

December 3, 2018

TO: The Board of Directors

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

Mark E. Pearce  
Director, Division of Depositor and Consumer Protection

SUBJECT: Notice of Proposed Rulemaking to (1) Rescind Regulations Transferred from the Former Office of Thrift Supervision, Part 390, Subpart P – Lending and Investment; (2) Amend Part 365, Subpart A – Real Estate Lending Standards; and (3) Rescind Part 365, Subpart B - Registration of Residential Mortgage Loan Originators

### Summary of Recommendation

Staff recommends that the FDIC Board of Directors (“Board”) approve and authorize for publication in the *Federal Register* with a 60-day public comment period, a notice of proposed rulemaking (“NPR”) to rescind and remove 12 CFR part 390, subpart P, entitled *Lending and Investment*, and amend 12 CFR part 365, subpart A, entitled *Real Estate Lending Standards*, to make it applicable to State savings associations. Further, the NPR proposes to rescind and remove 12 CFR part 365, subpart B concerning registration requirements for residential mortgage loan originators because it is no longer necessary in light of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>1</sup> Rescinding part 390, subpart P and part 365, subpart B will serve to streamline the FDIC’s regulations by eliminating unnecessary regulations. Technical amendment of part 365, subpart A also is necessary to reflect its application to all FDIC-supervised institutions including State savings associations.

Upon removal of part 390, subpart P, all FDIC-supervised institutions would follow regulations relating to: safety and soundness (12 CFR part 364), real estate lending (part 365, subpart A), and lending and investment activities (12 CFR part 362).

Separately, upon removal of part 365, subpart B, all FDIC-supervised institutions will continue to follow the Bureau of Consumer Financial Protection’s (“Bureau”) Regulation G (“Regulation G”)<sup>2</sup> related to the registration of residential mortgage loan originators, as required by the Dodd-Frank Act.

Concur:  
Charles Yi, General Counsel

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> 12 CFR § 1007.101, *et seq.*

## Background

### A. OTS Rule Transfer to FDIC

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,<sup>3</sup> 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 Act<sup>4</sup> 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<sup>5</sup> 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.”<sup>6</sup>

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act<sup>7</sup> 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<sup>8</sup> (“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<sup>9</sup> 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.<sup>10</sup> In the preamble to this interim rule, the FDIC specifically noted that its staff would evaluate the transferred OTS

<sup>3</sup> 12 U.S.C. § 5411.

<sup>4</sup> 12 U.S.C. § 5414(b).

<sup>5</sup> 12 U.S.C. § 5414(c).

<sup>6</sup> 76 FR 39247 (July 6, 2011).

<sup>7</sup> 12 U.S.C. § 5412(b)(2)(B)(i)(II).

<sup>8</sup> 12 U.S.C. § 1811 *et seq.*

<sup>9</sup> 12 U.S.C. § 1813(q).

<sup>10</sup> 76 FR 47652 (Aug. 5, 2011).

regulations and might later recommend incorporating the transferred OTS regulations into existing FDIC regulations, amending them, or rescinding them, as appropriate.

**B. S.A.F.E. Act Authority Transferred Pursuant to Dodd-Frank Act**

Prior to the enactment of the Dodd-Frank Act, the FDIC issued part 365, subpart B<sup>11</sup> and its appendix A in order to implement the Federal registration requirements for mortgage loan originators required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“S.A.F.E. Act”).<sup>12</sup> As relevant here, the S.A.F.E. Act required the Federal banking agencies, the Farm Credit Administration, and National Credit Union Administration to develop and maintain a system for registering mortgage loan originators.<sup>13</sup> The Dodd-Frank Act transferred that authority to the Bureau,<sup>14</sup> which published an interim final rule in 2011 incorporating such mortgage registration requirements into its Regulation G that became final on April 28, 2016. The Bureau’s Regulation G is substantially the same as the FDIC’s S.A.F.E. Act regulation at part 365, subpart B with respect to Federal registration requirements for mortgage loan originators and applies to all FDIC-supervised institutions,<sup>15</sup> rendering part 365, subpart B unnecessary.<sup>16</sup>

**Section By Section Analysis**

**A. Part 390, Subpart P – Lending and Investment**

A subset of the OTS regulations that addressed lending and investment provisions applicable to State savings associations<sup>17</sup> were transferred to the FDIC and currently appear in part 390, subpart P of the FDIC’s regulations. Substantive provisions of part 390, subpart P (sections not “Reserved,” or left empty intentionally), are addressed below along with staff’s basis for rescission.

**B. Section 390.260 – General**

This section provides general authority and scope for safety-and-soundness based lending and investment activities for State savings associations.

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<sup>11</sup> 12 CFR §§ 365.101-105.

<sup>12</sup> The S.A.F.E. Act was enacted as part of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654, sections 1501-17 (codified at 12 U.S.C. §§ 5101-16).

<sup>13</sup> 12 U.S.C. § 5106.

