] Information Technology Officer's Questionnaire, Part 1(k) (Dec. 2007).
[12] Information Technology Officer's Questionnaire, Part 5(b) (Dec. 2007).
[13] 12 U.S.C. §§ 1861 *et seq.*

Commission Act that prohibits unfair or deceptive acts or practices. These examinations address any problems IDIs may have with the adequacy of consumer disclosures, among other things.

In addition, the BSCA requires IDIs to provide written notice to the FDIC (or other appropriate Federal banking agency) of the existence of third party service relationships "within thirty days after the making of such service contract or the performance of the service, whichever occurs first."[14] The BSCA covers services performed by third parties, including TSPs and the FDIC has long interpreted the BSCA to include within its scope Internet banking service providers.[15]

Specific and ongoing information obtained and evaluated by the FDIC through the IT pre-examination questionnaire, on-site IT examinations, TSP examinations and compliance examinations as well as the BSCA notice better enables the FDIC to evaluate existing or potential safety and soundness and compliance concerns. The FDIC's IT examination process renders a general, point-in-time notice such as that required by the OTS's Electronic Operations rule, to be unnecessary. The rule is inefficient and unnecessarily burdensome, and it should be eliminated.

In its supplemental notice of proposed rulemaking, the OTS expressed concerns regarding the safety of Internet banking and protecting customers' privacy in support of its rule.[16] However, these supervisory concerns have been addressed elsewhere effectively, rendering the Electronic Operations rule superfluous. For example, in 2005 and most recently updated in 2011, the FDIC, with the other FFIEC agencies, issued guidance that describes supervisory expectations regarding customer authentication for high-risk transactions, layered security programs, and other controls related to Internet banking.[17] The guidance includes regulatory expectations about enhanced authentication methods banks must use when authenticating the identity of customers using on-line products and services, the need for layered security, and minimum control expectations for certain online banking activities.

In addition, 12 C.F.R. Part 364, Appendix B ("Part 364, Appendix B") to the FDIC regulations, which implements the Graham-Leach-Bliley Act, addresses the bank's requirements for safeguarding customer information, which includes transactional websites.[18] An institution's compliance with Part 364, Appendix B is assessed at every FDIC IT examination and specifically addressed in each Report of Examination.

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[14] 12 U.S.C. § 1867(c)(2). Although the BSCA notice does not require a prior notification like the Electronic Operations notice requirement, it is supplemented by other, ongoing and detailed sources of supervisory information.
[15] *See Bank Service Company Act*, FDIC, FIL-49-99 (June 3, 1999).
[16] 63 Fed. Reg. 43327 (Aug. 13, 1998).
[17] The guidance was first issued in 2005, *see Authentication in an Internet Banking Environment*, FDIC, FIL-103-2005 (Oct. 12, 2005), and was updated in 2011, *see FFIEC Supplement to Authentication in an Internet Banking Environment*, FDIC, FIL-50-2011 (June 29, 2011).
[18] *Interagency Guidelines Establishing Information Security Standards*, 12 C.F.R. Part 364, Appendix B.

After careful review of the OTS's transferred rule in Part 390, Subpart L, and the former OTS's stated rationale for the rule, staff recommends that the FDIC, as the appropriate Federal banking agency for State savings associations, propose to rescind and remove the former OTS rule in its entirety. Rescinding Part 390, Subpart L also will serve to streamline the FDIC's rules and eliminate obsolete, unnecessary, and burdensome regulations. If the proposal is adopted in final form, all IDIs regulated by the FDIC—including State savings associations—will be regulated in a uniform manner.

EGRPRA

Section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA") requires the FDIC to review all of its regulations at least once every 10 years in order to identify any outdated or otherwise unnecessary regulations imposed on IDIs.[19] The FDIC's review is ongoing and must be completed by 2016. The attached NPR solicits comments on whether the proposed rescission of Part 390, Subpart L would impose any outdated or unnecessary regulatory requirements on any IDIs.

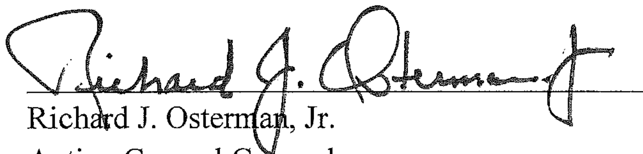
Staff members knowledgeable about this case

Frederick M. Coleman, Division of Risk Management Supervision, (703) 254-0452

Martha L. Ellett, Legal Division, (202) 898-6765

Jennifer Maree, Legal Division, (202) 898-6543

Concur



Richard J. Osterman, Jr.
Acting General Counsel
Legal Division

[19] Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).