

September 12, 2019

TO: The Board of Directors

FROM: Doreen R. Eberley  
Director, Division of Risk Management ~~S~~upervision

SUBJECT: Notice of Proposed Rulemaking: Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations

**Summary:** The NPR proposes to rescind 12 CFR part 390, subpart T, entitled *Accounting Requirements* (part 390, subpart T) because the additional financial disclosure requirements required by part 390, subpart T for State savings associations are substantially similar to, although more detailed than, other applicable financial statement form and content requirements and disclosure requirements that State nonmember banks must satisfy under federal banking or securities laws or regulations. Upon the rescission of part 390, subpart T, State savings associations will continue to use generally accepted accounting principles (GAAP) in the preparation of their financial statements and financial reports pursuant to section 37 of the Federal Deposit Insurance Act (FDI Act) and section 4 of the Home Owners Loan Act (HOLA) and State savings association Exchange Act filings will continue to be governed by 12 CFR 335, entitled *Securities of State Nonmember Banks and State Savings Associations* (part 335). With respect to proxy solicitations and offering circulars to be used in a securities offering in connection with a mutual to stock conversion, a State savings association will continue to be subject to the OCC's conversion rules at 12 CFR part 192 (part 192).

**Recommendation:** Staff recommends that the FDIC Board of Directors (Board) approve and authorize for publication in the *Federal Register* the attached Notice of Proposed Rulemaking (NPR) entitled, *Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations*, with a comment period of 30 days from the date of publication.

Concur:  
Nicholas J. Podsiadly, General Counsel

## **I. Background**

### **A. The Dodd-Frank Act**

Effective July 21, 2011, section 311 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>1</sup> transferred to the FDIC the powers, duties and functions formerly performed by the Office of Thrift Supervision (OTS) with respect to state savings associations. Section 316(b) of the Dodd-Frank Act<sup>2</sup> provided that OTS regulatory issuances in effect as of the transfer date would continue in effect and be enforceable by and against the appropriate Federal banking agency until modified, terminated, set aside, or superseded. On June 14, 2011, the 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.”<sup>3</sup> When the transferred OTS regulations were subsequently published as new FDIC regulations,<sup>4</sup> the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later incorporate them into other FDIC rules, amend them, or rescind them, as appropriate.

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act<sup>5</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 FDI Act and other laws as the “appropriate Federal banking agency.” Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act<sup>6</sup> to add State savings associations to the list of entities for which the FDIC is designated the “appropriate Federal banking agency.”<sup>7</sup> As a

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<sup>1</sup> 12 U.S.C. 5411.

<sup>2</sup> 12 U.S.C. 5414(b).

<sup>3</sup> 76 FR 39246 (Jul. 6, 2011).

<sup>4</sup> 76 FR 47652 (Aug. 5, 2011).

<sup>5</sup> 12 U.S.C. 5412(b)(2)(B)(i)(II).

<sup>6</sup> 12 U.S.C. 1813(q).

<sup>7</sup> See 12 U.S.C. 5412 note.

result, when the FDIC acts as the “appropriate Federal banking agency” for State savings associations it has the authority to issue, modify, and rescind regulations involving such associations as well as for State nonmember banks and insured U.S. branches of foreign banks.<sup>8</sup>

### **B. Part 390, Subpart T – Accounting Requirements**

One of the OTS rules transferred to the FDIC governs the accounting requirements for State savings associations. The OTS rule, formerly found at 12 CFR Part 563c, was transferred to the FDIC with nominal changes and is now found in the FDIC’s rules at part 390, subpart T, entitled *Accounting Requirements*.<sup>9</sup> This subpart prescribes for State savings associations accounting requirements with respect to definitions, public accountant qualifications, and the form and content of financial statements pertaining to certain securities and their related transaction documents. These transaction documents include proxy statements and offering circulars in connection with a conversion, any offering of securities by a State savings association, and filings by State savings associations requiring financial statements under the Exchange Act.<sup>10</sup>

