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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303, 326, 337, 353, and 390

RIN 3064-AF14

Removal of Transferred OTS Regulations Regarding Certain Regulations for the Operations of State Savings Associations and Conforming Amendments to Other Regulations

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is adopting a final rule (final rule) to rescind and remove certain regulations transferred in 2011 to the FDIC from the former Office of Thrift Supervision (OTS) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) because they are unnecessary, redundant, or duplicative of other regulations or safety and soundness considerations. In addition to the removal, the FDIC is making technical changes to other parts of the FDIC's regulations so that they may be applicable on their terms to State savings associations. Following the removal of the identified regulations, the regulations governing the operations of State savings associations will be substantially the same as those for all other FDIC-supervised institutions.

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

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SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objectives of the proposed rule are twofold. The first is to simplify the FDIC's regulations by removing unnecessary ones and thereby improving ease of reference and public understanding. The second is to promote parity between State savings associations and State nonmember banks by having certain regulations governing the operations of both classes of institutions addressed in the same FDIC rules.

II. Background

A. The Dodd-Frank Act

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,¹ the powers, duties, and functions of the former 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 (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS.² The section provides that if such issuances were in effect on the day before the transfer date, they

¹ 12 U.S.C. 5411.

² 12 U.S.C. 5414(b).

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.

The Dodd-Frank Act directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations to be enforced by each respective agency. The list was published by the FDIC and OCC as a Joint Notice in the *Federal Register* on July 6, 2011,³ and shortly thereafter, the FDIC published its transferred OTS regulations as new FDIC regulations in 12 CFR parts 390 and 391.⁴ When it republished the transferred OTS regulations, the FDIC noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS rules into other FDIC rules, amending them or rescinding them, as appropriate.

Section 312(b)(2)(C) of the Dodd-Frank Act⁵ amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the Federal Deposit Insurance Act (FDI Act)⁶ 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

³ List of Office of Thrift Supervision Regulations to be Enforced by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 39246 (Jul. 6, 2011).

⁴ Transfer and Redesignation of Certain Regulations Involving State Savings Associations Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 76 FR 47652 (Aug. 5, 2011).

⁵ 12 U.S.C. 5412(b)(2)(C).

⁶ 12 U.S.C. 1813(q).

issue, modify, and rescind regulations involving such associations and for State nonmember banks and insured branches of foreign banks.

B. 12 CFR Part 390, Subpart S

One of the rules of the former OTS that was transferred to the FDIC, 12 CFR part 563, governs many of the operations of State savings associations. The former OTS's rule was transferred to the FDIC with nominal changes and is now found in the FDIC's rules at part 390, subpart S, entitled "State Savings Associations – Operations."⁷ Subpart S governs a wide range of operations of State savings associations, as further discussed below.⁸

III. The Proposal

A. Removal of Part 390, Subpart S, Operations of State Savings Associations

On October 31, 2019, the FDIC published a notice of proposed rulemaking (NPR or proposal) regarding the removal of part 390, subpart S, which generally concerns supervision and governance of State savings associations, including operations dealing with chartering documents, the issuance and sale of State savings association securities, mergers and consolidations, advertising, composition of the board of directors, tying restrictions, employment contracts, affiliate transactions, insider loans, pension plans, capital rules for subordinated debt securities and certain preferred stock, capital distributions, management and financial policies, examinations, financial derivatives,

⁷ 12 CFR part 390, subpart S.

⁸ The transferred OTS provision governing the frequency of safety and soundness examinations of State savings associations, 12 CFR 390.351, was rescinded and removed by the final rule that amended 12 CFR 337.12 to reflect the authority of the FDIC under section 4(a) of HOLA to provide for the examination of safe and sound operation of State savings associations. *See* Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks, 81 FR 90949 (Dec. 16, 2016).

interest-rate-risk management, Bank Secrecy Act (BSA), fidelity bonds, conflicts of interest, and changes of directors or officers.⁹ The NPR proposed removing part 390, subpart S from the Code of Federal Regulations (CFR) because, after careful review and consideration, the FDIC believed it was largely unnecessary, redundant, or duplicative of existing regulations or safety and soundness considerations. The FDIC received no comments on these aspects of the proposal.

Rather than restate the rationale for rescission and removal of each section of subpart S, the reader is referred to the fulsome explanations for rescission and removal provided in the NPR,¹⁰ which the FDIC references here as the basis for finalizing the regulations as proposed. In several instances, the proposal to remove a specific section of subpart S was coupled with a proposed amendment to another section of the FDIC's regulations. These amendments are discussed below.

B. Amendments to Parts 303, 326, 337, and 353

The proposal would have made largely technical amendments to sections of the FDIC's regulations located in parts 303, 326, 337, and 353. The proposal would have changed the scope of several regulations to make them applicable, not only to State nonmember banks, but also to State savings associations. One proposed amendment would have included provisions specific to the Home Owners Loan Act (HOLA)¹¹ and applicable to State savings associations in regulations that previously had not applied to State savings associations, as further described below. Other proposed changes would

⁹ 84 FR 58492 (Oct. 31, 2019).

¹⁰ *Id.*

¹¹ 12 U.S.C. 1461, *et seq.*

have revised FDIC regulations to take into account changes to other regulations that are cross-referenced in those FDIC regulations.

This Supplementary Information section of this final rule sets forth the rationales for the amendments to the FDIC's regulations located in parts 303, 326, 337, and 353 because in each case the proposal would have made, and the final rule makes, revisions to FDIC regulations that will remain in place, albeit in an amended form.

1. Part 303 – Filing Procedures

- a. Subpart D – Mergers

The proposal would have amended § 303.62(a)(1) to clarify that subpart D of part 303¹² applies to merger transactions in which the resulting institution is either a State nonmember bank or a State savings association. This would permit the FDIC to rescind § 390.332, which deals with mergers and similar transactions in which the resulting institution is a State savings association. The proposal also would have added a new paragraph (c) to § 303.64 to take into account HOLA's expedited statutory processing requirement as it applies to State savings associations. Specifically, the amendment would have clarified that the FDIC will act on merger applications submitted by State savings associations within 60 days after the date of the FDIC's receipt of a substantially complete merger application, subject to the FDIC's authority to extend such period by an additional 30 days in cases where material information is substantially inaccurate or incomplete. Finally, the proposal would have made a technical amendment to § 303.62(b)(5), requiring the transferring institution, rather than the assuming institution, to file the certification of assumption of deposit liability with the FDIC in accordance

¹² 12 CFR 303.60-303.65.

with part 307. This revision would have accurately reflected the requirements of part 307, which were amended in 2006.¹³

The FDIC received no comments on these aspects of the proposal.

b. Subpart K – Distributions and Reduction of Capital

The proposal would have made changes to §§ 303.200 and 303.203 so that subpart K of part 303¹⁴ would expressly apply to State savings associations, as well as to State nonmember banks and insured branches of foreign banks. The proposed change (together with revisions to § 303.241, described below) would render §§ 390.342-390.348 redundant and unnecessary. In addition, the proposal would have removed the reference to section 18(i) of the FDI Act, which is not applicable to State savings associations, and replaced it with a reference to § 303.241, which the proposal would have made applicable to State savings associations,¹⁵ to ensure that filings subject to §§ 303.203 and 303.241 are made concurrently or as part of the same application.

The FDIC received no comments on these aspects of the proposal.

c. Subpart M – Other Filings

The proposal would have amended § 303.241, which implements section 18(i) of the FDI Act, to make § 303.241 applicable to State savings associations seeking to reduce or retire any part of their common stock or preferred stock, or capital notes or debentures, as if the State savings association were a State nonmember bank subject to section 18(i). As discussed in the proposal, while section 18(i) does not specifically apply to State savings associations, the FDIC believes that it would be consistent with its authority

¹³ See 71 FR 8789 (Feb. 21, 2006), codified at 12 CFR 307.1 *et seq.*

¹⁴ 12 CFR 303.200-.207.

¹⁵ See section III.B.1.c., *infra*.

under section 39 of the FDI Act to prescribe an operational standard requiring State savings associations to obtain the approval of the FDIC before entering into a transaction that would result in the reduction or retirement of capital stock or debt instruments, even if the institution would not be undercapitalized as a result of the transaction. Consistent with the procedures set forth in subpart K of part 303, the proposal would have required that applications pursuant to section 38 of the FDI Act and § 303.241 should be filed concurrently or as a single application.

The FDIC received no comments on these aspects of the proposal.

2. Part 326 – Minimum Security Devices and Procedures and Bank Secrecy Act Compliance

The proposal would have amended two sections in part 326 to make the regulations of that part applicable to all entities for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act.¹⁶ These amendments would have been accomplished by revising the definition in § 326.1(a) and by replacing each instance of “insured nonmember bank” in § 326.8 with “FDIC-supervised institution” and each instance of “bank” with “institution.” These revisions would have rendered § 390.354 duplicative and unnecessary. In addition, the title of §326.8 would have been changed from “Bank Security Act compliance” to “Bank Secrecy Act compliance” to correct a scrivener’s error.

The FDIC received no comments on these aspects of the proposal.

3. Part 337 – Unsafe and Unsound Banking Practices

The proposal would have revised § 337.3 to include State savings associations and foreign banks having an insured branch, as well as insured nonmember banks, within

¹⁶ 12 U.S.C. 1813(q).

the scope of the FDIC's limits on extensions of credit to executive officers, directors, and principal shareholders, thereby making § 390.338 redundant and unnecessary.

