

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 340**

**RIN 3064-AE26**

**Restrictions on Sale of Assets of a Failed Institution by the Federal Deposit Insurance Corporation**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final Rule.

**SUMMARY:** With this final rule (the final rule), the Federal Deposit Insurance Corporation (FDIC) is revising its rule concerning restrictions on the sale of assets of a failed institution under the Federal Deposit Insurance Act in order to clarify the purpose, scope and applicability of that rule and to make that rule more consistent with the FDIC's rule concerning restrictions on the sale of assets of a covered financial company under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

**DATES:** This final rule is effective July 1, 2015.

**FOR FURTHER INFORMATION CONTACT:** James D. Sigler, Senior Franchise and Asset Marketing Specialist, 571-858-8284; Elizabeth Falloon, Supervisory Counsel, Legal Division, 703-562-6148; Shane Kiernan, Counsel, Legal Division, 703-562-2632; Federal Deposit Insurance Corporation, 550 17<sup>th</sup> Street, N.W., Washington, D.C. 20429.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The FDIC promulgated part 340 in 2000 to implement section 11(p) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(p) (section 11(p)). Under section 11(p), individuals or entities whose acts or omissions have, or may have, contributed to the failure of an insured depository institution (failed institution) cannot buy the assets of that failed institution from the FDIC. The FDIC expanded the purchaser eligibility restriction as permitted by statute when it promulgated part 340 by precluding such individuals or entities from purchasing the assets of *any* failed institution, not only the particular institution affected by the actions of the respective individuals or entities. As provided in section 11(p), part 340 also prohibits the sale of assets involving FDIC financing to certain persons who have defaulted on obligations of \$1 million or more, in aggregate, owed to a failed insured depository institution or the FDIC and who have made fraudulent misrepresentations in connection with any of those obligations. Compliance with part 340 is established through a self-certification process in which a prospective purchaser certifies that it is eligible to purchase an asset from the FDIC and that the FDIC's sale of an asset to such prospective purchaser would not be restricted under section 11(p) or part 340.

In March of 2014, the FDIC promulgated section 380.13 to implement section 210(r) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5390(r) (section 210(r)). Section 210(r) prohibits certain sales of assets held by the FDIC in the course of

liquidating a covered financial company. Because section 210(r) and section 11(p) share substantially similar statutory language, part 340 served as a model for the development of section 380.13. While many aspects of part 340 were included in section 380.13, FDIC staff identified new or different concepts to include in section 380.13 that were not already in part 340. The addition of these concepts into part 340 will improve part 340 and make it more consistent with section 380.13.

## **II. Notice of Proposed Rulemaking**

On October 21, 2014, the Board of Directors approved a notice of proposed rulemaking entitled "*Restrictions on Sale of Assets by the Federal Deposit Insurance Corporation*" (the proposed rule), which was published in the **Federal Register** on October 24, 2014 with a 60-day comment period that ended on December 23, 2014.<sup>1</sup> One comment letter addressing the proposed rule was received by the FDIC expressing general support for the proposed rule. The final rule is substantively the same as the proposed rule.

## **III. The Final Rule**

With this final rule, the FDIC is adopting the revisions to part 340 in substantially the same form as they were presented in the proposed rule. Part 340 is revised in a number of ways. Some revisions are significant, substantive changes and others are non-substantive, technical or conforming changes. This supplemental information section describes the substantive changes made by the final rule.

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<sup>1</sup> 79 FR 63580.

The title of part 340 is revised to clarify that part 340 applies to sales of assets of a failed institution (specifically, a failed insured depository institution). This change is made to help distinguish part 340 from section 380.13, which applies to sales of assets of a covered financial company by the FDIC. While the two rules will preclude sales to certain prospective purchasers in a very similar manner, each pertains to a separate set of asset sales by the FDIC.

The final rule amends paragraph 340.1(b), which sets forth the purpose of part 340, to extend the restrictions on sales of assets of a failed institution to individuals or entities who are also prohibited from purchasing assets of a covered financial company from the FDIC under section 210(r) and section 380.13. This ensures consistency between part 340 and section 380.13. Under section 380.13, individuals or entities prohibited from purchasing assets of a failed institution under part 340 are also prohibited from purchasing assets of a covered financial company under section 380.13. Likewise, individuals or entities prohibited from purchasing assets of a covered financial company under section 380.13 are prohibited from purchasing assets of a failed institution under part 340.

