



FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 390

RIN 3064-AF15

Removal of Transferred OTS Regulations Regarding Accounting Requirements for State Savings Associations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is adopting a final rule to rescind and remove rules regarding accounting requirements for State savings associations because these financial statement and disclosure requirements 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 final rule adopts, without change, a notice of proposed rulemaking (NPR) published in the *Federal Register* on October 2, 2019, which received no comments.

DATES: The final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Maureen Loviglio, Senior Staff Accountant, Division of Risk Management Supervision, (202) 898-6777, MLoviglio@FDIC.gov; Suzanne Dawley, Counsel, Legal Division, sudawley@FDIC.gov.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objectives of the final rule are twofold. The first is to simplify the FDIC's regulations by removing unnecessary regulations, or realigning existing regulations in order to improve the public's understanding and to improve the ease of reference. The second is to promote parity between State savings associations and State nonmember banks by making both classes of institutions subject to the same accounting requirements. Thus, as further detailed in this section, the FDIC is rescinding and removing from the Code of Federal Regulations rules entitled Accounting Requirements (part 390, subpart T) applicable to State savings associations. Such requirements prescribe definitions, public accountant qualifications, and the form and content of financial statements pertaining to certain securities and their related transaction documents. Transaction documents may 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 Securities Exchange Act of 1934 (Exchange Act).¹ The FDIC has determined that the additional financial disclosure requirements required by part 390, subpart T, for State savings associations are substantially similar to, although more detailed than, otherwise applicable financial statement form and content requirements and disclosure requirements that State nonmember banks must satisfy under Federal banking or securities laws or regulations. Therefore, the FDIC is rescinding and removing part 390, subpart T, and

¹ 15 U.S.C. 78a *et seq.*

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

II. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),² 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.³

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,⁴ 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 the Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System, as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act⁵ provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials issued, made, prescribed, or allowed to become effective by the OTS. Section 316(b) also provides that, if such 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.

Pursuant to section 316(c) of the Dodd-Frank Act,⁶ 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

² 12 U.S.C. 5301 *et seq.*

³ 12 U.S.C. 5411.

⁴ *Id.*

⁵ 12 U.S.C. 5414(b).

⁶ 12 U.S.C. 5414(c).

Act.” This list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011.⁷

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁸ 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)⁹ and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c)(1) of the Dodd-Frank Act¹⁰ revised the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act¹¹ to add State savings associations to the list of entities for which the FDIC is designated as the “appropriate Federal banking agency.” As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations. Further, section 376 of the Dodd-Frank Act¹² grants rulemaking and administrative authority to the FDIC over the Exchange Act¹³ filings of State savings associations.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC’s Board of Directors reissued and re-designated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the *Federal Register* on August 5, 2011.¹⁴ When it republished the transferred OTS

⁷ 76 FR 39246 (July 6, 2011).

⁸ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁹ 12 U.S.C. 1811 *et seq.*

¹⁰ 12 U.S.C. 5412(c)(1).

¹¹ 12 U.S.C. 1813(q).

¹² Section 376 of the Dodd Frank Act amended section 3(a) of the Exchange Act. *See* 15 U.S.C. 78c(a)(34).

¹³ 15 U.S.C. 78a *et seq.*

¹⁴ 76 FR 47652 (Aug. 5, 2011).

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.

III. The Proposed Rule

On October 2, 2019, the FDIC published a notice of proposed rulemaking (NPR) regarding the removal of part 390, subpart T (formerly OTS part 563c),¹⁵ which addressed accounting requirements for State savings associations.¹⁶ 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 transaction documents.¹⁷ 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.¹⁸

After a careful review of part 390, subpart T, the FDIC determined that the accounting requirements with respect to financial statements and disclosure forms and content set forth by part 390, subpart T, 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, the FDIC proposed to rescind and remove part 390, subpart T (including the appendix to 12 CFR 390.384).

¹⁵ 12 CFR part 390, subpart T.

¹⁶ 84 FR 52387 (Oct. 2, 2019).

¹⁷ *Id.*

¹⁸ 12 CFR 390.380.

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).¹⁹ While securities issued by State savings associations are exempt from registration requirements of the Securities Act of 1933 (Securities Act),²⁰ the FDIC reviews for compliance with 12 CFR part 192, *Conversion from a Mutual to Stock Form* (OCC conversion regulations), 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.²¹ 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.²² 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 12 CFR part 335, entitled *Securities of State Nonmember Banks and State Savings Associations* (part 335) of the FDIC rules.²³ With

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

²⁰ 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).

²¹ 12 CFR 192.300.

²² 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 the 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.

²³ 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.

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,²⁴ 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 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 is negligible and does not justify maintaining separate disclosure regulations applicable solely to State savings associations.

IV. Comments

The FDIC issued the NPR with a 30-day comment period, which closed on November 4, 2019. The FDIC received no comments on the NPR. Consequently, the proposed rule is adopted as final without change, and part 390, subpart T, will be rescinded in its entirety.

78I(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 reporting to the FDIC under the Exchange Act and part 335 can be accessed at <https://www.fdic.gov/bank/individual/part335/index.html>.

²⁴ 12 CFR 390.384(c).

V. Explanation of the Final Rule

As discussed in the NPR, 12 CFR part 390, subpart T, is being rescinded, in its entirety, because the financial statement and disclosure requirements set forth in part 390, subpart T, 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 to be filed with the FDIC by insured depository institutions, including insured State saving associations, be uniform and consistent with GAAP. Moreover, the HOLA has required that savings association reports and financial statements be consistent with GAAP since the Competitive Equality Banking Act of 1987²⁵ was enacted. 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 reports and other filings containing generally the same information that would be included in Exchange Act reports with the FDIC pursuant to part 335, instead of filing with the SEC.