At the same time, the proposal would have made three technical edits to § 337.3. The first two revisions would have reflected changes made by the FRB to its Regulation O,¹⁷ which the FDIC incorporated by reference in § 337.3 with the exception of §§ 215.5(b) and (c)(3) and (4) and 215.11. Due to revisions made by the FRB to Regulation O, those cross-references are no longer accurate, and the proposal would have corrected that error. Similarly, the proposal would have changed the cross-reference in footnote 3 to the correct section of Regulation O that defines unimpaired capital and surplus.

Finally, the proposal would have removed paragraphs (b)(3) and (4), which included transition periods for loans that were entered into prior to May, 28, 1992. Given the passage of time since the codification of § 337.3, the FDIC concluded that those subsections are no longer necessary.

The FDIC received no comments to these aspects of the proposal.

4. Part 353 – Suspicious Activity Reports (SARs)

The proposed rule would have made the FDIC's SAR-reporting regulations applicable to State savings associations as well as State nonmember banks and foreign banks having an insured branch. It would have added a new definition of FDIC-supervised institution to § 353.2 and amended §§ 353.1 and 353.3 by (1) removing the term "insured nonmember bank" and replacing it with "FDIC-supervised institution" and

¹⁷ 12 CFR part 215.

(2) removing the term “bank” and replacing it with “institution”. These revisions would have made the SAR-reporting requirements of § 390.355 duplicative and unnecessary.

The FDIC received no comments to these aspects of the proposal.

IV. The Final Rule

For the reasons stated herein and in the NPR, the FDIC is adopting the proposal as proposed.

V. Expected Effects

As of June 30, 2019, the FDIC supervised 3,424 insured depository institutions. The final rule primarily affects regulations that govern State savings associations. Of the 3,424 FDIC-supervised institutions, 38 (1.1 percent) are State savings associations.¹⁸ Therefore, the final rule is expected to affect 38 FDIC-supervised institutions.

Section 390.330 requires a de novo State savings association, prior to commencing operations, to file its charter and bylaws with the FDIC for certification. The FDIC does not charter depository institutions, therefore the certification authority outlined in § 390.330 does not conform with the FDIC’s general authority. The OCC or State banking supervisors do charter depository institutions and therefore, may have similar charter and bylaw certification requirements for de novo savings associations. If the OCC or a State banking supervisor does not have similar charter and bylaw certification requirements for de novo savings associations, this aspect of the final rule could reduce recordkeeping and reporting requirements for future de novo savings associations. However, an analysis of de novo activity for savings associations shows that there has been only one in the last eleven years. The final rule would also eliminate

¹⁸ 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.

the federal requirement for a state savings association to make available to its accountholders, on request, a copy of its bylaws. The nature of the requirements contained in § 330 are typically addressed by state law. Depending on the state, elimination of this section could result in a small reduction in expenses. The final rule would also eliminate the federal requirement for a State savings association to make available to its accountholders, on request, a copy of its bylaws. The nature of the requirements contained in § 390.330 are typically addressed by state law. Depending on the state, elimination of this section could result in a small reduction in expenses. Therefore, this aspect of the final rule is unlikely to pose significant effects on a substantial number of FDIC-supervised State savings associations.

Section 390.331 requires that every security issued by a State savings association include in its provisions a clear statement that the security is not insured by the FDIC. Although, the FDIC does not have a companion rule that requires State nonmember institutions to clearly state that a security is not insured by the FDIC, provisions of the FDI Act, FDIC regulations, and Statements of Policy clarify that securities are not insured by the FDIC. Moreover, the FDIC has issued two Statements of Policy, one regarding the sale of nondeposit investment products and one regarding the use of offering circulars, that are intended to prevent confusion on the part of customers and investors regarding these matters. Therefore, rescission of § 390.331 would not substantively change deposit insurance coverage for State savings associations, or security disclosure practices. This aspect of the final rule is unlikely to pose significant effects on FDIC-supervised State savings associations.

Section 390.332 addresses the application requirements for mergers, consolidations, purchases or sales of assets, and assumptions of liabilities that apply to State savings associations. The FDIC is rescinding § 390.332 and amending 12 CFR part 303, subpart D, the section of the FDIC’s regulations governing merger transactions. The amendments to subpart D would make that section applicable to any FDIC-supervised institution, including State savings associations, and would make other conforming changes. Because the changes would not affect the application requirements and application content this aspect of the final rule is unlikely to pose any effects on FDIC-supervised State savings associations.

Section 390.333 prohibits State savings associations from making inaccurate representations about services, contracts, investments, or financial condition in their advertising. The prohibition of misrepresentations in advertising contained in § 390.333 is substantially similar to the more general prohibition of unfair or deceptive acts or practices under section 5(a) of the Federal Trade Commission Act (section 5). The FDIC enforces this provision pursuant to its authority under section 8 of the FDI Act.¹⁹ The prohibition contained in section 5 is broader than § 390.333 because it prohibits all “unfair or deceptive acts or practices in or affecting commerce,” and it applies to all FDIC-supervised institutions, not only State savings associations.²⁰ Because the narrower prohibitions of § 390.333 appear subsumed within the broader prohibitions of Section 5, the FDIC believes that this aspect of the final rule will not have any substantive effect on FDIC-supervised State savings associations.

¹⁹ 12 U.S.C. 1818.

²⁰ 15 U.S.C. 45(a)(1).

Section 390.334 limits who may serve on the board of directors of a State savings association by providing that: a majority of the directors must not be employees of the State savings association or its affiliates; no more than two directors may come from the same family; and no more than one director may be an attorney with a particular law firm. This aspect of the final rule could reduce compliance requirements on FDIC-supervised State savings associations by enabling them to make changes to the composition of their board of directors if they so choose. Such a reduction of compliance requirements could benefit covered entities by enabling them to choose a board that best executes the fiduciary powers of the board of directors, and more effectively supports the financial health of the institution. However, rescinding § 390.334 also potentially reduces the independence of boards of directors for State savings associations. While an independent board of directors is an important aspect of the governance of an insured institution and contributes to its safety and soundness, State savings associations and their directors would be subject to the same governance standards, supervisory expectations for risk management, and examination approaches as would other banks supervised by the FDIC. Therefore, the FDIC believes that this aspect of the final rule will not have any significant effects on FDIC-supervised State savings associations.

Section 390.335 is entitled “Tying restriction exception” and refers solely to the regulations issued by the FRB. Section 312(b)(2) of the Dodd-Frank Act transferred the authority to grant exceptions from the anti-tying regulations of HOLA to the FRB, rather than to the FDIC, upon the dissolution of the OTS.²¹ Therefore, rescinding § 390.335 would align the FDIC’s regulations with the FDIC’s general authority. Additionally,

²¹ 12 U.S.C. 5412(b)(2)(A).

because the FRB maintains the authority to grant exceptions from the anti-tying regulations for Federal and State savings associations, this aspect of the final rule will have no substantive effect on FDIC-supervised State savings associations.

Section 390.336 sets forth requirements with which a State savings association must comply when entering into an employment contract with its officers and other employees. State savings associations are subject to existing statutory authority regarding employment contracts with institution-affiliated parties. For instance, section 30 of the FDI Act prohibits an insured depository institution from entering into a contract with any person for services or goods if the contract would adversely affect the institution's safety or soundness.²² Further, the FDIC expects that State savings associations will be guided by the Interagency Guidelines Establishing Standards for Safety and Soundness (the Interagency Safety and Soundness Guidelines) prescribed pursuant to section 39 of the FDI Act, which apply to all insured depository institutions, including State savings associations.²³ In addition, part 359 of the FDIC's regulations limits and/or prohibits troubled institutions from paying and making golden parachute and indemnification payments to an institution-affiliated party. Although there are no similar regulations for FDIC-supervised institutions, existing statutes, guidelines, and regulations have a similar effect on FDIC-supervised institutions, including State savings associations. Therefore, removal of § 390.336 is unlikely to have any substantive effect on FDIC-supervised State savings associations.

²² 12 U.S.C. 1831g.

²³ See 12 U.S.C. 1831p-1(c); 12 CFR part 364, app. A, section III.

Section 390.337 states only that State savings associations should “see the regulations issued by Board of Governors of the Federal Reserve System” for the applicable rules for transactions with affiliates. Because HOLA applies sections 23A and 23B of the Federal Reserve Act to State savings associations²⁴ and because the FRB’s Regulation W²⁵ addresses the additional restrictions of HOLA applicable to State and Federal savings associations’ transactions with their affiliates, the FDIC believes that this aspect of the final rule will not have any substantive effects on FDIC-supervised institutions.

Section 390.338 cross-referenced the FRB’s Regulation O,²⁶ with some additional modifications. Section 337.3 of the FDIC’s regulations reference Regulation O to impose similar direct regulatory requirements on State nonmember banks. The FDIC is rescinding and removing § 390.338, making minor conforming changes to § 337.3 to clarify its applicability to State savings associations, and making technical amendments to § 337.3. Therefore, this aspect of the final rule is unlikely to have any effect on FDIC-supervised institutions.

Section 390.339 prohibits State savings associations from sponsoring an employee pension plan which, because of unreasonable costs or for any other reason, could lead to material financial loss or damage to the sponsor. The section further requires a State savings association that serves as a pension plan sponsor to retain detailed pension plan records and actuarial funding reports and to provide advance notice

²⁴ 12 U.S.C. 1468(a).

²⁵ The FDIC has interpreted the language “in the same manner and to the same extent” to include the application of Regulation W.