The final rule makes three changes to clarify part 340's scope of coverage, set forth in paragraph 340.1(c). First, the final rule clarifies the applicability of part 340 to sales of assets by a subsidiary of a failed institution or by a bridge depository institution. Sales of assets of a failed institution's subsidiary or a bridge depository institution are not expressly subject to section 11(p). However, if the FDIC has the right to control the terms of a sale of assets of a failed institution's subsidiary or a bridge depository institution, or has the ability to control selection of

the purchaser of those assets under an agency agreement or as shareholder, the restrictions set forth in section 11(p) and part 340 should apply. The FDIC has discretionary authority to expand the scope of coverage because section 11(p) sets the minimum requirements for restrictions on sales of assets, and the FDIC may prescribe further restrictions on its own accord. Under the final rule's revision of part 340, the restrictions apply to sales of assets of a failed institution's subsidiary or a bridge depository institution if the FDIC controls the terms of the sale by agreement or as shareholder.

Second, the final rule amends section 340.1 to explicitly state that part 340 does not apply to certain types of transactions involving marketable securities and other financial instruments. Under paragraph 340.1(c)(5), a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that, in each case, customarily is traded through a financial intermediary where the seller cannot control selection of the purchaser would not be covered by part 340 if the sale is to be consummated through that customary practice. For example, if the FDIC were to sell publicly-traded stocks or bonds that the failed institution held, it might engage a broker or custodian to conduct or facilitate the sale. The broker or custodian would then tender the securities to the market and accept prevailing market terms offered by another broker, a specialist, a central counterparty or a similar financial intermediary who would then sell the security to another purchaser. In this scenario, it is not possible for the FDIC to control selection of the end purchaser at the time of sale. Therefore, the transaction cannot be a sale covered by section 11(p) because the FDIC would have no way to select the prospective purchaser or determine whether that purchaser would or would not be prohibited from purchasing the asset. Moreover, a prospective purchaser of such assets will not be able to select the FDIC as the seller

and therefore could not determine whether section 11(p) and part 340 apply to the transaction. The final rule defines the term “financial intermediary,” as discussed below, for the purposes of part 340. This express limitation on the scope of part 340’s coverage will provide greater certainty regarding the applicability of section 11(p) and part 340 to market participants and FDIC staff who conduct asset sales.

Third, the final rule clarifies in paragraph 340.1(c)(6) that part 340 is not applicable to a judicial sale or a trustee’s sale of property securing an obligation to the FDIC if the sale is not conducted or controlled by the FDIC. Although the FDIC could have a security interest in property serving as collateral and therefore the authority to initiate a foreclosure action, the selection of the purchaser and terms of the sale are not necessarily within the FDIC’s control. Rather, a court or trustee would conduct the sale in accordance with applicable state law and would select the purchaser. In this situation, the sale is not a sale by the FDIC. While the plain language of part 340 does not suggest that such a sale would fall within its scope, the FDIC makes this change for the sake of clarity. This exception does not affect sales if the FDIC is in possession of the collateral property and conducts the sale itself, however. Where the FDIC has control over the manner and terms of the sale, it will require the prospective purchaser’s certification that the prospective purchaser is not prohibited under section 11(p) or part 340 from purchasing the asset.

Section 340.2 sets forth definitions for certain terms used in part 340 and several are revised by the final rule. The definition of “associated person” is revised to include limited liability companies of which an individual is a member (or was a member at the time of the occurrence of any event that would result in a restriction on sale as set forth in section 340.4) if the prospective

purchaser of assets is an individual and, if the prospective purchaser is a limited liability company, to include the manager of the limited liability company. The definition of “failed institution” is revised to remove reference to entities “owned and controlled” by the failed institution because the revision to paragraph 340.1(c), discussed above, explicitly states that sales of subsidiary assets are covered under part 340 if the FDIC controls the terms of the sale by agreement or in its role as shareholder. Additionally, references to the Resolution Trust Corporation and RTC are removed in favor of referencing the FDIC’s “predecessor” agencies.