<sup>14</sup> See section 1100 of the Dodd-Frank Act.

<sup>15</sup> 12 CFR 1007.101(c).

<sup>16</sup> 76 FR 78487 (Dec. 19, 2011); see 12 C.F.R. § 1007.101(b).

<sup>17</sup> Subpart P comprises the OTS regulations, formerly found at 12 CFR part 560, sections 560.1, 560.3, 560.100, 560.101, 560.120, 560.121, 560.130, 560.160, 560.170, and 560.172,

After a careful review and comparison of 12 C.F.R. § 390.260 and the FDIC's 12 C.F.R. § 364.101 (providing FDIC's regulations for safety and soundness), staff proposes to rescind section 390.260 because it is substantively similar to FDIC's existing rule.

C. Section 390.262 – Definitions

Section 390.262, contains definitions that pertain to the provisions of part 390, subpart P such as “consumer loan,” “home loan,” and “real estate loans.”

Because staff has concluded that the substantive provisions of part 390, subpart P are unnecessary, redundant, or otherwise duplicative of other FDIC regulations, staff considers section 390.262 unnecessary and should be rescinded with the rescission of subpart P.

D. Sections 390.264 – Real estate lending standards, purpose and scope and 390.265- Real estate lending standards

Sections 390.264 and 390.265 (including its appendix A) implemented the Federal banking agencies' joint rulemaking for real estate lending.<sup>18</sup>

Staff reviewed and compared 12 C.F.R. §§ 390.264 and 390.265 with FDIC's existing part 365, subpart A, which is the FDIC's regulation for real estate lending and found the regulations are virtually identical. Therefore, staff proposes to rescind sections 390.264 and 390.265 because they are considered duplicative of part 365, subpart A.

Additionally, in order to clarify that part 365, subpart A applies to all institutions for which the FDIC is the appropriate Federal banking agency, staff proposes to amend sections 365.1 and 365.2 to replace throughout the phrases “insured state nonmember banks (including state-licensed insured branches of foreign banks)” and “state nonmember bank” with the phrase “FDIC-supervised institution” or its plural form.

E. Sections 390.267 – Letters of credit and other independent undertakings to pay against documents and 390.268 – Investment in State housing corporations

Section 390.267 provides standards and restrictions for all savings associations that may issue a letter of credit or other independent undertaking that had been recognized in law or approved by the former OTS. This rule is a companion to the OCC's 12 CFR 160.120 which applies to

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<sup>18</sup> Section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991 required the Federal banking agencies to adopt uniform regulations prescribing standards for extensions of credit that are secured by liens on interests in real estate. See Pub. L. 102-242, 105 Stat. 2236 (codified at 12 U.S.C. § 1828(o)); 57 FR 62896, 62900 (Dec. 31, 1992).

Federal savings associations that engage in letters of credit and other independent undertakings.<sup>19</sup> Section 390.268 addresses investments in or loans to state housing corporations.

After careful review and comparison of sections 390.267 and 390.268 and the FDIC's regulations, staff determined that there are no substantively similar rules. However, as explained below, both underlying activities are permissible for Federal savings associations and are therefore permissible activities for State savings associations pursuant to subpart C of part 362 of the FDIC's regulations, eliminating the need to maintain separate FDIC regulations for State savings associations.<sup>20</sup>

Specifically, with respect to section 390.267, Federal savings associations are permitted to issue letters of credit pursuant to 12 C.F.R. § 160.50, subject to the limits and restrictions contained in 12 C.F.R. § 160.120. Under part 362, subpart C, State savings associations may rely on section 160.50 to issue letters of credit or other independent undertakings, subject to the standards and restrictions applicable to Federal savings associations that engage in letters of credit contained in section 160.120, provided that they undertake the activity in a safe and sound manner. Accordingly, staff proposes to rescind section 390.267 as it is unnecessary.

Moreover, with respect to section 390.268, Federal savings associations are expressly authorized to invest in state housing corporations pursuant to section 5(c)(1)(P) of the Home Owner's Loan Act ("HOLA").<sup>21</sup> Under part 362, subpart C, State savings associations may rely on section 5(c)(1)(P) of HOLA to make investments in State housing corporations, provided that they do so in a safe and sound manner. As such, staff proposes to rescind 390.268 as it also is unnecessary.

#### F. Section 390.269 – Prohibition on loan procurement fees

Section 390.269 addresses loan procurement fees and was transferred and redesignated by the FDIC without change. Section 390.269 provides,

If you are a director, officer, or other natural person having the power to direct the management or policies of a State savings association, you must not receive, directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the State savings association or a subsidiary of the State savings association.

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<sup>19</sup> See 76 FR 48950 (Aug. 9, 2011).