²⁶ 12 CFR part 215.

of a pension plan termination. The Interagency Safety and Soundness Guidelines apply to all insured depository institutions, including State savings associations. Section III of the Interagency Safety and Soundness Guidelines explicitly prohibits compensation that could lead to material financial loss as an unsafe and unsound practice. The Interagency Safety and Soundness Guidelines also address excessive compensation as an unsafe and unsound practice, taking into account factors such as compensation history, the institution's financial condition, comparable compensation practices, the projected costs and benefits of postemployment benefits, fraudulent or other inappropriate activity, and any other factors the agencies deem relevant. "Compensation" is defined as "all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement."²⁷ Additionally, regulations on recordkeeping by the Pension Benefit Guaranty Corporation (PBGC) would apply to any pension plan offered by an FDIC-supervised institution.²⁸ Because FDIC-supervised institutions, including State savings associations, will continue to be subject to the Interagency Safety and Soundness Guidelines, as well as PBGC regulations, rescinding § 390.339 is unlikely to substantively effect FDIC-supervised institutions.

Section 390.340 generally prohibits the offer or sale of debt or equity securities issued by a State savings association or an affiliate of the State savings association at an

²⁷ 12 CFR part 364, app. A, section I.B.3.

²⁸ Pub. L. 109-280, 120 Stat. 780, 29 U.S.C. 1301 *et seq.*

office of the State savings association with the exception of equity securities issued in connection with the State savings association's conversion from mutual to stock form in a transaction that has been approved by the FDIC or if the sale is conducted in accordance with the conditions set forth in § 390.340. The Nondeposit Investment Products (NDIP) Statement of Policy²⁹ provides guidelines for all sales of nondeposit products (such as annuities, mutual funds, and other securities) by depository institutions, including State savings associations. Additionally, the Offering Circular Statement of Policy³⁰ provides guidelines for sales and distribution of bank securities. Therefore, the FDIC believes that rescission of § 390.340 will not substantively change the offer or sale of debt or equity securities issued by a State savings associations or their subsidiaries. Therefore, this aspect of the final rule is unlikely to pose significant effects on FDIC-supervised State savings associations.

Section 390.341 provides application and notice procedures and form and content requirements for subordinated debt securities and mandatorily redeemable preferred stock that a State savings association seeks to include in its tier 2 capital. There is no corresponding requirement applicable to State nonmember banks. Many of the form and content requirements in § 390.341 that are designed to prevent consumer confusion are included in the FDIC's Offering Circular Statement of Policy. FDIC-supervised institutions, including State savings associations, are governed by the criteria for inclusion in tier 2 capital are included in the FDIC's capital rules in 12 CFR part 324.³¹

²⁹ Interagency Statement on Retail Sales of Nondeposit Investment Products (February 15, 1994), <https://www.fdic.gov/regulations/laws/rules/5000-4500.html>.

³⁰ Statement of Policy Regarding Use of Offering Circulars in Connection with Public Distribution of Bank Securities, 61 Fed. Reg. 46808 (Sept. 5, 1996).

³¹ See 12 CFR 324.20(d)(1).

Therefore, this aspect of the final rule is unlikely to pose significant effects on FDIC-supervised State savings associations.

Section 390.342 states that §§ 390.342 through 390.348 apply to capital distributions by a State savings association.³² Because the final rule would rescind §§ 390.342 through 390.348, and would amend FDIC regulations 303.200, 303.203, and 303.241 to make them applicable to State savings associations, the removal of § 390.342 will not have any substantive effects on FDIC-supervised State savings associations.

Section 390.343 defines a “capital distribution” for the purposes of §§ 390.342-390.348. Section 38 of the FDI Act³³ applies to all insured depository institutions, and, among other things, generally prohibits an insured depository institution from making a capital distribution if, after making the distribution, the institution would be undercapitalized. Section 38 also defines a “capital distribution” to include certain dividends; repurchases, redemptions, retirements, or other acquisitions of shares or other ownership interests, including extensions of credit to finance an affiliated company’s acquisition of such shares; and any other transaction that the Federal banking agencies find to be in substance a distribution of capital.³⁴ Part 303 of the FDIC’s regulations includes procedures to implement the filing requirements for capital distributions under the Prompt Corrective Action (PCA) provisions of section 38 for insured State nonmember banks and insured branches of foreign banks. The final rule would amend § 303.203 so that it expressly applies to State savings associations. The requirements of § 390.343(a) and (b) are substantively similar to requirements in section 38 and the

³² 12 CFR 390.342.

³³ 12 U.S.C. 1831o.

³⁴ 12 U.S.C. 1831o(b)(2)(B).

current, analogous FDIC regulations at § 303.203. Section 390.343(e) incorporates FDI Act section 38(b)(2)(B)(iii), which authorizes the Federal banking agencies to, by order or regulation, deem as a “capital distribution” any transaction that the FDIC determines to be in substance a distribution of capital.³⁵ Therefore, the final rule’s rescission of these elements and amendments to § 303.203 will have no effects on FDIC-supervised State savings associations.

Section 390.343(c) further defines “capital distribution” to include any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring, including the payment of cash or property to shareholders of another savings association or its holding company to acquire ownership in that savings association, other than by a distribution of shares.³⁶ This prong of § 390.343’s definition of “capital distribution” is not matched by an analogous prong in section 38.

Additionally, § 390.343(d) captures as a “capital distribution” any capital distribution that is charged against a State savings association’s capital accounts if the State savings association would not be well capitalized following the distribution.³⁷ As with payments made in connection with a corporate restructuring, this element of § 390.343’s regulatory definition is not expressly addressed in section 38. The final rule would rescind these requirements for FDIC-supervised State savings associations. The FDIC believes that this aspect of the final rule is unlikely to substantively affect FDIC-supervised institutions. Additionally, the FDIC believes that FDIC-supervised State savings association would benefit from the establishment of equal treatment of capital

³⁵ 12 CFR 390.343(e), 12 U.S.C. 1831o(b)(2)(B)(iii).

³⁶ 12 CFR 390.343(c).

³⁷ 12 CFR 390.343(d).

distributions for State nonmember banks and State savings associations. However, it is difficult to estimate these effects because they depend on the financial condition of, and future decisions of senior management at, FDIC-supervised State savings associations.

Section 390.344 adopts additional definitions specifically for the capital distribution provisions of §§ 390.342 through 390.348.³⁸ Part 303 of the FDIC's regulations includes procedures to implement the filing requirements for capital distributions under the PCA provisions of section 38 for insured State nonmember banks and insured branches of foreign banks, and definitions of terms for capital distribution provisions are contained in the FDIC's capital rules. The final rule would amend § 303.203 so that it expressly applies to State savings associations. Therefore, rescinding § 390.344 is unlikely to have any substantive effects on FDIC-supervised State savings associations.

Section 390.345 establishes that a State savings association is required to file an application for a proposed capital distribution in certain circumstances, and in others is required to file a notice. The application requirements of § 303.203 are analogous to those imposed on State savings associations by § 390.345(a)(3), as both sections require applications to the FDIC in cases where an institution would be undercapitalized following a capital distribution, as mandated by section 38 of the FDI Act. Because section 38 prohibits capital distributions in cases where an insured depository institution would be undercapitalized, the substantive requirements of § 390.345(a)(3) would be preserved by making § 303.203 applicable to State savings associations. The application requirements of § 303.241 are analogous to the notice requirements imposed on State

³⁸ 12 CFR 390.344.

savings associations by § 390.345(b)(2), as both sections require regulatory consideration of transactions that would reduce or retire common or preferred stock or capital notes or debentures. Accordingly, the FDIC is rescinding §§ 390.345(a)(3) and 390.345(b)(2) and, as noted above, the FDIC also is amending § 303.241 so that it applies to State savings associations.

The FDIC is rescinding the entirety of § 390.345, which would effectively eliminate application requirements for capital distributions in cases where: a State savings association is not eligible for expedited processing under § 390.101; the total amount of all capital distributions by a State savings association for the applicable calendar year exceeds the association's net income for that year to date plus retained net income for the preceding two years; and where a State savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement with the FDIC, or violate a condition imposed on the State savings association in an FDIC-approved application or notice. The rescission of § 390.345 would also effectively eliminate the notice requirements for capital distributions in cases where a State savings association would not be well capitalized following the distribution. The PCA provisions of section 38 of the FDI Act, however, which apply to all insured institutions, would address such situations. This aspect of the final rule is expected to reduce compliance costs for FDIC-supervised State savings associations. Although reducing notice requirements for these capital distribution activities could potentially increase the frequency of this activity for FDIC-supervised State savings associations, the FDIC believes such effects are likely to be relatively small. However, it is difficult to estimate these effects because they depend on the

financial condition of, and future decisions of senior management at, FDIC-supervised State savings associations. Additionally, the FDIC believes that FDIC-supervised State savings associations would benefit from the establishment of equal treatment for application and notification requirements of capital distributions for State nonmember banks and State savings associations.

Section 390.346 provides filing instructions for capital distributions that are subject to application or notice requirements under § 390.345, including instructions concerning a filing's content, schedules, and timing.³⁹ Because the FDIC is rescinding § 390.345, these provisions would no longer be applicable. Therefore, the FDIC is rescinding § 390.346. As described above, the FDIC is also making §§ 303.203 and 303.241 applicable to State savings associations, and both of these sections set forth requirements related to the content of filings. Furthermore, certain rules of general applicability, including those related to processing, are set forth in subpart A of part 303 of the FDIC's regulations and would apply to filings made by State savings associations under §§ 303.203 and 303.241. Based on this information, the FDIC believes that this aspect of the final rule is unlikely to have any effect on FDIC-supervised State savings associations.

