

February 28, 2018

TO: The Board of Directors

FROM: Doreen Eberley
Director
Division of Risk Management

SUBJECT: Review of Regulations Transferred from the Former Office of Thrift Supervision: Part 391, Subpart A – Security Procedures

Summary of Recommendation

Staff recommends that the FDIC Board of Directors (“Board”) approve and authorize for publication in the *Federal Register* a final rule (“Final Rule”) to: (1) rescind and remove a former Office of Thrift Supervision (OTS) rule currently located at 12 C.F.R. Part 391, Subpart A, and entitled *Security Procedures* (Part 391, Subpart A) and (2) make technical and conforming amendments to its primary counterpart in the FDIC’s rules, 12 C.F.R. Part 326, Subpart A, entitled *Minimum Security Procedures*, to include State-chartered savings associations (State savings associations).

The FDIC and former OTS minimum security rules (requiring designation of a security officer and a security program with lighting, alarms, cameras, and other devices) are substantively nearly identical except the OTS rule also contains a provision at the end of the Part 391, Subpart A, directing savings associations to comply with the *Interagency Guidelines Establishing Information Security Standards (Interagency Guidelines)*. The *Interagency Guidelines*, jointly adopted by OTS, the FDIC and other Federal banking agencies in 2001, are located in FDIC rules at 12 C.F.R. Part 364 (Part 364) Appendix B, which was revised in 2015 as part of the former OTS rule integration process and made applicable to State savings associations. For these reasons, Part 391, Subpart A is redundant and unnecessary.

On November 1, 2016, a notice of proposed rulemaking (“NPR” or “Proposed Rule”) was published in the *Federal Register* that proposed the removal of Part 391, Subpart A, and amendments to Part 326. The public comment period expired on January 3, 2017, and no comments were received. Accordingly, staff recommends that the Board approve and authorize the publication in the *Federal Register* of a Final Rule to adopt the Proposed Rule without changes.

Concur:

Charles Yi
General Counsel

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“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.¹ 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 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 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

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 12 U.S.C. §§ 5301 *et seq.* (2010).

² 76 Fed. Reg. 39247 (July 6, 2011).

³ 76 Fed. Reg. 47652 (August 5, 2011).

later recommend incorporation of the transferred OTS regulations into existing FDIC rules, amending or rescinding them as appropriate.

Part 391, Subpart A – Security Procedures

One of the regulations transferred to the FDIC governed former OTS’s oversight of certain security procedures of State savings associations. The *Security Procedures* rule, located in OTS rules at 12 C.F.R. Part 568, was transferred pursuant to the Dodd-Frank Act to the FDIC with only nominal changes and is currently located in the FDIC’s rules at 12 C.F.R. Part 391, Subpart A. The primary FDIC counterpart to Part 391, Subpart A is located in 12 C.F.R. Part 326, Subpart A. Part 326, Subpart A is entitled *Minimum Security Procedures* and governs FDIC oversight of minimum security procedures of State nonmember banks. One provision in Part 391, Subpart A, namely Section 391.5, is not contained in Part 326 but is addressed by Part 364, Appendix B, which was revised by the FDIC in 2015 and made applicable to State savings associations.

The primary statutory basis for Part 391, Subpart A and for Part 326, Subpart A, is the Bank Protection Act of 1968.⁴ The Bank Protection Act directed the appropriate Federal banking agencies and the OTS’s predecessor, the Federal Home Loan Bank Board (“FHLBB”), to establish “minimum standards” for banks and savings associations with respect to the “installation, maintenance and operation of security devices and procedures, reasonable in cost, to discourage robberies, burglaries, and larcenies” and to assist law enforcement “in identifying and apprehending persons who commit such acts.”⁵ The Federal banking agencies and the FHLBB consulted and cooperated with each other and issued substantively similar rules in January 1969.⁶

The agencies substantially revised the minimum security rules in 1991 to remove obsolete requirements (such as references to 16mm film speed for bank cameras) and to place greater responsibility on the boards of directors of insured financial institutions for establishing and ensuring the implementation and maintenance of security programs and procedures. The former FHLBB rules were redesignated as 12 C.F.R. Part 568 by the newly created OTS but the OTS rule in Part 568 and Part 326 in the FDIC rules remained substantively similar after these revisions.⁷

In 2001, in a rulemaking pursuant to Section 501 of the Gramm-Leach-Bliley Act⁸, the OTS, the FDIC and other Federal banking agencies issued *Interagency Guidelines for Safeguarding Customer Information* after notice and comment.⁹ Within this rulemaking, the OTS also

⁴ Pub. L. No. 90-389, 12 U.S.C. § 1882(a).

⁵ *Id.*

⁶ 34 Fed. Reg. 618 (January 16, 1969) (FDIC); 34 FR 621 (FHLBB); 34 FR 612 (OCC).

⁷ 56 Fed. Reg. 29565 (June 28, 1991); 56 FR 13579 (April 3, 1991).

⁸ Pub. L. No. 106-102, 15 U.S.C. § 6801 (1999).