<sup>20</sup> Subpart C of part 362 implements section 28 of the FDI Act, 12 U.S.C. § 1831e. Subpart C specifically addresses insured State savings associations and restricts their activities to those permissible for a Federal savings association under any statute, including the Home Owner's Loan Act, 12 U.S.C. §§ 1464 et seq., ("HOLA"), and to those recognized as permissible for a Federal savings association by the OCC or former OTS or in bulletins, orders, or written interpretations of either the OCC or the former OTS. See 12 C.F.R. § 362.9(a).

<sup>21</sup> 12 U.S.C. § 1464(c)(1)(P).

After careful review and comparison of section 390.269 and the FDIC's regulations, there exists no substantively similar regulation. However, rather than identify and prohibit particular types of compensation or fees on a case-by-case basis, the FDIC's approach has been to act against compensation practices that are unsafe or unsound, or that represent a breach of an officer's or director's duty not to place his or her own interests ahead of those of the institution; where necessary, the FDIC can take action under section 8 of the FDI Act.<sup>22</sup> Therefore, staff proposes to rescind section 390.269 as it is unnecessary.

G. Section 390.270 – Asset classification

Section 390.270 requires, among other things, that State savings associations classify assets on a regular basis in a manner consistent with the classification system used by the FDIC and to establish adequate valuation allowances or charge-offs, consistent with generally accepted accounting principles (“GAAP”) and the practices of the Federal banking agencies. The FDIC's part 364 and its appendix A provides the FDIC's minimum standards for establishing and maintaining “a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets.”<sup>23</sup>

State savings associations are already expected to maintain an appropriate level of allowance for loan and lease losses in accordance with GAAP. Because safety and soundness principles require all insured depository institutions for which the FDIC is the appropriate Federal banking agency – including State savings associations – to provide timely and accurate financial, operational, and regulatory reports in accordance with GAAP, staff proposes to rescind section 390.270 as unnecessary.

H. Section 390.271 – Records for lending transactions

Section 390.271 governs records for lending transactions requiring State savings associations to establish and maintain loan documentation practices.

Because the lending documentation practices and requirements contained in section 390.271 are contained in part 364 and appendix A, as discussed above, staff proposes to rescind section 390.271 as unnecessary.

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<sup>22</sup> 12 U.S.C. § 1818.

<sup>23</sup> 12 CFR 364, app. A, sec. II.G.

### I. Section 390.272 – Re-evaluation of real estate owned

Section 390.272 addresses re-evaluation of assets and, among other things, required a savings association to appraise each parcel of real estate owned at the earlier of in-substance foreclosure or at the time of the savings association's acquisition, and at such times thereafter as directed by prudent management policy or as required by the OTS' regional director.<sup>24</sup>

As transferred to the FDIC, section 390.272 is not duplicative of any other existing FDIC regulation. However, the FDIC relies on part 364, which directs FDIC-supervised institutions to "establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration of those assets"<sup>25</sup> and also directs such State-chartered institutions to follow State law with respect to the initial and subsequent valuations of other real estate ("ORE").<sup>26</sup> The FDIC expects all FDIC-supervised institutions to follow part 364, including its appendices, with regard to maintaining a system to identify and manage problem assets (including ORE) and to provide for timely and accurate financial, operational, and regulatory reports according to GAAP and the Call Report Instructions as it pertains to the appropriate carrying value of ORE. Further, State law generally provides for when an appraisal is necessary for State-chartered institutions (including savings associations). Therefore, staff proposes to rescind section 390.272 as unnecessary.

### J. Part 365, Subpart B – Registration of Residential Mortgage Loan Originators

The FDIC issued part 365, subpart B<sup>27</sup> to implement the Federal registration requirements for mortgage loan originators required by the S.A.F.E. Act. However, the Dodd-Frank Act amended the S.A.F.E. Act, transferring that authority from the S.A.F.E. Act Agencies to the Bureau. In December of 2011, the Bureau published an interim final rule incorporating the S.A.F.E. Act into its Regulation G. On April 28, 2016, the Bureau finalized the interim final rule, which is substantially duplicative of the FDIC's S.A.F.E. Act regulation at part 365, subpart B. The Bureau's regulation addresses Federal registration requirements for mortgage loan originators and applies to all FDIC-supervised institutions.<sup>28</sup> Thus, staff proposes to rescind part 365, subpart B because it is no longer necessary.

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<sup>24</sup> 12 C.F.R. § 563.172 (1994).

<sup>25</sup> 12 CFR 364, app. A., sec. II.G.

<sup>26</sup> See FIL-62-2008.

<sup>27</sup> 12 C.F.R. §§ 365.101-105.

<sup>28</sup> 12 C.F.R. § 1007.101(b).

**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.

**Staff contacts:**

Karen J. Currie, Division of Risk Management Supervision, (202) 898-3981

Cassandra Duhaney, Division of Depositor and Consumer Protection, (202) 898-6804

Rodney Ray, Legal Division, (202) 898-3556

Linda Hubble Ku, Legal Division, (202) 898-6634