Section 390.347 authorizes a State savings association to combine a notice or application required under § 390.345 with another related notice or application.⁴⁰ Because the FDIC is rescinding § 390.345, these provisions would no longer be applicable. Therefore, the FDIC is rescinding § 390.347. As noted above, by making

³⁹ 12 CFR 390.346.

⁴⁰ 12 CFR 390.347.

State savings associations subject to §§ 303.203 and 303.241, as amended, State savings associations would be permitted to file applications that are subject to both sections as a single filing or concurrently with other filings.⁴¹ Therefore, the FDIC believes that this aspect of the final rule is unlikely to have any effect on FDIC-supervised State savings associations.

Section 390.348 sets forth the bases on which the FDIC may deny, in whole or in part, a notice or application filed under § 390.345. Because the FDIC is rescinding § 390.345, these provisions would no longer be applicable. Furthermore, the statutory exception that applies to capital distributions subject to section 38 of the FDI Act would continue to apply to capital distributions by State savings associations that are subject to section 38. In addition, because the proposal would make reductions or retirements of capital by State savings associations subject to the application requirements of § 303.241, the FDIC would evaluate such applications in light of the statutory factors enumerated in section 18(i)(4) of the FDI Act, and the bases identified in §§ 390.348(b) and 390.348(c) would be preserved insofar as they would be inherent in how the FDIC would review applications in light of the statutory factors of section 18(i)(4).⁴² Therefore, the FDIC believes that this aspect of the final rule is unlikely to have any effect on FDIC-supervised State savings associations.

Section 390.349 implements the statutory requirement of section 4 of the HOLA. That section requires each State savings association to be operated in a safe and sound

⁴¹ See 12 CFR 303.203(b) and 12 CFR 303.241(e).

⁴² The statutory factors of section 18(i)(4) are: (A) the financial history and condition of the institution; (B) the adequacy of its capital structure; (C) its future earnings prospects; (D) the general character and fitness of its management; (E) the convenience and needs of the community to be served; and (F) whether or not its corporate powers are consistent with the purposes of the FDI Act. 12 U.S.C. 1828(i)(4).

manner and encourages State savings associations to provide credit for housing safely and soundly.⁴³ In particular, § 390.349 includes explicit safety and soundness requirements relating to liquidity and compensation to officers, directors, employees, and consultants. Section 39 of the FDI Act⁴⁴ requires the Federal banking agencies to prescribe safety and soundness standards for internal controls, information systems, and internal audit systems; loan documentation; credit underwriting; interest rate exposure; asset growth; compensation, fees, and benefits; and such other operational and managerial standards as the agency determines to be appropriate. To this end, the FDIC has adopted part 364 and the related appendices. Part 364 establishes compensation-related standards and provides for other safety- and soundness-related guidelines which apply to all insured State nonmember banks, to State-licensed insured branches of foreign banks, and to State savings associations.⁴⁵ As such, the safety and soundness standards in § 390.349 are generally duplicative of the standards implemented through part 364. Part 364, as amended, provides consistent safety and soundness standards for both State nonmember banks and State savings associations. Therefore, the FDIC believes that this aspect of the final rule will have no substantive effects on FDIC-supervised institutions.

Section 390.350 contains requirements regarding examinations, appraisals, establishing and maintaining books and records, and using data processing services for maintenance of records. The final rule rescinds paragraphs (a), pertaining to examinations and audits, and (b), pertaining to appraisals. Section 390.350(a) states that

⁴³ 12 U.S.C. 1463(a).

⁴⁴ 12 U.S.C. 1831p-1.

⁴⁵ 12 CFR 364.101. In 2015, 12 CFR 364.101 was amended to apply to both State nonmember banks and State savings associations. *See* Removal of Transferred OTS Regulations Regarding Safety and Soundness Guidelines and Compliance Procedures; Rules on Safety and Soundness, 80 FR 65903 (Oct. 28, 2015).

each State savings association and affiliate will be examined periodically and may be examined anytime by the FDIC and that appraisals may be required as part of the examination. Section 337.12 states that the FDIC examines State nonmember banks pursuant to section 10 of the FDI Act,⁴⁶ State savings associations pursuant to section 10 of the FDI Act and section 4 of HOLA,⁴⁷ and implements the frequency of examinations specified by section 10 for insured depository institutions, including State savings associations. Section 390.350(b) permits the FDIC to select appraisers in connection with an examination, requires State savings associations to pay for such an appraiser, and mandates that the FDIC furnish the appraisal report to the State savings association within 90 days following the filing of the report to the FDIC. Part 323 of the FDIC's regulations implements Title XI of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA),⁴⁸ which requires written appraisals in connection with certain federally related transactions entered into by institutions regulated by the FDIC. Section 323.3(c), which applies to all FDIC-supervised institutions, including State savings associations, allows the FDIC to require an appraisal whenever the agency believes it is necessary to address safety and soundness concerns, which would include during an examination.

Section 390.350(c) requires each State savings association and its affiliates to establish and maintain such accounting and other records as will provide an accurate and complete record of all business it transacts to enable the examination of the State savings association and its affiliates by the FDIC. The documents, files, and other material or

⁴⁶ 12 U.S.C. 1820.

⁴⁷ 12 U.S.C. 1463.

⁴⁸ Pub. L. 101-73, 103 Stat. 183; codified at 12 U.S.C. 3331 *et seq.*

property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be. State savings associations are already subject to other FDIC regulations that achieve the purposes of § 390.350(c). For example, as recognized by § 304.3 of the FDIC's regulations, all insured depository institutions, including State savings associations, are required to file quarterly Consolidated Reports of Condition and Income (Call Reports). As such, the records maintenance requirements for State savings associations outlined in § 390.350(c) are generally duplicative of the standards implemented through part 304. Therefore, rescinding § 390.350(c) will have no substantive effects on FDIC-supervised institutions.

Section 390.350(d) prohibits State savings associations from transferring the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has authorized the transfer by resolution and notified the appropriate regional director. The FDIC has not promulgated a similar rule for State nonmember banks. The removal of § 390.350(d) will provide relief to State savings associations by not having to notify the appropriate regional director of its intention to relocate records from its home office to a branch or service office and will provide parity with State nonmember banks which do not provide the FDIC with prior notification of transferring records from one location to another. It is difficult to estimate these effects because they depend on the financial condition of, and future decisions of senior management at, FDIC-supervised State savings associations, in particular their propensity to change the

location of general accounting or control records, or the maintenance thereof. However, because the final rule only affects a relatively small number of institutions and because the notification requirements being rescinded pose a relatively small burden, the FDIC believes that this aspect of the final rule is unlikely to substantively benefit any FDIC-supervised State savings associations.

Section 390.350(e) requires that when a State savings association maintains any of its records by means of data processing services, it will notify the appropriate regional director for the region in which the principal office of such State savings association is located, in writing, at least 90 days prior to the date on which such maintenance of records will begin. Section 304.3(d), implementing section 7 of the Bank Service Company Act,⁴⁹ already requires FDIC-supervised institutions, including State savings associations, to notify the FDIC about the existence of a service relationship within thirty days after the making of the contract or the performance of the service and provides for the required information either through a letter or FDIC Form 6120/06 *Notification of Performance of Bank Services*. Therefore, the FDIC believes that rescinding § 390.350 is unlikely to have any substantive effects on FDIC-supervised State savings associations.

Section 390.352 addresses the permissibility of financial derivatives transactions, the responsibility of the board of directors and management of a State savings association with respect to such transactions, and recordkeeping requirements related to such transactions. Section 28(a) of the FDI Act,⁵⁰ implemented by part 362 of the FDIC's

⁴⁹ 12 U.S.C. 1867.

⁵⁰ 12 U.S.C. 1831e(a).

regulations,⁵¹ restricts and prohibits State savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for a Federal savings association and its service corporations. The term “activities permissible for a Federal savings association” means, among other things, activities recognized as permissible in OCC regulations.⁵² Section 163.172 of the OCC’s regulations governs the financial derivatives activities of Federal savings associations, the responsibility of the board of directors and management of a Federal savings association with respect to such transactions, and recordkeeping requirements related to such transactions.⁵³ Because section 28(a) of the FDI Act and part 362 establish requirements that are duplicative of § 390.352, the FDIC believes that rescinding § 390.352 is unlikely to have any effect on FDIC-supervised State savings associations.

Section 390.353 requires the board of directors or a board committee of a State savings association to develop, implement, and review policies and procedures for the management of a State savings association’s interest-rate-risk; requires the association’s management to report periodically to the board regarding implementation of the policy; and requires the association’s board of directors to adjust the policy as necessary, including adjustments to the authorized acceptable level of interest rate risk. As mentioned above, the Interagency Safety and Soundness Guidelines, promulgated pursuant to section 39 of the FDI Act, describe examples of safe and sound practices for State nonmember banks and State savings associations. The Guidelines provide that an institution “should manage interest rate risk in a manner that is appropriate to its size and

⁵¹ See 12 CFR 362.9-362.15.

⁵² See 12 CFR 362.9(a).

⁵³ See 12 CFR 163.172.

the complexity of its assets and liabilities”.⁵⁴ Management and the board of directors should be provided reports regarding interest rate risk that are adequate to assess the level of risk. Because the requirements outlined in § 390.353 are similar to the safety and soundness practices outlined in established Guidelines that already apply to FDIC-supervised State savings associations, the FDIC believes that this aspect of the final rule is unlikely to have any substantive effects on FDIC-supervised State savings associations.