## **II. Proposal to Rescind Part 390, Subpart T**

Staff carefully reviewed part 390, subpart T and determined that the accounting requirements with respect to financial statement and disclosure form and content set forth by part 390, subpart T for State savings associations are substantially similar to, although more detailed than, other requirements that a State savings association must satisfy under federal banking or securities laws or regulations. Therefore, staff proposes to rescind and remove part 390, subpart T (including the Appendix to 12 CFR

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<sup>8</sup> See also 12 U.S.C. 5412(b)(2)(C)(ii) (“the Corporation shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision on the day before the transfer date relating to the functions transferred under clause (i).” [relating to State savings associations])

<sup>9</sup> 12 CFR Part 390, Subpart T.

<sup>10</sup> *Id.*

390.384) and apply existing disclosure requirements, and related form and content of financial statements requirements to State savings associations.

State savings association reports and financial statements are required to be uniform and consistent with U.S. generally accepted accounting principles (GAAP) pursuant to section 37 of the FDI Act and section 4(b) of the Homeowners Owners Loan Act (HOLA).<sup>11</sup> While securities issued by State savings associations are exempt from registration requirements of the Securities Act of 1933 (Securities Act),<sup>12</sup> the FDIC reviews for compliance with 12 CFR part 192, *Conversion from a Mutual to Stock Form*, offering circulars related to mutual-to-stock conversions involving securities offerings by State savings associations. The FDIC will not approve an offering circular until concerns regarding the adequacy or accuracy of the offering circular or the disclosures are satisfactorily addressed.<sup>13</sup> The FDIC is also responsible for administering and enforcing certain sections of the Exchange Act with respect to State savings associations with securities that are publicly traded.<sup>14</sup> As such, a State savings association that is an Exchange Act reporting company must file required periodic reports such as annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K with the FDIC pursuant to part 335 of the FDIC rules.<sup>15</sup> With respect to the form and content requirements for offerings of mutual

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<sup>11</sup> 12 U.S.C. 1831n(a)(2); 12 U.S.C. 1463(b)(2).

<sup>12</sup> 15 U.S.C. 77a *et seq.* Section 3(a)(5) of the Securities Act exempts from registration requirements securities issued by State savings associations. 15 U.S.C. 77c(a)(5).

<sup>13</sup> 12 CFR 192.300.

<sup>14</sup> 12 CFR 335.101. Part 335 issued by the FDIC under section 12(i) of the Exchange Act applies to all securities of State savings associations that are subject to the registration requirements of section 12(b) or section 12(g) of the Exchange Act. The FDIC is vested with the powers, functions, and duties of Securities and Exchange Commission (SEC) to administer and enforce Exchange Act sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78j-1, 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding State savings associations with one or more classes of securities subject to the registration provisions of sections 12(b) or 12(g) of the Exchange Act.

<sup>15</sup> Pursuant to section 12(a) of the Exchange Act, an issuer must register as an Exchange Act reporting company if it elects to list a class of securities (debt or equity) on a national securities exchange. 15 U.S.C. 78l(a). Generally, an issuer must register pursuant to section 12(g) of the Exchange Act if a class of its equity securities (other than exempted securities) is held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors and, on the last day of the issuer's fiscal year, its total assets exceed \$10 million. 12 CFR Part 335. However, for banks, bank holding companies, and savings and loan holding companies, the threshold is 2,000 or more holders of record; the separate registration trigger for 500 or more non-accredited holders of record does not apply. A list of FDIC-supervised depository institutions currently

capital certificates and debt securities of State savings associations set forth in part 390, subpart T,<sup>16</sup> the FDIC has determined that the additional disclosures required by part 390, subpart T, are, substantially similar to, although more detailed than, otherwise applicable financial statement form and content and disclosure requirements that a State savings association must satisfy under GAAP, the Exchange Act, FDIC regulations, and state regulations, as appropriate. A brief review of the State savings association accounting requirements in part 390, subpart T follow.