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 remain 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

²⁵ Pub. L. 100-86, 101 Stat. 552 (1987).

Act requirements. While State savings association public offerings of securities are exempt from Securities Act registration requirements, the FDIC reviews 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, meet the needs of investors and 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.

VI. Expected Effects

As of June 30, 2019, the FDIC supervises 3,424 insured depository institutions, of which 38 (1.1 percent) are insured State saving associations.²⁶ The final rule primarily would only affect regulations that govern State savings associations. As explained in the NPR, the final rule would remove §§ 390.380, 390.381, 390.382, 390.383, and 390.384 of part 390, subpart T, because other Federal banking or securities laws or regulations contain similar requirements. Because these regulations are largely redundant, rescinding them will not have any substantive effects on FDIC-supervised institutions.

VII. Alternatives

The FDIC considered alternatives to the final rule but believes that the amendments represent the most appropriate option for covered institutions. As discussed previously, the Dodd-Frank Act transferred certain powers, duties, and functions formerly performed by the OTS to the FDIC. The FDIC's Board reissued and redesignated certain transferred regulations from the OTS, but noted that it would

²⁶ Based on data from the June 30, 2019, Consolidated Reports of Condition and Income (Call Report) and Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

evaluate them and might later incorporate them into other FDIC regulations, amend them, or rescind them, as appropriate. The FDIC has evaluated the existing regulations relating to State savings association accounting requirements and part 390, subpart T (including the appendix to 12 CFR 390.384). The FDIC considered the alternative of retaining the current regulations, but did not choose to do so because it would be needlessly complex and confusing for its supervised institutions if substantively similar regulations regarding accounting requirements for Exchange Act filers were located in different locations within the Code of Federal Regulations. The FDIC believes it would be burdensome for FDIC-supervised institutions to refer to these separate sets of regulations. Therefore, the FDIC is rescinding part 390, subpart T (including the appendix to 12 CFR 390.384) and streamlining the FDIC's regulations.

VIII. Administrative Law Matters

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),²⁷ 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.

The final rule rescinds and removes from FDIC regulations part 390, subpart T (including the appendix to 12 CFR 390.384). The final rule will not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

B. The Regulatory Flexibility Act

²⁷ 44 U.S.C. 3501–3521.

The Regulatory Flexibility Act (RFA), requires that, in connection with a final rule, an agency prepare a final regulatory flexibility analysis that describes the impact of the final rule on small entities.²⁸ However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the Federal Register together with the rule. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million.²⁹ Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the rule would not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As of June 30, 2019, the FDIC supervised 3,424 insured depository institutions, of which 2,665 are considered small banking organizations for the purposes of RFA.³⁰ The rule primarily affects regulations that govern State savings associations. There are 36

²⁸ 5 U.S.C. 601, *et seq.*

²⁹ The SBA defines a small banking organization as having \$600 million or less in assets, where an organization’s “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201 (as amended, by 84 FR 34261, effective August 19, 2019). “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

³⁰ Based on data from the June 30, 2019, Call Report and Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

State savings associations considered to be small banking organizations for the purposes of the RFA.³¹

As explained in the NPR, the final rule would remove §§ 390.380, 390.381, 390.382, 390.383, and 390.384 of part 390, subpart T, because these sections are unnecessary or redundant of existing Federal banking and securities laws or regulations that prescribe accounting requirements for State savings associations. Because these regulations are redundant to existing regulations, rescinding them would not have any substantive effects on small FDIC-supervised institutions.

Based on the information above, the FDIC certifies that the final rule would not have a significant economic impact on a substantial number of small entities.

C. The Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major” rule.³² If a rule is deemed a major rule by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.³³

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in – (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on

³¹ *Id.*

³² 5 U.S.C. 801 *et seq.*

³³ 5 U.S.C. 801(a)(3).

the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.³⁴

The OMB has determined that the final rule is not a major rule for purposes of the Congressional Review Act and the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act³⁵ requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language.

E. 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.³⁶ The FDIC, along with the other Federal banking agencies, submitted a Joint Report to Congress on March 21, 2017, (EGRPRA Report) discussing how the review was conducted, what has been done to date to address regulatory burden, and further measures that will be taken to address issues that were identified.³⁷ As noted in the EGRPRA Report, the FDIC is continuing to streamline and clarify its regulations through the OTS rule integration process. By removing outdated or unnecessary regulations, such as part 390, subpart T, this final rule complements other

³⁴ 5 U.S.C. 804(2).

³⁵ Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (1999).

³⁶ Pub. L. 104-208, 110 Stat. 3009 (1996).

³⁷ 82 FR 15900 (March 31, 2017).

actions the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

F. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),³⁸ in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.³⁹

Because the final rule does not impose additional reporting, disclosure, or other requirements on IDIs, section 302 of RCDRIA does not apply.

List of Subjects in 12 CFR Part 390

Administrative practice and procedure, Advertising, Aged, Civil rights, Conflict of interests, Credit, Crime, Equal employment opportunity, Fair housing, Government employees, Individuals with disabilities, Reporting and recordkeeping requirements, Savings associations.

³⁸ 12 U.S.C. 4802(a).

³⁹ 12 U.S.C. 4802(b).

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation amends 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 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 O also issued under 12 U.S.C. 1828.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

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

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

Subpart T — [Removed and Reserved]

2. Remove and reserve subpart T, consisting of §§ 390.380 through 390.384.

Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on December 12, 2019.

Annmarie H. Boyd,
Assistant Executive Secretary.

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