The final rule also adds a new term for use in part 340, “financial intermediary,” which is defined to mean any broker, dealer, bank, underwriter, exchange, clearing agency registered with the SEC under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another. This definition is used to identify transactions of marketable financial instruments described in section 340.1(c) that would not be covered by section 11(p) or part 340. Although not separately defined in the final rule, the term “security” is intended to apply broadly and include, without limitation, all instruments which constitute securities under Federal securities laws.

Section 340.4 sets forth the conditions under which a person (whether an individual or entity) is prohibited from acquiring assets of a failed institution from the FDIC. Those conditions are that the person, or its associated person: (1) participated as an officer or director of a failed institution or of an affiliate of a failed institution, “in a material way in a transaction that caused a

substantial loss to the failed institution” (as defined in paragraph (b) of section 340.4); (2) has been removed from a failed institution by order of a primary federal regulatory agency; (3) engaged in a “pattern or practice of defalcation” (as defined in paragraph (c) of section 340.4) with respect to obligations owed to a failed institution; or (4) committed a certain criminal offense against a financial institution and is in default on an obligation owed by that person or its associated person. The final rule adds a fifth restriction: prohibition from purchasing assets of a covered financial company from the FDIC. As explained above, the FDIC believes part 340 should also restrict the sale of assets of a failed institution to individuals or entities who are also prohibited from purchasing assets of a covered financial company from the FDIC under section 210(r) and section 380.13. This ensures consistent treatment of prospective purchasers of assets from the FDIC, whether such assets are assets of a covered financial company or of a failed institution.

The final rule amends paragraph (a) of section 340.7, which sets forth the requirement that a prospective purchaser certify that none of the restrictions set forth in part 340 apply to the sale, by adding a sentence stating that the person must also certify that it is not using a straw purchaser or other subterfuge to allow it to purchase an asset of an insured depository institution from the FDIC or benefit from such transaction if such person would otherwise be ineligible to purchase assets from the FDIC under part 340. The FDIC’s form certification (the Purchaser Eligibility Certification, FDIC Form 7300/06) already includes a statement under which a prospective purchaser certifies that neither the identity nor form of the prospective purchaser, nor any aspect of the contemplated transaction, has been created or altered to allow an individual or entity who

otherwise would be ineligible to purchase assets of a failed institution from the FDIC to benefit from the sale. Explicitly stating this requirement in the regulatory text itself strengthens part 340.

Paragraph (b) of section 340.7, which excepts from the self-certification requirement certain federal agencies or instrumentalities and states or political subdivisions of states, is revised in the final rule to include bridge depository institutions as well. A bridge depository institution is expected to be in compliance with part 340 because such entity is newly chartered and subject to control or oversight by the FDIC.

Finally, the final rule revises section 340.8, which provides that part 340 does not apply if the sale resolves or settles a person's obligation to the FDIC, to also except a sale that resolves a claim that the FDIC has asserted against a person. This is not intended to be a substantive change but to more closely track section 11(p), which excepts sales that resolve or settle claims as well as obligations. This change ensures that the regulation cites both bases for exception set forth in the statute. It also ensures consistency with the equivalent provision in paragraph (a)(2)(vi) of section 380.13.

The final rule's changes to part 340 ensure consistency among part 340 and section 380.13. This will facilitate efficient administration of the two rules and will help the public better understand how and when each applies. One comment submitted in response to the proposed rule noted that the revisions to part 340 will help to clarify the purpose, scope and applicability, and will make part 340 more consistent with the parallel provision in the FDIC's Orderly Liquidation Authority regulations that implements section 210(r) (section 380.13). The comment goes on to state that

the proposed revisions will improve regulatory consistency and understandability, align better with market practices, and promote the regulatory objectives and intentions under the Federal Deposit Insurance Act.

The substantive amendments and technical and conforming changes to part 340 that are made in the final rule are extensive. Therefore, the FDIC is revising and restating the text of part 340 in full rather than through fragmentary amendments.