#### *390.380 Form and content of financial statements*

This section provides the form and content requirements of financial disclosures, including specific statements, to be included by a State savings association in a proxy statement or offering circular required to be used in connection with a mutual-to-stock conversion under 12 CFR part 192 and an offering circular or nonpublic offering materials required to be used in connection with an offer or sale of securities under part 390, subpart W, (*Securities Offerings*).<sup>17</sup> Unless provided for by FDIC rule or order, the financial disclosures governed by this subpart must be prepared and presented in accordance with GAAP and be consistent with certain provisions of SEC Regulation S-X (Regulation S-X).<sup>18</sup>

#### *390.381 Definitions.*

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reporting to the FDIC under the Exchange Act and Part 335 can be accessed at <https://www.fdic.gov/bank/individual/part335/index.html>.

<sup>16</sup> 12 CFR 390.384(c).

<sup>17</sup> 12 CFR Part 390, Subpart W.

<sup>18</sup> 15 U.S.C. 78a *et seq.* 17 CFR part 210, entitled *Form and Content of and Requirements for Financial Statements, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935, Investment Company Act of 1940, Investment Advisers Act of 1940, and Energy Policy and Conservation Act of 1975*. Such provisions include articles 1, 2, 3, 4, 10, and 11 of Regulation S-X, 17 CFR 210.1-210.4; 210.10, and 210.11. Regulation S-X generally sets forth form and content of and requirements for financial statements with respect to filing under the Securities Act and Exchange Act, among others.

Section 390.381 provides a general cross-reference to the definitions section of Regulation S-X. This section also includes Regulation S-X definitions of *registrant* and *significant subsidiary* that the OTS modified specifically for State savings associations.

*390.382 Qualification of public accountant.*

Section 390.382 provides a cross-reference to SEC Rule 2-01 of Regulation S-X that sets forth qualifications of accountants.<sup>19</sup> Pursuant to this section, a “qualified public accountant” must be a certified public accountant certified by, or a licensed public accountant licensed by, a regulatory authority of a State or other political subdivision of the United States who is in good standing under the laws of the jurisdiction where the home office of the registrant to be audited is located.

*390.383 Condensed financial information [Parent only].*

Section 390.383 applies to the condensed financial information of the State savings association as the parent of consolidated subsidiaries required to be presented in a note to the financial statement when the restricted net assets of consolidated subsidiaries exceed 25 percent of the consolidated net assets as of the end of the most recent fiscal year, and is closely related to the following section, § 390.384, *Financial statements for conversions, SEC filings, and offering circulars*.<sup>20</sup> Section 390.383 further requires that the investment in, and indebtedness of and to, State savings association subsidiaries be stated separately in the condensed balance sheet from amounts for other subsidiaries, and the amount of cash dividends paid to the parent State savings association for each of the last three years by the State savings association subsidiaries be stated separately in the condensed income statement from amounts from other subsidiaries.

*390.384 Financial statements for conversions, SEC filings, and offering circulars.*

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<sup>19</sup> 17 CFR § 210.2-01.

<sup>20</sup> 12 CFR § 390.383.

Section 390.384 and its appendix prescribe the form and content of State savings association financial statements used in connection with (1) mutual-to-stock conversions pursuant to 12 CFR 192, (2) filings under the Exchange Act, and (3) offering circulars used in connection with mutual capital certificates<sup>21</sup> and debt securities.<sup>22</sup> This section reflects items in SEC Rule 9-03 and SEC Rule 9-04 that, if applicable, should appear on the face of the balance sheets or its notes, or income statement or its notes, respectively, as well as incorporating items from other rules in Regulation S-X as modified by the OTS to specifically apply to savings associations and includes references to Regulation S-X rules as well.<sup>23</sup>

### ***B. Accounting Requirements Applicable to State Savings Associations***

The FDIC's regulations do not have a direct analog to the accounting requirements for State savings association set forth in the transferred OTS regulations at part 390, subpart T. However, as mentioned above, existing federal banking and securities laws and regulations provide requirements that are substantially similar.