Section 390.354 requires State savings associations to establish and maintain a Bank Secrecy Act (BSA) compliance program and a customer identification program. Section 390.354 also enumerates the four pillars required for a BSA compliance program. Similarly, § 326.8 of the FDIC’s regulations⁵⁵ requires insured depository institutions for which the FDIC is the appropriate Federal banking agency to establish a BSA compliance program to include the same four pillars and a customer identification program. The final rule would rescind § 390.354 and make technical changes to § 326.8, which is currently only applicable to insured depository institutions for which the FDIC is the appropriate Federal banking agency.⁵⁶ Because the amended § 326.8 would be duplicative of § 390.354 the FDIC believes that this aspect of the final rule is unlikely to have any effect on FDIC-supervised State savings associations.

Section 390.355 requires State savings associations and service corporations to make certain reports. Section 390.355(a) requires State savings associations to make

⁵⁴ 12 CFR part 364, app. A, section II.E.

⁵⁵ 12 CFR 326.8, 326.1(a).

⁵⁶ 12 CFR 326.8 is applicable to “all insured nonmember banks as defined in 12 CFR 326.1.” Section 326.1 was revised to remove the definition of “insured nonmember bank” and replace it with the term “FDIC-supervised institution” or “institution”, defined to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act (12 U.S.C. 1813(q). 83 FR 13839, 13842 (April 2, 2018).

periodic reports to the FDIC in such a manner and on such forms as the FDIC may prescribe. There are a number of Federal statutes that require reporting by State savings associations. For example, section 5 of HOLA requires “each association to make reports of conditions to the appropriate Federal banking agency which shall be in a form prescribed by the appropriate Federal banking agency...” and sets forth the type of information such reports shall contain.⁵⁷ Section 7(a)(3) of the FDI Act requires all insured depository institutions to make four annual reports of condition to their appropriate Federal banking agency.⁵⁸ In addition, section 36 of the FDI Act⁵⁹ and the FDIC’s implementing regulations at part 363⁶⁰ require insured depository institutions above a specified asset threshold to have annual independent audits and to submit annual reports and audited financial statements to the FDIC. Section 37 of the FDI Act requires financial statements, and other reports provided to the FDIC, to be prepared in a manner consistent with generally accepted accounting principles.⁶¹ Finally, the Interagency Policy Statement on External Auditing Programs of Banks and Savings Associations⁶² provides unified interagency guidance regarding independent external auditing programs of insured depository institutions for community banks and savings associations that do not have to comply with part 363 (because they do not meet the size threshold) or that are not otherwise subject to audit requirements by order, agreement, statute, or FDIC

⁵⁷ 12 U.S.C. 1464(v)(1). Although 12 U.S.C. 1464 is titled “Federal savings associations”, section 1464(v) describes the reporting obligations of “[e]ach association” and refers to the requirements of the “appropriate Federal banking agency” rather than only the OCC. The FDIC is the appropriate Federal banking agency for State savings associations. 12 U.S.C. 1813(q).

⁵⁸ 12 U.S.C. 1817(a)(3).

⁵⁹ 12 U.S.C. 1831m.

⁶⁰ 12 CFR part 363.

⁶¹ 12 U.S.C. 1831n(a)(2).

⁶² See FIL-96-99 (Oct. 25, 1999); 64 FR 57094 (Oct. 22, 1999).

regulations. Therefore, the FDIC believes that removing § 390.355(a) will not have any effect on FDIC-supervised State savings associations.

Section 390.355(b) prohibits State savings associations from making false or misleading statements or omissions to the FDIC and to auditors of State savings associations. The Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.⁶³ On August 9, 2011, the OCC published in the Federal Register a final rule that contained a provision, 12 CFR 163.180(b), that is substantially similar to § 390.355(b) and that applies to both State and Federal savings associations.⁶⁴ It prohibits all savings associations from knowingly making false or misleading statements to their “appropriate Federal banking agency” and to those auditing the institution.⁶⁵ The OCC’s prohibition at § 163.180(b), which is enforceable by the FDIC, effectively prohibits a State savings association from making false or misleading statements to the FDIC or to any party auditing or preparing or reviewing its financial statements. Therefore, the FDIC believes that rescinding this section will have no effect on FDIC-supervised State savings associations.

Section 390.355(c) requires a State savings association maintain bond insurance coverage to promptly notify its carrier and file a proof of loss concerning any covered losses more than twice the deductible amount. The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management

⁶³ See 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁶⁴ 76 FR 49047 (Aug. 9, 2011).

⁶⁵ The FDIC is the “appropriate Federal banking agency” for any State savings association. See 12 U.S.C. 1813(q).

of a *de novo* financial institution applying for deposit insurance.⁶⁶ However, the FDIC does not otherwise impose a reporting requirement such as the one contained in § 390.355(c).⁶⁷ Therefore, rescinding § 390.355(c) potentially reduces reporting requirements on FDIC-supervised State savings associations. The FDIC believes that these potential effects are likely to be relatively small. However, it is difficult to estimate these effects because they depend on the financial condition of, and future decisions of senior management at, FDIC-supervised State savings associations.

Section 390.355(d) regulates SARs for State savings associations and was enacted in concert with the other Federal banking agencies, including the OCC,⁶⁸ the FRB,⁶⁹ and the FDIC,⁷⁰ as well as the Financial Crimes Enforcement Network (FinCEN).⁷¹ These entities issued substantially similar proposals, which became effective on April 1, 1996. Section 390.355(d)(1)-(8), (12) and (13) mirrors § 353.3 for State nonmember banks. The notification requirements for the board of directors, or a committee of directors or executive officers of State savings associations outlined in § 390.355(d)(9) also mirror notifications requirements in § 353.3. Section 390.355(d)(9) also states that if the subject

⁶⁶ See 12 U.S.C. 1816; FDIC Statement of Policy on Applications for Deposit Insurance, 63 FR 44756 (Aug. 20, 1998), amended at 67 FR 79278 (Dec. 27, 2002), available at <https://www.fdic.gov/regulations/laws/rules/5000-3000.html>.

⁶⁷ *Id.* (“An insured depository institution should maintain sufficient fidelity bond coverage on its active officers and employees to conform with generally accepted industry practices. Primary coverage of no less than \$1 million is ordinarily expected. Approval of the application may be conditioned upon acquisition of adequate fidelity coverage prior to opening for business.”).

⁶⁸ Minimum Security Devices and Procedures, Reports of Suspicious Activities, and Bank Secrecy Act Compliance Program, 61 FR 4332 (Feb. 5, 1996).

⁶⁹ Membership of State Banking Institutions in the Federal Reserve System; International Banking Operations; Bank Holding Companies and Change in Control; Reports of Suspicious Activities Under Bank Secrecy Act, 61 FR 4338 (Feb. 5, 1996).

⁷⁰ Suspicious Activity Reports, 61 FR 6095 (Feb. 16, 1996).

⁷¹ Amendment to the Bank Secrecy Act Regulations; Requirement to Report Suspicious Transactions, 61 FR 4326 (Feb. 5, 1996).

of the SAR is a director or executive officer, the State savings association may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but shall notify all directors who are not suspects. In this circumstance, § 353.3 does not have analogous language; however, the FDIC relies on 31 U.S.C. 5813(g)(2) to achieve the same purpose. Section 390.355(d)(10) states that a State savings association's failure to file a SAR in accordance with this section may subject the State savings association, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action. In this circumstance, § 353.3 does not have analogous language. Although § 353.3 does not explicitly provide a remedy for failure to file a SAR, the FDIC has enforcement authority for violations of law or regulation.⁷² Therefore, the FDIC is rescinding § 390.355(d)(10) in its entirety because it is unnecessary. Section 390.355(d)(11) states that a State savings association may obtain SARs and the instructions from the appropriate FDIC region as defined in § 303.2 of the FDIC's regulations. In this circumstance, § 353.3 does not have analogous language. However, FDIC-supervised institutions can obtain SAR forms electronically. FinCEN converted to the BSA E-Filing System for filing SARs for all financial institutions;⁷³ therefore this provision is now obsolete as forms are no longer available from FDIC regions. With this final rule the FDIC is making conforming changes to §§ 353.1 and 353.3 to make part 353 of the FDIC's regulations applicable to all FDIC-supervised institutions, including State savings associations. Therefore, the FDIC believes that rescinding this subsection of § 390.355 will have no effect on FDIC-supervised State savings associations.

⁷² See 12 U.S.C. 1818.

⁷³ See <https://bsaefiling.fincen.treas.gov/main.html>.

Section 390.355(e) requires State savings associations within the jurisdiction of a Federal Home Loan Bank (FHLB) to provide data from the Call Report upon the request of the FHLB. The FDIC is required under section 402(e)(3) of FIRREA to “take such action as may be necessary to assure that the indexes prepared by the ... Federal home loan banks immediately prior to the enactment of this subsection and used to calculate the interest rate on adjustable rate mortgage instruments continue to be available.”⁷⁴ As noted above, the Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.⁷⁵ On August 9, 2011, the OCC published in the Federal Register a final rule that contained a provision, § 163.180(e), that is substantially similar to § 390.355(e) and that applies to both State and Federal savings associations.⁷⁶ It requires all savings associations within the jurisdiction of that FHLB to report specified data items for the FHLB to use in calculating and publishing an adjustable-rate mortgage index.⁷⁷ Because the provision contained in the OCC’s regulation is applicable to all savings associations, is enforceable by the FDIC with respect to State savings associations, and is substantially similar to the rule found at § 390.355(e), the FDIC believes that rescinding this subsection will not have any effect on FDIC-supervised State savings associations.