### **III. Regulatory Analysis and Procedure**

#### **A. Paperwork Reduction Act**

In accordance with the requirements of the Paperwork Reduction Act (PRA), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.<sup>2</sup>

The FDIC has developed a purchaser eligibility certification form for use by prospective purchasers of assets of a failed institution to establish compliance with part 340. The certification is an OMB-approved collection of information under the PRA.<sup>3</sup> The FDIC expects that the net PRA burden estimates of this collection will not be affected by the changes made in the final rule. Any subsequent changes to the form will be submitted by the FDIC to OMB for review and approval.

*Title of Information Collection:* Purchaser Eligibility Certification.

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<sup>2</sup> 44 U.S.C. 3501, *et seq.*

<sup>3</sup> OMB Number: 3064-0135.

*OMB Control Number:* 3064-0135

*Form Number:* FDIC Form 7300/06

*Affected Public:* Prospective purchasers of failed insured depository institution assets.

*Frequency of Response:* Event generated.

*Estimated Number of Respondents:* 1500.

*Time per Response:* 30 minutes.

*Total Estimated Annual Burden:* 750 hours.

The FDIC has a continuing interest in comments on paperwork burden. Comments are invited on (a) whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

## B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that an agency either certify that a final rule will not have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment.<sup>4</sup> The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a

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<sup>4</sup> 5 U.S.C. 601, et seq.

substantial number of small entities. The FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the final rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

Under regulations issued by the Small Business Administration, a “small entity” includes those firms in the “Finance and Insurance” sector whose size varies from \$7.5 million or less in assets (mortgage and nonmortgage loan brokers) to \$550 million or less in assets (commercial banks, savings institutions, credit unions, and others).<sup>5</sup> The final rule imposes no new burden on prospective purchasers of assets sold by the FDIC. The requirement that a prospective purchaser complete and submit the Purchaser Eligibility Certification described above is a precondition to sale that is already required. Completion of the Purchaser Eligibility Certification does not require the use of professional skills or the preparation of special reports or records and should continue to have minimal economic impact on those individuals and entities that seek to purchase assets from the FDIC. Thus, any impact on small entities will not be substantial.

### C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which provides for agencies to report rules to Congress and for Congress to review such rules.<sup>6</sup> The reporting requirement is triggered in instances where the FDIC issues a final

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<sup>5</sup> 13 CFR 121.201.

<sup>6</sup> Pub. L. 104–121, 110 Stat. 857.

rule as defined by the Administrative Procedure Act (APA).<sup>7</sup> Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by the SBREFA.

#### D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000.<sup>8</sup> The FDIC has sought to present the final rule in a simple and straightforward manner.

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<sup>7</sup> 5 U.S.C. 551 *et seq.*

<sup>8</sup> Pub. L. 106-102, 113 Stat. 1338, 1471.

## **Text of the Final Rule**

### **Federal Deposit Insurance Corporation**

12 CFR Chapter III

#### **List of Subjects in 12 CFR Part 340**

Asset disposition, Banks, banking

##### *Authority and Issuance*

For the reasons stated in the Supplementary Information, the Federal Deposit Insurance Corporation revises and restates Part 340 of title 12 of the Code of Federal Regulations to read as follows:

#### **Part 340—RESTRICTIONS ON SALE OF ASSETS OF A FAILED INSTITUTION BY THE FEDERAL DEPOSIT INSURANCE CORPORATION**

Sec.

340.1 What is the statutory authority for the regulation, what are its purpose and scope, and can the FDIC have other policies on related topics?

340.2 Definitions.

340.3 What are the restrictions on the sale of assets by the FDIC if the buyer wants to finance the purchase with a loan from the FDIC?

340.4 What are the restrictions on the sale of assets by the FDIC regardless of the method of financing?

340.5 Can the FDIC deny a loan to a buyer who is not disqualified from purchasing assets using seller-financing under this regulation?