#### *Generally Accepted Accounting Principles*

In the United States, GAAP is a commonly recognized set of rules and procedures designed to govern corporate accounting and financial reporting.<sup>24</sup> This comprehensive set of accounting practices was developed by the Financial Accounting Standards Board (FASB), an independent not-for-profit body that derives its authority from the SEC.<sup>25</sup> FASB sets GAAP with input from the SEC, the

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<sup>21</sup> 12 CFR 163.74.

<sup>22</sup> 12 CFR 390.341.

<sup>23</sup> 17 CFR 210-9.03, 210-9.04. Other items included by the OTS in § 390.384 are similar to items for in Rule 1-02 *Definitions*, Rule 3-04 *Changes in stockholders' equity and noncontrolling interests*, Rule 4-08, *General notes to financial statements*, and Rule 10-01, *Interim financial statements*.

<sup>24</sup> Robert Parrino and David Kidwell, *Fundamentals of Corporate Finance*, 3.1 (John Wiley & Sons) (2009).

<sup>25</sup> *Id*

American Institute of Certified Public Accountants, and other stakeholders that include preparers, users, and auditors.<sup>26</sup>

Section 37 of the FDI Act, like part 390, subpart T, requires that reports and statements to be filed with federal banking agencies by insured depository institutions, including insured State saving associations, be uniform and consistent with GAAP.<sup>27</sup> Section 4(b) of HOLA also requires that savings associations use accounting standards that are no less stringent than GAAP.<sup>28</sup> Further, the instructions to the Consolidated Reports of Condition and Income (Call Report) state that the regulatory reporting requirements applicable to the Call Report shall conform to GAAP as set forth in the FASB's Accounting Standards Codification.<sup>29</sup> By eliminating regulations that are substantially similar to existing statutory directives for State savings associations to use GAAP, the FDIC would follow the SEC in amending and disclosure requirements that have become redundant in light of GAAP, among other things.<sup>30</sup>

#### *Exchange Act Filings*

State saving associations that have securities subject to the registration requirements of Section 12(b) or Section 12(g) of the Exchange Act are subject to a mandatory periodic disclosure process that is designed to require Exchange Act-registered companies to make public the information that investors would find pertinent in making investment decisions.<sup>31</sup> Section 12(i) of the Exchange Act provides that the appropriate Federal banking agencies must issue substantially similar regulations to regulations and

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<sup>26</sup> *Id.*

<sup>27</sup> 12 U.S.C. 1831n(a)(2).

<sup>28</sup> 12 U.S.C. 1463(b)(2).

<sup>29</sup> [Instructions for Preparation of Consolidated Reports of Condition and Income](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201906_i.pdf), Form FFIEC 031 and 041, [https://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC031\\_FFIEC041\\_201906\\_i.pdf](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201906_i.pdf). [Instructions for Preparation of Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than \\$1 Billion](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC051_201906_i.pdf), Form FFIEC 051, [https://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC051\\_201906\\_i.pdf](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC051_201906_i.pdf).

<sup>30</sup> 83 FR 50148 (Oct. 4, 2018).

