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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 390

RIN 3064-AE17

Removal of Transferred OTS Regulations Regarding Possession by Conservators and Receivers for Federal and State Savings Associations.

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) proposes to rescind and remove regulations regarding possession by conservators and receivers for federal and state savings associations, which are no longer necessary in light of or contradict provisions of the Federal Deposit Insurance Act and are not in accordance with FDIC practice and procedures. The regulations were included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Comments must be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: You may submit comments by any of the following methods:

- **FDIC Web Site:** <http://www.fdic.gov/regulations/laws/federal>. Follow instructions for submitting comments on the agency website.
- **FDIC E-mail:** Comments@fdic.gov. Include RIN **3064-AE17** in the subject line of the message.
- **FDIC Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivery to FDIC:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please note: All comments received will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal/> including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),¹ signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning

¹ Pub. L. 111-203, 12 U.S.C. 5301, *et seq.* (2010).

July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,² the powers, duties, and functions formerly performed by the 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 Act³ 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 advisory 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 Act⁴ further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC respectively. On June 14, 2011 the FDIC’s Board of Directors approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.⁵

² 12 U.S.C. 5411.

³ 12 U.S.C. 5414(b).

⁴ 12 U.S.C. 5414(c).

⁵ 76 FR 39247 (July 6, 2011).

FDIC's Authority

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁶ 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 (the "FDI Act")⁷ and other laws as the "appropriate Federal banking agency." Section 312(c) of the Dodd-Frank Act amended section 3(q) of the FDI Act⁸ 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" for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

As noted, on June 14, 2011, the FDIC's Board of Directors reissued and redesignated certain regulations promulgated by the former OTS. These transferred OTS regulations were published as FDIC interim rules in the Federal Register on August 5, 2011.⁹ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the regulations transferred to the FDIC set forth procedures to be followed by conservators and receivers for Federal and State savings associations upon taking possession of said entities and for providing notice of appointment. This OTS regulation, formerly

⁶ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷ 12 U.S.C. 1811, *et seq.*

⁸ 12 U.S.C. 1813(q).

⁹ 76 FR 47652 (August 5, 2011).

found at 12 CFR part 558, was transferred to the FDIC with only nominal changes and is now sections 390.240 and 390.241 in subpart N.

The FDIC's authority to act as conservator or receiver and its powers and duties in those roles are set forth in the FDI Act¹⁰ and in regulations found in 12 CFR. part 360. The Board has delegated authority to staff to establish policies and procedures for carrying out receivership operations. The FDI Act and the policies and procedures implemented and followed by FDIC staff subsume the responsibilities set forth in subpart N.¹¹

II. The Proposal

Section 316(b)(3) of the Dodd-Frank Act¹² provides that the former OTS's regulations will continue in effect until they are modified, terminated, set aside, or superseded in accordance with applicable law. After careful review of subpart N, the FDIC proposes that it be rescinded and removed because it is unnecessary, or because it prescribes actions that are duplicative of actions taken by the OCC or state chartering authority. The FDIC believes that the provisions of the FDI Act and the FDIC's existing policies and procedures sufficiently address the provision of notice of appointment and the authority to take possession of, and exercise control over, the assets of a failed institution, including insured Federal and State savings associations.

12 CFR 390.240 - Procedure upon taking possession.

The FDIC interim rule found at 12 CFR 390.240 ("section 390.240") is the redesignation of the OTS regulation outlining procedures to be followed by conservators and receivers for Federal and State savings associations for taking possession of said entities

¹⁰ 12 U.S.C. 1811, *et seq.*

¹¹ Such policies and procedures include the FDIC Division of Resolution and Receivership's Failed Financial Institution Closing Manual.

¹² 12 U.S.C. 5414(c).

upon appointment. The FDIC is proposing that section 390.240 be rescinded and removed because it is unnecessary. Paragraph (a) requires the conservator or receiver to take possession of the failed institution's principal office in accordance with the terms of the appointment. FDIC's procedure already provides that it takes coordinated simultaneous possession of all locations from which a failed institution operates. Moreover, the FDIC's powers and duties as conservator or receiver are set forth in the FDI Act, not pursuant to the "terms of the . . . appointment."

Paragraphs (b)(1) and (b)(5), respectively, provide that the conservator or receiver shall immediately take possession of the institution's books, records, and assets, and shall succeed to rights, titles, powers and privileges of the savings association and its stockholders, members, account holders, depositors, officers, and directors. These provisions are redundant of the FDI Act, which already provides that the FDIC succeeds to "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution" when acting as conservator or receiver.¹³

Paragraphs (b)(2), (3), and (4), respectively, instruct the conservator or receiver to "notify in writing, served personally or by registered mail or telegraph" all parties known to be holding or in possession of assets of the failed institution that the conservator or receiver has succeeded to all rights, powers and privileges of the failed institution; file a statement with the Executive Secretary that the conservator or receiver took possession of the failed institution; and post a notice on the door of the principal and other offices of the failed institution in the form, if any, prescribed by the OCC or state bank supervisor. For three reasons, these provisions are unnecessary given existing FDIC policies and procedures.

¹³ 12 U.S.C. 1821(d)(2)(A).

First, the FDIC's practice is to demand the return of assets of the failed institution in whatever manner and form that is appropriate under the circumstances. Second, the Executive Secretary is provided with a copy of all closing documents by FDIC staff. Third, the OCC or state bank supervisor itself posts its order closing the institution on the door of the principal office.