340.6 What is the effect of this part on transactions that were entered into before its effective date?

340.7 When is a certification required, and who does not have to provide a certification?

340.8 Does this part apply in the case of a workout, resolution, or settlement of obligations?

**Authority:** 12 U.S.C. 1819 (Tenth), 1821(p).

§ 340.1 What is the statutory authority for the regulation, what are its purpose and scope, and can the FDIC have other policies on related topics?

(a) Authority. The statutory authority for adopting this part is section 11(p) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1821(p). Section 11(p) was added to the FDI Act by section 20 of the Resolution Trust Corporation Completion Act (Pub. L. 103–204, 107 Stat. 2369 (1993)).

(b) Purpose. The purpose of this part is to prohibit individuals or entities that improperly profited or engaged in wrongdoing at the expense of a failed institution or covered financial company, or seriously mismanaged a failed institution, from buying assets of a failed institution from the FDIC.

(c) Scope.

(1) The restrictions of this part generally apply to sales of assets of failed institutions owned or controlled by the FDIC in any capacity.

- (2) The restrictions in this section apply to the sale of assets of a subsidiary of a failed institution or a bridge depository institution if the FDIC controls the terms of the sale by agreement or in its role as shareholder.
  
- (3) Unless we determine otherwise, this part does not apply to the sale of securities in connection with the investment of corporate and receivership funds pursuant to the Investment Policy for Liquidation Funds managed by the FDIC as it is in effect from time to time.
  
- (4) In the case of a sale of securities backed by a pool of assets that may include assets of failed institutions by a trust or other entity, this part applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities.
  
- (5) The restrictions of this part do not apply to a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that, in each case, customarily is traded through a financial intermediary, as defined in section 340.2, where the seller cannot control selection of the purchaser and the sale is consummated through that customary practice.
  
- (6) The restrictions of this part do not apply to a judicial sale or a trustee's sale of property that secures an obligation to the FDIC where the sale is not conducted or controlled by the FDIC.

(d) The FDIC retains the authority to establish other policies restricting asset sales. Neither 12 U.S.C. 1821(p) nor this part in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured any failed institution, or to other prospective purchasers, such as certain employees or contractors of the FDIC, or individuals who are not in compliance with the terms of any debt or duty owed to the FDIC. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

#### § 340.2 Definitions.

Many of the terms used in this part are defined in the Federal Deposit Insurance Act, 12 U.S.C. 1811, *et seq.* Additionally, for the purposes of this part, the following terms are defined:

(a) Associated person of an individual or entity means:

(1) With respect to an individual:

(i) The individual's spouse or dependent child or any member of his or her immediate household;

(ii) A partnership of which the individual is or was a general or limited partner;

- (iii) A limited liability company of which the individual is or was a member; or
  - (iv) A corporation of which the individual is or was an officer or director.
- (2) With respect to a partnership, a managing or general partner of the partnership or with respect to a limited liability company, a manager; or
- (3) With respect to any entity, an individual or entity who, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the entity.
- (b) Default means any failure to comply with the terms of an obligation to such an extent that:
- (1) A judgment has been rendered in favor of the FDIC or a failed institution; or
  - (2) In the case of a secured obligation, the property securing such obligation is foreclosed on.
- (c) FDIC means the Federal Deposit Insurance Corporation.
- (d) Failed institution means any insured depository institution (as defined in 12 U.S.C. 1813(c)) that has been under the conservatorship or receivership of the FDIC or any of its predecessors.

(e) Financial intermediary means any broker, dealer, bank, underwriter, exchange, clearing agency registered with the SEC under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another.

(f) Obligation means any debt or duty to pay money owed to the FDIC or a failed institution, including any guarantee of any such debt or duty.

(g) Person means an individual, or an entity with a legally independent existence, including: a trustee; the beneficiary of at least a 25 percent share of the proceeds of a trust; a partnership; a corporation; an association; or other organization or society.

(h) Substantial loss means:

(1) An obligation that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than \$50,000;

(2) An unpaid final judgment in excess of \$50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding;

(3) A deficiency balance following a foreclosure of collateral in excess of \$50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding;

(4) Any loss in excess of \$50,000 evidenced by an IRS Form 1099-C (Information Reporting for Cancellation of Debt).