Section 390.356 requires fidelity bond coverage for directors, officers, employees, and agents of State savings associations. Neither the FDI Act nor the FDIC’s regulations for State nonmember banks contain similar prescriptive language concerning fidelity

⁷⁴ See 12 U.S.C. 1437 nt.

⁷⁵ See 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷⁶ 76 FR 49047 (Aug. 9, 2011).

⁷⁷ 12 CFR 163.180(e).

bonds that would be applicable to State savings associations. Section 18(e) of the FDI Act authorizes, but does not mandate, the FDIC to require an insured depository institution to “provide protection and indemnity against burglary, defalcation, and other similar insurable losses.”⁷⁸ The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management of a *de novo* financial institution applying for deposit insurance.⁷⁹ However, other than expressing general guidelines regarding the appropriate level of insurance coverage, the FDIC does not otherwise impose requirements such as the ones contained in § 390.356.⁸⁰ There are no other relevant provisions concerning fidelity bond coverage or the use of fidelity bond proceeds. And, there is no analogous statutory or regulatory language for State nonmember banks that mirrors § 390.356. Therefore, rescinding § 390.356 could potentially reduce compliance costs for FDIC-supervised State savings associations if they choose to make changes to their fidelity bond coverage. The FDIC believes that this aspect of the final rule is likely to pose relatively small effects on FDIC-supervised State savings associations. However, it is difficult to estimate these effects because they depend on the decisions of senior management at FDIC-supervised savings associations.

Section 390.357 provides that, in lieu of a bond for directors, officers, employees, and agents of State savings associations referenced in § 390.356, the State savings

⁷⁸ See 12 U.S.C. 1828(e).

⁷⁹ See 12 U.S.C. 1816; Statement of Policy on Applications for Deposit Insurance.

⁸⁰ See Statement of Policy on Applications for Deposit Insurance (“An insured depository institution should maintain sufficient fidelity bond coverage on its active officers and employees to conform with generally accepted industry practices. Primary coverage of no less than \$1 million is ordinarily expected. Approval of the application may be conditioned upon acquisition of adequate fidelity coverage prior to opening for business.”).

association's board may approve a bond for its agents. This bond must be twice the average monthly collections of such agent, and the agent is required to settle its account with the State savings association at least monthly. Similar to § 390.356, there are no analogous statutory or regulatory requirements for State nonmember banks that resemble § 390.357. Therefore, rescinding § 390.357 could potentially reduce compliance costs for FDIC-supervised State savings associations to the extent that they were engaging in such bond coverage practices and choose to make changes. The FDIC believes that this aspect of the final rule is likely to pose relatively small effects on FDIC-supervised State savings associations. However, it is difficult to estimate these effects because they depend on the decisions of senior management at FDIC-supervised State savings associations.

Section 390.358 prohibits persons including directors, officers, or employees of State savings associations, or others who have power to direct its management or policies or who otherwise owe a fiduciary duty to a State savings association from advancing personal or business interests, or those of others, at the expense of the State savings association. The section also prescribes how these individuals should interact with the board of directors of a State savings association if they have an interest in a matter or transaction requiring board consideration. While section 8(e) of the FDI Act authorizes enforcement actions against directors and officers who breach their fiduciary duties to the depository institution, the existence and scope of a fiduciary duty is a matter of State law. The FDIC does not believe rescinding § 390.358 will be likely to have a substantive effect on FDIC-supervised State savings associations because applicable State laws will continue to govern conflicts of interest and fiduciary duties, relevant FDIC guidance on

boards of director will continue to apply, and the FDIC will have the same enforcement authority for violations of law in this area.

Section 390.359 prohibits persons, including directors and officers or others who have power to direct its management or policies or who otherwise owe a fiduciary duty to a State savings association from taking advantage of corporate opportunities belonging to the State savings association. Such conduct is governed by either statutory or common law. While section 8(e) of the FDI Act authorizes enforcement actions against directors and officers who breach their fiduciary duties to the depository institution, the existence and scope of a fiduciary duty is a matter of state law. The FDIC does not believe rescinding § 390.359 likely to have a substantive effect on FDIC-supervised State savings associations because applicable State laws will continue to govern conflicts of interest and fiduciary duties, relevant FDIC guidance on boards of director will continue to apply, and the FDIC will have the same enforcement authority for violations of law in this area.

Sections 390.360 through 390.368 require certain insured depository institutions and insured depository institution holding companies to furnish the appropriate Federal banking agency with at least 30 days' notice prior to adding any individual to the board of directors or employing any individual as a senior executive officer. It also permits the appropriate Federal banking agency no more than 90 days to issue a notice of disapproval of the proposed addition of a director or employment of a senior executive officer.

Subpart F of part 303 of the FDIC's regulations imposes similar notice filing requirements on insured State nonmember banks. After careful review, the FDIC is amending subpart F of part 303 so that it applies to State savings associations as well as State nonmember banks and rescinding and removing §§ 390.360 through 390.368.

Therefore, the FDIC believes that rescinding §§ 390.360 through 390.368 is unlikely to have any effect on FDIC-supervised State savings associations.

VI. Alternatives Considered

The FDIC has considered alternatives to the final rule but believes that the amendments represent the most appropriate option for covered entities. 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 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 the operations of insured depository institutions, including part 303, part 326, part 337, part 353 and part 390, subpart S. The FDIC considered the status quo alternative of retaining the current regulations but did not choose to do so because the underlying purposes of those regulations are already accomplished through substantively similar regulations. Therefore, the FDIC is amending and streamlining the FDIC's regulations.

VII. Regulatory Analysis and Procedure

A. *The Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),⁸¹ 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.

⁸¹ 44 U.S.C. 3501, *et seq.*

The final rule rescinds and removes from the FDIC’s regulations part 390, subpart S. The final rule will not create any new or revise any existing information collections under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities.⁸²

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.⁸³ 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 final rule would not have a significant

⁸² 5 U.S.C. 601, *et seq.*

⁸³ The SBA defines a small banking organization as having \$600 million or less in assets, where “a financial institution’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 FDIC-supervised institution is “small” for the purposes of RFA.

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. The final rule primarily affects regulations that govern State savings associations. There are 36 State savings associations considered to be small banking organizations for the purposes of the RFA.⁸⁴

As described in the Expected Effects section of this rule, many of the provisions being removed will be replaced by substantively identical rules applicable to other FDIC-supervised banks. For such provisions, the final rule should have no substantive effect on the compliance costs of small FDIC-supervised institutions or their safety and soundness. As also described in the Expected Effects section, other provisions of subpart S that are being removed are more restrictive or more detailed than comparable rules applicable to other FDIC-supervised banks. As such, the 36 savings associations would benefit from potentially greater flexibility and reduced compliance burden in respect to those provisions. The effects on the small FDIC-supervised institutions affected by the rule are thus generally small and burden-reducing. The FDIC believes that the existing body of FDIC regulations, OCC regulations applicable to savings associations, and FDIC examination of the banks it supervises, make it highly unlikely that the rule will have adverse safety and soundness effects or associated costs resulting from the replacement of provisions applying to the 36 institutions that are more restrictive or detailed with the provisions more generally applicable to FDIC-supervised banks. Quantification of the

⁸⁴ 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.

costs and benefits of the rule is not feasible, as the effects depend on the nature of the activities of each institution and the relevance of the provisions being removed to those specific activities.

The FDIC received no comments on the information provided in the Regulatory Flexibility Act Section of the notice of proposed rulemaking.

Given the relatively small number of institutions affected (36) and that the affected institutions will be governed by regulations that are largely similar to the provisions being removed, the FDIC certifies that the final rule will not have a significant economic effect on a substantial number of institutions.

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.⁸⁵ 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.⁸⁶

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

⁸⁵ 5 U.S.C. 801 *et seq.*

⁸⁶ 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.⁸⁷

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 Act⁸⁸ requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC has 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.⁸⁹ 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.⁹⁰ 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

⁸⁷ 5 U.S.C. 804(2).

⁸⁸ Pub. L. 106-102, 113 Stat. 1338, 1471 (1999).

⁸⁹ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

⁹⁰ 82 FR 15900 (March 31, 2017).

unnecessary regulations, such as part 390, subpart S, this final rule complements other 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 of 1994 (RCDRIA),⁹¹ 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, disclosure, 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.⁹²

As previously stated, the final rule removes part 390, subpart S from the Code of Federal Regulations because, after careful review and consideration, the FDIC believes it is largely unnecessary, redundant, or duplicative of existing regulations or safety and soundness considerations. In addition, the final rule also includes amendments to the FDIC's regulations located in parts 303, 326, 337, and 353 to ensure that any provisions

⁹¹ 12 U.S.C. 4802(a).

⁹² 12 U.S.C. 4802.

that were contained in part 390, subpart S which are not considered unnecessary, redundant, or duplicative of existing FDIC regulations, will remain in place, albeit in an amended form. These amendments do not impose any additional reporting, disclosure, or other requirements on IDIs. Because the final rule does not impose additional reporting, disclosure, or other new requirements on IDIs, section 302 of the RCDRIA does not apply.

List of Subjects

12 CFR part 303

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

12 CFR part 326

Banks, banking, Currency, Reporting and recordkeeping requirements, Security measures.

12 CFR part 337

Banks, banking, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR part 353

Banks, banking, Crime, Reporting and recordkeeping requirements.

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.

For the reasons stated in the preamble and under the authority of 12 U.S.C. 5412, the Federal Deposit Insurance Corporation amends parts 303, 326, 337, 353, and 390 of title 12 of the Code of Federal Regulations as follows:

PART 303 – FILING PROCEDURES

- 1. The authority citation for part 303 is revised to read as follows:

Authority: 12 U.S.C. 378, 478, 1463, 1467a, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831i, 1831e, 1831o, 1831p-1, 1831w, 1831z, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5412; 15 U.S.C. 1601-1607.