12 CFR 390.241 – Notice of Appointment.

The FDIC interim rule found at 12 CFR 390.241 (“section 390.241”) is the redesignation of the OTS regulation outlining procedures for giving notice of the appointment of a conservator or receiver for a Federal or State savings association. The FDIC is proposing that section 390.241 be rescinded and removed because it is unnecessary. Specifically, paragraph (a) requires the FDIC to designate the persons or entities who are to: (1) give notice of the appointment “to any officer or employee who is present in and appears to be in charge at the principal office of the savings association;”¹⁴ (2) serve a copy of the order of appointment by (i) “leaving a certified copy of the order of appointment at the principal office of the savings association,”¹⁵ or (ii) “handing a certified copy of the order of appointment to the previous conservator . . . or the officer or employee of the savings association . . . who is present in and appears to be in charge at the principal office of the savings association;”¹⁶ and (3) file with the Executive Secretary of the FDIC a statement that includes the date and time that notice of the appointment was given and service of the order of appointment was made.”¹⁷ It is not necessary to include these provisions among the FDIC's regulations because the OCC or state chartering authority is responsible for providing

¹⁴ 12 CFR 390.241(a)(1).

¹⁵ 12 CFR 390.241(a)(2)(i).

¹⁶ 12 CFR 390.241(a)(2)(ii).

¹⁷ 12 CFR 390.241(a)(3).

or serving notice of the appointment of the FDIC as conservator or receiver on a Federal or State savings association. Further, the FDIC's Executive Secretary maintains records of the appointment of the FDIC as conservator or receiver. Paragraph (b), which instructs the FDIC to cause a notice of the appointment of the conservator or receiver to be published in the *Federal Register*, is unnecessary because the FDIC causes such a publication regarding any institution for which it is appointed as conservator or receiver in accordance with its policy and procedures. For these reasons, the FDIC proposes that subpart N should be rescinded and removed. Rescinding subpart N will serve to streamline the FDIC's rules, prevent confusion and eliminate unnecessary regulations.

III. Request for Comments

The FDIC invites comments on all aspects of the proposal. Written comments must be received by the FDIC no later than [insert date 60 days after publication in the Federal Register].

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) ("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. Removing subpart N will not revise any existing information collections pursuant to the PRA. Consequently, FDIC has not submitted any information collection request to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, et seq. (“RFA”), requires that each federal agency either (1) certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment.

Rescinding subpart N will leave the FDI Act as the sole source of the FDIC’s authority to act as conservator or receiver for an insured depository institution and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities within the meaning of those terms as used in the RFA.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, 1471, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposal to rescind Subpart N in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

D. The Economic Growth and Regulatory Paperwork Reduction Act.

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations

imposed on insured institutions. The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the proposal would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects in Part 390

Banks and banking; Savings Associations

Authority and Issuance

For the reasons stated in the preamble and under the authority of 12 U.S.C. 5412, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 390 as follows:

PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

1. The authority citation for part 390 is revised to read as follows:

Authority: [12 U.S.C. 1819](#).

Subpart A also issued under [12 U.S.C. 1820](#).

Subpart B also issued under [12 U.S.C. 1818](#).

Subpart C also issued under [5 U.S.C. 504](#); 554-557; [12 U.S.C. 1464](#); 1467; 1468; 1817; 1818; 1820; 1829; 3349, 4717; [15 U.S.C. 78 l](#); 78o-5; 78u-2; [28 U.S.C. 2461](#) note; [31 U.S.C. 5321](#); [42 U.S.C. 4012a](#).

Subpart D also issued under [12 U.S.C. 1817](#); 1818; 1820; [15 U.S.C. 78 l](#).

Subpart E also issued under [12 U.S.C. 1813](#); 1831m; [15 U.S.C. 78](#).

Subpart F also issued under [5 U.S.C. 552](#); 559; [12 U.S.C. 2901](#) *et seq.*

Subpart G also issued under [12 U.S.C. 2810](#) *et seq.*, 2901 *et seq.*; [15 U.S.C. 1691](#); [42 U.S.C. 1981](#), 1982, 3601-3619.

Subpart H also issued under [12 U.S.C. 1464](#); 1831y.

Subpart I also issued under [12 U.S.C. 1831x](#).

Subpart J also issued under [12 U.S.C. 1831p-1](#).

Subpart L also issued under [12 U.S.C. 1831p-1](#).

Subpart M also issued under [12 U.S.C. 1818](#).

Subpart O also issued under [12 U.S.C. 1828](#).

Subpart P also issued under [12 U.S.C. 1470](#); 1831e; 1831n; 1831p-1; 3339.

Subpart Q also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464.

Subpart R also issued under [12 U.S.C. 1463](#); 1464; 1831m; 1831n; 1831p-1.

Subpart S also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p-1; 1881-1884; 3207; 3339; [15 U.S.C. 78b](#); 78 l; 78m; 78n; 78p; 78q; 78w; [31 U.S.C. 5318](#); [42 U.S.C. 4106](#).

Subpart T also issued under [12 U.S.C. 1462a](#); 1463; 1464; [15 U.S.C. 78c](#); 78 l; 78m; 78n; 78w.

Subpart U also issued under [12 U.S.C. 1462](#)a; 1463; 1464; [15 U.S.C. 78c](#); 78 l; 78m; 78n; 78p; 78w; 78d-1; 7241; 7242; 7243; 7244; 7261; 7264; 7265.

Subpart V also issued under [12 U.S.C. 3201](#)-3208.

Subpart W also issued under [12 U.S.C. 1462](#)a; 1463; 1464; [15 U.S.C. 78c](#); 78 l; 78m; 78n; 78p; 78w.

Subpart X also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1828; 3331 *et seq.*

Subpart Y also issued under 12 U.S.C.1831o.

Subpart Z also issued under [12 U.S.C. 1462](#); 1462a; 1463; 1464; 1828 (note).

Subpart N – [Removed and Reserved]

2. Remove and reserve subpart N, consisting of §§ 390.240 through 390.241.

Dated at Washington, D.C., this 15th day of July, 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

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