§ 340.3 What are the restrictions on the sale of assets by the FDIC if the buyer wants to finance the purchase with a loan from the FDIC?

A person may not borrow money or accept credit from the FDIC in connection with the purchase of any assets of a failed institution from the FDIC if:

(a) There has been a default with respect to one or more obligations totaling in excess of \$1,000,000 owed by that person or its associated person; and

(b) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

§ 340.4 What are the restrictions on the sale of assets by the FDIC regardless of the method of financing?

(a) A person may not acquire any assets of a failed institution from the FDIC if the person or its associated person:

- (1) Has participated, as an officer or director of a failed institution or of an affiliate of a failed institution, in a material way in one or more transaction(s) that caused a substantial loss to that failed institution;
- (2) Has been removed from, or prohibited from participating in the affairs of, a failed institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the FDIC, or any of their predecessors or successors;
- (3) Has demonstrated a pattern or practice of defalcation regarding obligations to any failed institution;
- (4) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 affecting any failed institution and there has been a default with respect to one or more obligations owed by that person or its associated person; or
- (5) Would be prohibited from purchasing the assets of a covered financial company from the FDIC under 12 U.S.C. 5390(r) or its implementing regulation at 12 CFR part 380.13.

(b) For purposes of paragraph (a) of this section, a person has participated “in a material way in a transaction that caused a substantial loss to a failed institution” if, in connection with a substantial loss to a failed institution, the person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the FDIC or by any component of the government of the United States or of any state:

(1) To have violated any law, regulation, or order issued by a federal or state banking agency, or breached or defaulted on a written agreement with a federal or state banking agency, or breached a written agreement with a failed institution;

(2) To have engaged in an unsafe or unsound practice in conducting the affairs of a failed institution; or

(3) To have breached a fiduciary duty owed to a failed institution.

(c) For purposes of paragraph (a) of this section, a person or its associated person has demonstrated a “pattern or practice of defalcation” regarding obligations to a failed institution if the person or associated person has:

(1) Engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to any insured depository

institution or with reckless disregard for whether such transactions would cause a loss to any such insured depository institution; and

(2) The transactions, in the aggregate, caused a substantial loss to one or more failed institution(s).

§ 340.5 Can the FDIC deny a loan to a buyer who is not disqualified from purchasing assets using seller-financing under this regulation?

The FDIC still has the right to make an independent determination, based upon all relevant facts of a person's financial condition and history, of that person's eligibility to receive any loan or extension of credit from the FDIC, even if the person is not in any way disqualified from purchasing assets from the FDIC under the restrictions set forth in this part.

§ 340.6 What is the effect of this part on transactions that were entered into before its effective date?

This part does not affect the enforceability of a contract of sale and/or agreement for seller financing in effect prior to July 1, 2000.

§ 340.7 When is a certification required, and who does not have to provide a certification?

(a) Before any person may purchase any asset from the FDIC that person must certify, under penalty of perjury, that none of the restrictions contained in this part applies to the purchase. The person must also certify that neither the identity nor form of the person, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the proposed transaction. The FDIC may establish the form of the certification and may change the form from time to time.

(b) Notwithstanding paragraph (a) of this section, and unless the Director of the FDIC's Division of Resolutions and Receiverships or designee in his or her discretion so requires, a certification need not be provided by:

- (1) A state or political subdivision of a state;
- (2) A federal agency or instrumentality such as the Government National Mortgage Association;
- (3) A federally-regulated, government-sponsored enterprise such as the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; or
- (4) A bridge depository institution.

§ 340.8 Does this part apply in the case of a workout, resolution, or settlement of obligations?

The restrictions of §§ 340.3 and 340.4 do not apply if the sale or transfer of an asset resolves or settles, or is part of the resolution or settlement of, one or more obligations or claims that have been, or could have been, asserted by the FDIC against the person with whom the FDIC is settling regardless of the amount of such obligations or claims.

Dated at Washington, D.C. this    day of           , 2015.

By Order of the Board of Directors, Federal Deposit Insurance Corporation.

Robert E. Feldman,  
Executive Secretary.

BILLING CODE 6714-01-P