

December 8, 2020

MEMORANDUM TO: Board of Directors

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

SUBJECT: **Final rule.** Removal of Transferred OTS Regulations Regarding Subordinate Organizations (Part 390, Subpart O)

Summary: Staff requests that the FDIC Board of Directors (Board) approve and authorize for publication in the *Federal Register* the attached final rule entitled, *Removal of Transferred OTS Regulations Regarding Certain Subordinate Organizations of State Savings Associations* to rescind and remove 12 CFR Part 390, Subpart O, entitled *Subordinate Organizations* (Subpart O).

Subpart O sets forth procedures by which State savings associations may establish or acquire a subsidiary, engage in new activities through an existing subsidiary, and exercise salvage power, in addition to providing requirement for subsidiary issuance of securities.

By rescinding Subpart O, the FDIC will eliminate redundant or otherwise unnecessary regulations and streamline FDIC regulations.

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) 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 provided that OTS regulatory issuances in effect as of the transfer date would continue in effect and be enforceable by the appropriate Federal banking agency until modified, terminated, set aside, or superseded.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.”¹ When the transferred OTS regulations were subsequently published as new FDIC regulations, the FDIC specifically noted that staff would evaluate the transferred OTS regulations, and later incorporate the regulations into other FDIC rules, or amend or rescind the regulations, as appropriate.

Although Section 312 of the Dodd-Frank Act² 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.” 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 to add State savings associations to the list of entities for which the FDIC is designated the “appropriate Federal banking agency.”³ As a result, when the FDIC acts as the

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² See 312(b)(2)(B)(i)(II).

³ *Id.*

“appropriate Federal banking agency” for State savings associations, it has the authority to issue, modify, and rescind regulations involving such institutions.

B. Part 390, Subpart O – Subordinate Organizations

Subpart O was among the rules transferred to the FDIC from the OTS, and governs investments in, and activities of, subordinate organizations of State savings associations. The OTS rules, formerly found at 12 CFR Part 559, were transferred to the FDIC with nominal changes and are currently found at Part 390, Subpart O, *Subordinate Organizations*.⁴

II. The Proposed Rule

On October 26, 2020, the FDIC published an NPR regarding the removal of part 390, subpart O (formerly OTS part 559),⁵ which generally addresses subordinate organizations of State savings associations.⁶ Staff carefully reviewed Subpart O and determined that the procedures with respect to investments in, and activities of, subordinate organizations are substantially similar to requirements that a State savings association must satisfy under federal banking laws and regulations, specifically Part 362 of the FDIC Rules and Regulations,⁷ as well as State statutes.

The FDIC received no comments on the NPR.

III. The Final Rule

The final rule rescinds and removes subpart O and amends § 362.15 to remove references to Federal savings associations made unnecessary because of the amendment of Section 18(m) of the FDI Act, as amended by § 363(7) of the Dodd-Frank Act, which no longer requires Federal savings associations to provide notice to the FDIC prior to the establishment, or acquisition, of a

⁴ 12 CFR part 390, subpart O.

⁵ 12 CFR Part 390, Subpart O.

⁶ 85 FR 67684 (Oct. 26, 2020).

⁷ Part 362, Subparts C and D are applicable to State savings associations and subsidiaries.

subsidiary, or prior to commencement of a new activity in a subsidiary controlled by a Federal savings association.⁸

As discussed in the NPR, the FDIC statutory and regulatory provisions applicable to State savings associations and subsidiaries provide a substantially similar process for an insured State savings association, or its subsidiary, to apply for prior consent from the FDIC to engage in certain activities, that are not otherwise prohibited by federal or state law, while reaching substantially the same result as provided in subpart O without the burden of referring to a duplicative set of regulations.⁹ Under the final rule, the application of part 362, which implements section 28 and section 18(m) of the FDI Act, provides State savings associations with substantially similar procedures for notices and applications related to State savings association subsidiaries and investments. Further, section 37 of the FDI Act and section 4(b) of the Home Owners Loan Act (HOLA) already require that State savings association reports and financial statements are uniform and consistent with U.S. generally accepted accounting principles (GAAP).¹⁰

Two additional aspects of the final rule are summarized below.

With respect to the issuance of securities by a subsidiary of a State savings association, the NPR reminded State savings associations and subsidiaries that subsidiary securities issuances, like other permissible activities, are subject to the same restrictions or conditions imposed on the Federal savings association and must be conducted in the same manner in which an operating subsidiary or service corporation is authorized to issue such securities.¹¹ Under the final rule, section 390.254 is rescinded and removed because pursuant to section 28 of the FDI

⁸ Pub. L. 111-203, 124 Stat 1376 (2010); 12 U.S.C. 1828(m).

⁹ Section 28 (12 U.S.C. 1831e(a)), section 18(m), and section 37 (1831n(a), and section 4(b) of the Home Owners Loan Act govern the activities of State savings associations and subsidiaries.,

¹⁰ 12 U.S.C. 1831n(a)(2); 12 U.S.C. 1463(b)(2).

¹¹ 12 U.S.C. 1464, 1831e(a); 12 CFR §§ 5.38(e)(7), 5.59(e)(9).

Act State savings associations are permitted to engage as principal in the same activities permitted for a Federal Savings association, and operating subsidiaries and service corporations of Federal savings associations are permitted to issue securities, subject to regulatory limitations.¹²

Under the final rule, a State savings association making a contribution or a loan to a lower-tier entity (salvage investment) that exceeds the maximum amount otherwise permitted under law or regulation (maximum amount) to exercise its power to salvage the underlying asset (typically, an outstanding loan) must apply to the FDIC for prior approval pursuant to section 362.11 before making such a contribution or a loan, and be consistent with State law.¹³ The applicant would be required to provide evidence that the State approved any exception over the loan to one borrower limit.¹⁴

By applying these FDIC statutory and regulatory provisions to State savings associations and subsidiaries, the FDIC will achieve substantially similar supervisory results for State savings associations and subsidiaries under the final rule as would be obtained through subpart O.¹⁵

IV. Recommendation

Based on the foregoing, staff recommends the Board approve the attached Resolution to adopt and authorize the publication in the Federal Register of the referenced final rule with an effective date 30 days from the publication date.

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¹² 12 U.S.C. 1464, 1831e(a); 12 CFR §§ 5.38(e)(7), 5.59(e)(9), 390.254.

¹³ 12 CFR § 362.11.

¹⁴ LTOB Limits are established by state law of each chartering authority, and LTOB Limits are not consistent from state to state. Some states allow waivers or modifications, while others do not. Part 362 does not authorize any insured State savings association to make investments or conduct activities that are not authorized or that are prohibited by either Federal or State law. 12 CFR 362.9(c).

¹⁵ 85 FR 67684 (Oct. 26, 2020).