<sup>31</sup> State savings associations issuing securities exempt from section 3(a)(5) of the Securities Act are not subject to the reporting requirements under the Exchange Act.

rules issued by the SEC.<sup>32</sup> Therefore, the FDIC is vested with the powers and duties of the SEC to enforce the registration provisions of the Exchange Act with respect to State nonmember banks and State savings associations.<sup>33</sup>

Part 335, *Securities of State Nonmember Banks and State Savings Associations*, applies to all securities of State nonmember banks and State savings associations (FDIC-supervised institutions). Part 335 implements section 12(i) of the Exchange Act which vests authority in the FDIC to administer and enforce certain sections of the Exchange Act and Sarbanes-Oxley, including the accounting standards to be used in the preparation of filings and other reports under the respective laws. Part 335 incorporates the regulations and rules of the SEC with respect to the registration, reporting, and accounting requirements applicable to companies subject to the Exchange Act. The FDIC amended the scope of part 335 to include State savings associations in 2014, and, therefore, the requirement for all FDIC-supervised institutions is the same. These requirements are substantially similar to the securities offerings disclosure regulations that the OCC promulgated under the same authority for national banks and federal savings associations.<sup>34</sup> Therefore, State savings associations would file reports containing generally the same information, and the same form and content, that would be included in Exchange Act reports, including applicable financial statement form and content requirements of Regulation S-X, with the FDIC rather than the SEC, and subject to the same regulations as State nonmember banks.

#### *Mutual to Stock Conversion Offerings*

Mutually-owned State savings associations may convert from the mutual form of ownership, where the institution is owned jointly by the association members, to the stock form of ownership, where the institution is owned by shareholders. Although section 312 of the Dodd-Frank Act transferred all

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<sup>32</sup> 15 U.S.C. 78l(i),

<sup>33</sup> *Id.*

<sup>34</sup> 12 CFR Part 16.

functions of the OTS relating to State savings associations to the FDIC, rulemaking authority for Federal and State savings associations was transferred to the OCC.<sup>35</sup> As a result, the form and content of financial statements included as part of a State savings association conversion application is governed by part 192 of the OCC's Rules (OCC conversion regulations), instead of part 390, subpart T. Part 192 governs savings association conversions generally. These OCC conversion regulations apply to financial statements included with proxy solicitations and offering circulars.<sup>36</sup> In reviewing a notice of intent to convert from mutual to stock form from an insured state-chartered mutually-owned savings bank, the FDIC takes into account the extent to which the proposed conversion transaction conforms with the OCC conversion regulations, providing consistency in standards for financial statements included with proxy solicitations and offering circulars for mutual State savings association and mutual State bank conversions.<sup>37</sup> Additionally, mutual State savings associations must comply with the disclosure requirements for offering materials used in connection with the issuance of mutual capital certificates pursuant to 12 CFR 163.74.<sup>38</sup>

#### *State Savings Association Securities Offerings*

Securities issuances by State savings association are exempt from registration requirements pursuant to section 3(a)(5) of the Securities Act.<sup>39</sup> State savings associations are subject to a separate and stringent regulatory and reporting structure under federal banking laws independent of the SEC, such as through ongoing supervision and oversight, as well as extensive reporting requirements, frequent safety and soundness examinations<sup>40</sup> and capital requirements<sup>41</sup> that protect investors from securities

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<sup>35</sup> Section 312(b)(2), 124 Stat. at 1522, codified to 12 U.S.C. 5412(b)(2).

<sup>36</sup> 12 CFR Part 192, Subpart A, Standard Conversions.

<sup>37</sup> 12 CFR 303.163(b). Paragraph (b) references the former OTS mutual-to-stock regulations that were at 12 CFR part 563b. The OCC republished part 563b as part 192 as an interim final rule in August 2011, 76 FR 49156 (Aug. 9, 2011).

<sup>38</sup> Debt securities pursuant to 390.341 are also subject to the disclosure requirements for offering materials.

<sup>39</sup> 15 U.S.C. 77c(a)(5).

<sup>40</sup> 12 CFR 337.12.

<sup>41</sup> 12 CFR Part 324.

fraud and improper disclosure that the SEC registration process is designed to prevent. The Securities Act registration exemption allows State savings associations to issue securities with many of the benefits of registered offerings with the efficiency and cost effectiveness of private placements, does not place limitations on the number or type of investors that can participate, or on the amount of securities offered. As a result, State savings associations may access capital markets without the time and expense of conducting an SEC-registered offering.