- 2. Amend § 303.2 by adding paragraph (gg) to read as follows:

§ 303.2 Definitions.

(gg) *FDIC-supervised institution* means any entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

- 3. Revise § 303.62 to read as follows:

§ 303.62 Transactions requiring prior approval.

(a) *Merger transactions.* The following merger transactions require the prior written approval of the FDIC under this subpart:

(1) Any merger transaction, including any corporate reorganization, interim merger transaction, or optional conversion, in which the resulting institution is to be an FDIC-supervised institution; and

(2) Any merger transaction, including any corporate reorganization, or interim merger transaction, that involves an uninsured bank or institution.

(b) *Related regulations.* Transactions covered by this subpart also may be subject to other regulations or application requirements, including the following:

(1) *Interstate merger transactions.* Merger transactions between insured banks that are chartered in different states are subject to the regulations of section 44 of the FDI Act (12 U.S.C. 1831u). In the case of a merger transaction that consists of the acquisition by an out of state bank of a branch without acquisition of the bank, the branch is treated for section 44 purposes as a bank whose home state is the state in which the branch is located.

(2) *Deposit insurance.* An application for deposit insurance will be required in connection with a merger transaction between a state-chartered interim institution and an insured depository institution if the related merger application is being acted upon by a Federal banking agency other than the FDIC. If the FDIC is the Federal banking agency responsible for acting on the related merger application, a separate application for deposit insurance is not necessary. Procedures for applying for deposit insurance are set forth in subpart B of this part. An application for deposit insurance will not be required in connection with a merger transaction (other than a purchase and assumption transaction) of a federally-chartered interim institution and an insured institution, even if the resulting institution is to operate under the charter of the Federal interim institution.

(3) *Branch closings.* Branch closings in connection with a merger transaction are subject to the notice requirements of section 42 of the FDI Act (12 U.S.C. 1831r-1), including requirements for notice to customers. These requirements are addressed in the “Interagency Policy Statement Concerning Branch Closings Notices and Policies” (1 FDIC Law, Regulations, Related Acts (FDIC) 5391; *see* § 309.4(a) and (b) of this chapter for availability).

(4) *Undercapitalized institutions.* Applications for a merger transaction by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831o) should also provide the information required by § 303.204. Applications pursuant to sections 38 and 18(c) of the FDI Act (12 U.S.C. 1831o and 1828(c)) may be filed concurrently or as a single application.

(5) *Certification of assumption of deposit liability.* Whenever all of the deposit liabilities of an insured depository institution are assumed by one or more insured depository institutions by merger, consolidation, other statutory assumption, or by contract, the transferring insured depository institution, or its legal successor, shall provide an accurate written certification to the FDIC that its deposit liabilities have been assumed, in accordance with 12 CFR part 307.

- 4. Revise § 303.64 to read as follows:

§ 303.64 Processing.

(a) *Expedited processing for eligible depository institutions—(1) General.* An application filed under this subpart by an eligible depository institution as defined in § 303.2(r) and which meets the additional criteria in paragraph (a)(4) of this section will be acknowledged by the FDIC in writing and will receive expedited processing, unless

the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

(2) *Timing.* Under expedited processing, the FDIC will take action on an application by the date that is the latest of:

(i) 45 days after the date of the FDIC's receipt of a substantially complete merger application; or

(ii) 10 days after the date of the last notice publication required under §303.65 of this subpart; or

(iii) 5 days after receipt of the Attorney General's report on the competitive factors involved in the proposed transaction; or

(iv) For an interstate merger transaction subject to the provisions of section 44 of the FDI Act (12 U.S.C. 1831u), 5 days after the FDIC receives confirmation from the host state (as defined in §303.41(e)) that the applicant has both complied with the filing requirements of the host state and submitted a copy of the FDIC merger application to the host state's bank supervisor.

(3) *No automatic approval.* Notwithstanding paragraph (a)(1) or (2) of this section, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

(4) *Criteria.* The FDIC will process an application using expedited procedures if:

(i) Immediately following the merger transaction, the resulting institution will be “well-capitalized” pursuant to subpart H of part 324 of this chapter (12 CFR part 324), as applicable; and

(ii)(A) All parties to the merger transaction are eligible depository institutions as defined in § 303.2(r); or

(B) The acquiring party is an eligible depository institution as defined in § 303.2(r) and the amount of the total assets to be transferred does not exceed an amount equal to 10 percent of the acquiring institution's total assets as reported in its report of condition for the quarter immediately preceding the filing of the merger application.

(b) *Standard processing.* For those applications not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action taken by the FDIC on the application when the decision is rendered.

(c) *Processing for State savings associations.* Notwithstanding paragraphs (a) and (b) of this section, the FDIC will approve or disapprove an application filed by a State savings association to acquire or be acquired by another insured depository institution that is required to be filed with the FDIC within 60 days after the date of the FDIC's receipt of a substantially complete merger application, subject to the FDIC's discretion to extend such period by an additional 30 days if any material information submitted is substantially inaccurate or incomplete.

(1) The FDIC shall notify an applicant that is a State savings association in writing of the date the application is deemed substantially complete. The FDIC may request additional information at any time.

(2) Notwithstanding this paragraph (c), if the FDIC does not approve or disapprove an application within the 60-day or extended processing period it does not constitute an automatic or default approval.

- 5. Revise §303.100 to read as follows:

§ 303.100 Scope.

This subpart sets forth the circumstances under which an FDIC-supervised institution must notify the FDIC of a change in any member of its board of directors or any senior executive officer and the procedures for filing such notice. This subpart implements section 32 of the FDI Act (12 U.S.C. 1831i).

- 6. Amend § 303.101 by revising paragraphs (a) introductory text, (b), (c) introductory text, (c)(3) and (4) and adding paragraph (d) to read as follows:

§ 303.101 Definitions.

(a) *Director* means a person who serves on the board of directors or board of trustees of an FDIC-supervised institution, except that this term does not include an advisory director who:

* * * * *

(b) *Senior executive officer* means a person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured state branch of a foreign bank), chief financial officer, chief lending officer, chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. *Senior executive officer* also includes any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the FDIC-supervised institution.

(c) *Troubled condition* means any FDIC-supervised institution that:

* * * * *

(3) Is subject to a cease-and-desist order or written agreement issued by either the FDIC or the appropriate state banking authority that requires action to improve the financial condition of the FDIC-supervised institution or is subject to a proceeding initiated by the FDIC or state authority which contemplates the issuance of an order that requires action to improve the financial condition of the FDIC-supervised institution, unless otherwise informed in writing by the FDIC; or

(4) Is informed in writing by the FDIC that it is in troubled condition for purposes of the requirements of this subpart on the basis of the FDIC-supervised institution's most recent report of condition or report of examination, or other information available to the FDIC.

(d) *FDIC-supervised institution* means any entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

■ 7. Amend § 303.102 by revising paragraphs (a), (c)(1) introductory text, (c)(1)(i), and (c)(2) to read as follows:

§ 303.102 Filing procedures and waiver of prior notice.

(a) *FDIC-supervised institutions*. An FDIC-supervised institution shall give the FDIC written notice, as specified in paragraph (c)(1) of this section, at least 30 days prior to adding or replacing any member of its board of directors, employing any person as a senior executive officer of the institution, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if the FDIC-supervised institution:

(1) Is not in compliance with all minimum capital requirements applicable to the FDIC-supervised institution as determined on the basis of the institution's most recent report of condition or report of examination;

(2) Is in troubled condition; or

(3) The FDIC determines, in connection with its review of a capital restoration plan required under section 38(e)(2) of the FDI Act (12 U.S.C. 1831o(e)(2)) or otherwise, that such notice is appropriate.

* * * * *

(c) * * *

(1) *Waiver requests.* The FDIC may permit an individual, upon petition by the FDIC-supervised institution to the appropriate FDIC office, to serve as a senior executive officer or director before filing the notice required under this subpart if the FDIC finds that:

(i) Delay would threaten the safety and soundness of the FDIC-supervised institution

* * * * *

(2) *Automatic waiver.* The prior 30-day notice is automatically waived in the case of the election of a new director not proposed by management at a meeting of the shareholders of an FDIC-supervised institution, and the individual immediately may begin serving, provided that a complete notice is filed with the appropriate FDIC office within two business days after the individual's election.

* * * * *

- 8. Revise § 303.103 to read as follows:

§ 303.103 Processing.

(a) *Processing.* The 30-day notice period specified in § 303.102(a) shall begin on the date substantially all information required to be submitted by the notificant pursuant to § 303.102(c)(1) is received by the appropriate FDIC office. The FDIC shall notify the FDIC-supervised institution submitting the notice of the date on which the notice is accepted for processing and of the date on which the 30-day notice period will expire. If processing cannot be completed within 30 days, the notificant will be advised in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed.

(b) *Commencement of service—(1) At expiration of period.* A proposed director or senior executive officer may begin service after the end of the 30-day period or any other additional period as provided under paragraph (a) of this section, unless the FDIC disapproves the notice before the end of the period.

(2) *Prior to expiration of the period.* A proposed director or senior executive officer may begin service before the end of the 30-day period or any additional time period as provided under paragraph (a) of this section, if the FDIC notifies the FDIC-supervised institution and the individual in writing of the FDIC's intention not to disapprove the notice.