⁹ 66 Fed. Reg. 8616 (February 1, 2001).

separately added a provision in its Part 568 security procedures rules directing saving associations and certain subsidiaries to comply with Appendix B to the *Interagency Guidelines*.¹⁰ Subsequently, the *Interagency Guidelines for Safeguarding Customer Information* were revised and renamed the *Interagency Guidelines for Establishing Information Security Standards* (*Interagency Guidelines*) in a joint rulemaking by the OTS, FDIC, and other Federal banking agencies. The *Interagency Guidelines* are located in FDIC rules at Part 364, Appendix B. Part 364 was reviewed and revised by the FDIC in 2015 and, among other things, made applicable to State savings associations as well as State nonmember banks.

NPR to Remove Part 391, Subpart A and Amend Part 326

On November 1, 2016, the FDIC published a Proposed Rule regarding the removal of Part 391, Subpart A, which governs FDIC oversight of minimum security procedures of State savings associations.¹¹ The NPR proposed removing Part 391, Subpart A from the Code of Federal Regulations in an effort to streamline FDIC regulations for all FDIC-supervised institutions. As discussed in the Proposed Rule, the FDIC carefully reviewed and compared 12 C.F.R. Part 326, Subpart A, with the transferred former OTS rule in Part 391, Subpart A. Staff has concluded that the FDIC's Part 326, Subpart A, with several technical amendments described below, will provide appropriate and sufficient oversight of the requirements for minimum security procedures of all insured depository institutions and State savings associations for which the FDIC is the appropriate Federal banking agency. In addition, Part 364 covers State savings associations as well as State nonmember banks, making the former OTS rule Section 391.5 unnecessary. Where possible, insured depository institutions for which the FDIC is the appropriate Federal banking agency should be subject to the same substantive and procedural rules.

The FDIC issued the Proposed Rule with a 60-day comment period, which closed on January 3, 2017. The FDIC received no comments on its Proposed Rule, and consequently staff recommends that the Board adopt the Final Rule as Proposed without any changes.

The Final Rule

As discussed in the Proposed Rule, Part 391, Subpart A, is substantially similar to Part 326, and the designation of Part 326 as the single regulatory authority with respect to minimum security procedures will serve to streamline the FDIC's rules and eliminate unnecessary regulations. If approved, the Final Rule, with corresponding amendments to Part 326, Subpart A, to include State savings associations and their subsidiaries within the scope and conforming definitions, would make all of the banks and State savings associations supervised by the FDIC subject to the FDIC's Part 326, Subpart A, as modified.

¹⁰ *Id.* at footnote 2. (The preamble footnote states that OTS was placing the *Interagency Guidelines* in its Part 570, appendix B and, at the same time, "has included a provision in Part 568 which governs primarily physical security procedures, requiring compliance with the Guidelines in appendix B to Part 570.")

¹¹ 81 Fed. Reg. 75753 (November 1, 2016).

Consistent with the Proposed Rule, if approved, the Final Rule will rescind Part 391, Subpart A, and complete the FDIC's review of this subpart of the 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 Act. Upon removal of 12 C.F.R. Part 391, Subpart A, the minimum security procedures regulations applicable for all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency, will be found at 12 C.F.R. Part 326, Subpart A, and entitled *Minimum Security Procedures*.

The Final Rule, if approved, will fulfill the FDIC's review of the Minimum Security Procedures sections of the FDIC rules and regulations impacted by the abolishment of the OTS and the transfer of supervisory responsibilities for State savings associations to the FDIC.

Part 326.0 – Authority, purpose and scope

Section 326.1 currently defines the scope of Part 326 only with respect to FDIC-insured State nonmember banks that are required to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in identifying and prosecution of persons who commit such acts.

Staff recommends the FDIC finalize modifications to the scope of Part 326, Subpart A, to include State savings associations to conform to and reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency.

Section 326.1 – Definitions

Section 326.1 currently contains a definition of "insured nonmember bank" that means any bank, including a foreign bank that has a branch the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act, and that is not a member of the Federal Reserve System. The term does not include any institution chartered or licensed by the Comptroller of the Currency, any District bank, or any savings association.

Since the definition does not include State savings associations and specifically excludes savings associations, the Final Rule would include a definition of "FDIC-supervised insured depository institution or institution," which would encompass both State nonmember insured banks as well as State savings associations to reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency. Accordingly, an "FDIC-supervised insured depository institution or institution" is defined in the Final Rule as "any State nonmember insured bank or State savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))." The term "FDIC-supervised insured depository institution" or "institution" will therefore be substituted throughout the rule where appropriate.

In addition, Section 326.1 does not currently contain a definition of “State savings association.” Accordingly, staff recommends in the Final Rule to add a definition of “State savings association” as having “the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))” in a newly created subsection (d).

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 insured institutions.¹² The FDIC completed its review and submitted a joint report to Congress in March 2017.¹³ The Proposed Rule solicited comments on whether the proposed rescission of Part 391, Subpart A, and amendments to Part 326, Subpart A would impose any outdated or unnecessary regulatory requirements on any IDIs. No comments were received. Upon review, staff does not believe that Part 326, as amended, imposes any outdated or unnecessary regulatory requirements on any insured depository institutions. Rather, staff believes that such action will harmonize FDIC’s regulations and ensure uniform treatment of all FDIC-supervised institutions.

Recommendation

Staff recommends that the Board approve the attached resolution to adopt and authorize the publication in the *Federal Register* the referenced Final Rule, to be made effective 30 days after its publication.

Staff members knowledgeable about this case:

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¹² Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 12 U.S.C. § 3311 (1996).

¹³ 82 Fed. Reg. 15900 (March 31, 2017).