Nonetheless, as in any other securities offering, the anti-fraud provisions of the federal securities laws still apply, including section 17 of the Securities Act and section 10(b) of and Rule 10b-5 under the Exchange Act.<sup>42</sup> Financial statements used in proxy solicitations or offering circulars used in marketing securities must disclose the information necessary to avoid liability under the anti-fraud provisions even if specific disclosure requirements are not imposed. The FDIC reviews offering circulars to ensure that they were prepared in compliance with the anti-fraud provisions of the federal securities laws which require full and adequate disclosure of material facts and meet the needs of investors, depositors, and issuers.

With respect to the form and content requirements for offerings of mutual capital certificates and debt securities of State savings associations set forth in part 390, subpart T, the FDIC has determined that the additional disclosures required by part 390, subpart T may be more detailed than otherwise applicable financial statement form and content and disclosure requirements that a State savings association must satisfy under GAAP, the Exchange Act, FDIC regulations, and state regulations, as appropriate. While there may be situations where the disclosures required under GAAP, FDIC regulations, and state regulations, as appropriate, with respect to the offerings of mutual capital certificates and debt securities are less detailed than the requirements under part 390, subpart T, there

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<sup>42</sup> 15 U.S.C. 77q; 15 U.S.C 78j(b) and 17 CFR 240.10b-5.

have been no recent filings by State savings associations to the FDIC related to the offerings of mutual capital certificates and debt securities. Therefore, the FDIC has concluded that the practical impact of the differences in level of disclosure detail are negligible and do not justify maintaining separate disclosure regulations applicable solely to State savings associations. The FDIC continues to evaluate whether to update the 1996 statement of policy related to the use of offering circulars in connection with the public distribution of bank securities, to include issuances of mutual capital certificates and debt securities by State savings associations. The statement of policy currently applies only to insured state nonmember banks.<sup>43</sup>

### **III. Conclusion**

If the proposal is finalized, 12 CFR part 390, subpart T would be rescinded and removed because the financial statement and disclosure requirements set forth in that subpart are substantially similar to, although more detailed than, otherwise applicable financial statement form and content requirements and disclosure requirements that a State savings association must satisfy under federal banking or securities laws or regulations. The FDI Act has long required that reports and statements filed with the FDIC by insured depository institutions, including insured State saving associations, be uniform and consistent with GAAP accounting principles. Moreover, the HOLA has required that savings association reports and financial statements be consistent with GAAP since CEBA was enacted in 1987. State savings associations with securities traded in the secondary market are subject to the registration provisions and reporting requirements of the Exchange Act as implemented by the FDIC pursuant to the authority granted by Section 12(i) of the Exchange Act. As a result, a State savings association, like a State nonmember bank, is required to file with the FDIC reports and other filings containing generally the same information that would be included in Exchange Act reports, instead of filing with the SEC.

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<sup>43</sup> 44 FR 39381 (July 6, 1979); 61 FR 46808 (Sept. 5, 1996).

The form and content of financial statements used in connection with proxy solicitations and offering circulars for the conversion of a State savings association from mutual to stock form remains subject to the OCC conversion regulations at part 192 and offering materials for the issuance of mutual capital certificates remain subject to the OCC regulations at 12 CFR 163.74, in addition to GAAP and any applicable Exchange Act requirements. While State savings association public offerings of securities are exempt from Securities Act registration requirements, FDIC staff accountants review offering circulars to ascertain that they were prepared in compliance with the anti-fraud provisions of the federal securities laws which require full and adequate disclosure of material facts and meet the needs of investors, depositors, and are uniform and consistent with GAAP, including financial statement disclosure requirements. Removing part 390, subpart T will streamline the FDIC's regulations and will not increase regulatory burden for FDIC-supervised institutions.

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