(c) *Notice of disapproval.* The FDIC may disapprove a notice filed under § 303.102 if the FDIC finds that the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted indicates that it would not be in the best interests of depositors of the FDIC-supervised institution or in the best interests

of the public to permit the individual to be employed by, or associated with the FDIC-supervised institution. Subpart L of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

- 9. Amend § 303.200 by revising paragraph (b) to read as follows:

§ 303.200 Scope.

(b) *Institutions covered.* Restrictions and prohibitions contained in subpart H of part 324 of this chapter apply primarily to FDIC-supervised institutions, as well as to directors and senior executive officers of those institutions. Portions of subpart H of part 324 of this chapter also apply to all insured depository institutions that are deemed to be critically undercapitalized.

- 10. Revise §303.203 to read as follows:

§ 303.203 Applications for capital distributions.

(a) *Scope.* An FDIC-supervised institution shall submit an application for a capital distribution if, after having made a capital distribution, the institution would be undercapitalized, significantly undercapitalized, or critically undercapitalized.

(b) *Content of filing.* An application to repurchase, redeem, retire, or otherwise acquire shares or ownership interests of the FDIC-supervised institution shall describe the proposal, the shares or obligations that are the subject thereof, and the additional shares or obligations of the institution that will be issued in at least an amount equivalent to the distribution. The application also shall explain how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition. If the proposed action also requires an application under § 303.241 of this part regarding prior

consent to retire capital, such application should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*).

- 11. Amend §303.241 by revising paragraphs (a) and (e) to read as follows:

§ 303.241 Reduce or retire capital stock or capital debt instruments.

(a) *Scope*—(1) *Insured State nonmember banks*. The procedures contained in this section are to be followed by an insured State nonmember bank to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire any part of its capital notes or debentures pursuant to section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)(1)).

(2) *Insured State savings associations*. The procedures contained in this section are to be followed by an insured State savings association to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire any part of its capital notes or debentures, as if the insured State savings association were a State nonmember bank subject to section 18(i)(1) of the Act (12 U.S.C. 1828(i)(1)).

* * * * *

(e) *Undercapitalized institutions*. Procedures regarding applications by an undercapitalized insured depository institution to retire capital stock or capital debt instruments pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*) are set forth in subpart K (Prompt Corrective Action), § 303.203. Applications pursuant to section 38 and this section should be filed concurrently, or as a single application.

**PART 326 MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK
SECRECY ACT COMPLIANCE**

- 12. The authority citation for part 326 is revised to read as follows:

Authority: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881-1883, 5412; 31 U.S.C. 5311-5314, 5316-5332.2.

- 13. Amend § 326.1 by revising paragraph (a) to read as follows:

§ 326.1 Definitions.

(a) The term *FDIC-supervised institution* or *institution* means any entity for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

- 14. Revise §326.8 to read as follows:

§ 326.8 Bank Secrecy Act compliance.

(a) *Purpose.* This subpart is issued to assure that all FDIC-supervised institutions as defined in 12 CFR 326.1 establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR Chapter X.

(b) *Compliance procedures – (1) Program requirement.* Each institution shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing

regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the institution's board of directors, and noted in the minutes.

(2) *Customer identification program.* Each institution is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the FDIC and the Department of the Treasury at 31 CFR 1020.220.

(c) *Contents of compliance program.* The compliance program shall, at a minimum:

- (1) Provide for a system of internal controls to assure ongoing compliance;
- (2) Provide for independent testing for compliance to be conducted by institution personnel or by an outside party;
- (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and
- (4) Provide training for appropriate personnel.

PART 337 – UNSAFE AND UNSOUND BANKING PRACTICES

- 15. The authority citation for part 337 is revised to read as follows:

Authority: 12 U.S.C. 375a(4), 375b, 1463, 1464, 1468, 1816, 1818(a), 1818(b), 1819, 1820(d), 1821(f), 1828(j)(2), 1831, 1831f, 1831g, 5412.

- 16. Revise § 337.3 to read as follows:

§ 337.3 Limits on extensions of credit to executive officers, directors, and principal shareholders of FDIC-supervised institutions.

(a) With the exception of 12 CFR 215.5(b) and (c)(3) and (4), FDIC-supervised institutions are subject to the restrictions contained in Federal Reserve Board Regulation

O (12 CFR part 215) to the same extent and to the same manner as though they were member banks.

(b) For the purposes of compliance with § 215.4(b) of Federal Reserve Board Regulation O, no FDIC-supervised institution may extend credit or grant a line of credit to any of its executive officers, directors, or principal shareholders or to any related interest of any such person in an amount that, when aggregated with the amount of all other extensions of credit and lines of credit by the FDIC-supervised institution to that person and to all related interests of that person, exceeds the greater of \$25,000 or five percent of the FDIC-supervised institution's unimpaired capital and unimpaired surplus,¹ or \$500,000 unless:

(1) The extension of credit or line of credit has been approved in advance by a majority of the entire board of directors of that FDIC-supervised institution and

(2) The interested party has abstained from participating directly or indirectly in the voting.

(c)(1) No FDIC-supervised institution may extend credit in an aggregate amount greater than the amount permitted in paragraph (c)(2) of this section to a partnership in which one or more of the FDIC-supervised institution's executive officers are partners and, either individually or together, hold a majority interest. For the purposes of paragraph (c)(2) of this section, the total amount of credit extended by an FDIC-supervised institution to such partnership is considered to be extended to each executive officer of the FDIC-supervised institution who is a member of the partnership.

¹ For the purposes of section 337.3, an FDIC-supervised institution's unimpaired capital and unimpaired surplus shall have the same meaning as found in section 215.2(i) of Federal Reserve Board Regulation O (12 CFR 215.2(i)).

(2) An FDIC-supervised institution is authorized to extend credit to any executive officer of the bank for any other purpose not specified in § 215.5(c)(1) and (2) of Federal Reserve Board Regulation O (12 CFR 215.5(c)(1) and (2)) if the aggregate amount of such other extensions of credit does not exceed at any one time the higher of 2.5 percent of the FDIC-supervised institution's unimpaired capital and unimpaired surplus or \$25,000 but in no event more than \$100,000, provided, however, that no such extension of credit shall be subject to this limit if the extension of credit is secured by:

(i) A perfected security interest in bonds, notes, certificates of indebtedness, or Treasury bills of the United States or in other such obligations fully guaranteed as to principal and interest by the United States;

(ii) Unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or any corporation wholly owned directly or indirectly by the United States; or

(iii) A perfected security interest in a segregated deposit account in the lending FDIC-supervised institution.

(3) For the purposes of this paragraph (c), the definitions of the terms used in Federal Reserve Board Regulation O shall apply including the exclusion of executive officers of an FDIC-supervised institution's parent bank or savings and loan holding company and executive officers of any other subsidiary of that bank or savings and loan holding company from the definition of executive officer for the purposes of complying with the loan restrictions contained in section 22(g) of the Federal Reserve Act. For the purposes of complying with § 215.5(d) of Federal Reserve Board Regulation O, the reference to "the amount specified for a category of credit in paragraph (c) of this

section” shall be understood to refer to the amount specified in paragraph (c)(2) of this § 337.3.

(d) *Definition.* For purposes of this section, *FDIC-supervised institution* means an entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

- 17. Revise § 337.11 to read as follows:

§ 337.11 Effect on other banking practices.

(a) Nothing in this part shall be construed as restricting in any manner the Corporation's authority to deal with any banking practice which is deemed to be unsafe or unsound or otherwise not in accordance with law, rule, or regulation; or which violates any condition imposed in writing by the Corporation in connection with the granting of any application or other request by an FDIC-Supervised institution, or any written agreement entered into by such institution with the Corporation. Compliance with the provisions of this part shall not relieve an FDIC-supervised institution from its duty to conduct its operations in a safe and sound manner nor prevent the Corporation from taking whatever action it deems necessary and desirable to deal with specific acts or practices which, although they do not violate the provisions of this part, are considered detrimental to the safety and sound operation of the institution engaged therein.

(b) *Definition.* *FDIC-supervised institution* means an entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

PART 353—SUSPICIOUS ACTIVITY REPORTS

- 18. The authority citation for part 353 is revised to read as follows:

Authority: 12 U.S.C. 1818, 1819; 31 U.S.C. 5318.

§ 353.1 [Amended]

- 19.

Revise § 353.1 to read as follows:

§353.1 Purpose and scope.

The purpose of this part is to ensure that an FDIC supervised institution files a Suspicious Activity Report when it detects a known or suspected criminal violation of federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act. This part applies to all FDIC supervised institutions.

- 20. Amend § 353.2 by adding paragraph (c) to read as follows:

§ 353.2 Definitions.

(c) *FDIC-supervised institution* means an entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

§ 353.3 [Amended]

- 21. Amend § 353.3 by:

- a. Removing the term “A bank” and adding in its place the term “An FDIC-supervised institution” wherever it appears;

- b. Removing the term “a bank” and adding in its place the term “an FDIC-supervised institution” wherever it appears;

c. Removing the term “an insured state-licensed branch of a foreign bank” in paragraph (f) and adding in its place the term “a foreign bank having an insured branch”;

d. Removing the term “Any bank” in paragraph (g) and adding “An FDIC-supervised institution” in its place;

e. Removing the term “any bank” in paragraph (h) and adding “an FDIC-supervised institution” in its place; and

f. Removing the term “the bank” and adding in its place the term “the FDIC-supervised institution” wherever it appears.

PART 390 – REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

- 22. 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 S -- [Removed and Reserved]

- 23. Remove and reserve subpart S, consisting of §§ 390.330 through 390.368.

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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