



12 CFR Parts 338 and 390

RIN 3064-AF35

Removal of Transferred Office of Thrift Supervision (OTS) Regulations Regarding Nondiscrimination Requirements

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is rescinding and removing its regulation titled “Nondiscrimination Requirements” and amending its regulation titled “Fair Housing” to make it applicable to State savings associations. These actions will streamline the FDIC’s rules by eliminating unnecessary, inconsistent, and duplicative regulations, and ensure insured State nonmember banks and State savings associations generally will be subject to the same nondiscrimination requirements.

DATES: The final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Compliance with 12 CFR 338.4(b) regarding displaying the current address of the FDIC’s Consumer Response Center on an Equal Housing Lender poster is mandatory on February 3, 2022.

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SUPPLEMENTARY INFORMATION:

I. Background

Title III of the Dodd-Frank Act¹ provided for a substantial reorganization of the

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

regulation of State and Federal savings associations and their holding companies.

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,² the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of 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 Act³ 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. Section 316(b) states that if the materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act⁴ further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011.⁵

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁶ granted the OCC rulemaking authority relating to both State and Federal savings associations, the Dodd-Frank Act did not generally affect the FDIC's existing authority to issue regulations under

² Codified at 12 U.S.C. 5411.

³ Codified at 12 U.S.C. 5414(b).

⁴ Codified at 12 U.S.C. 5414(c).

⁵ 76 FR 39247 (July 6, 2011).

⁶ Codified at 12 U.S.C. 5412(b)(2)(B)(i)(II).

the Federal Deposit Insurance Act (FDI Act) and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the FDI Act⁷ 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, except in limited circumstances in which certain rulemaking authority is specifically given to another agency, 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 generally authorized to issue, modify and rescind regulations involving such associations, insured State nonmember banks, and insured branches of foreign banks.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC’s Board of Directors reissued and redesignated certain transferred OTS regulations. These transferred OTS regulations were published as new FDIC regulations in the *Federal Register* on August 5, 2011.⁸ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating them into other FDIC regulations, amending them, or rescinding them, as appropriate.

One of the OTS rules transferred to the FDIC requires State savings associations to not discriminate with respect to lending, employment, and other services provided. The OTS rule, formerly found at 12 CFR part 528 (part 528), was transferred to the FDIC with only technical changes and is now found in the FDIC’s rules at part 390, subpart G, entitled “Nondiscrimination Requirements.”

II. The Proposal

⁷ 12 U.S.C. 1813(q).

⁸ 76 FR 47652 (Aug. 5, 2011).

A. Removal of Part 390, Subpart G, Nondiscrimination Requirements

On September 25, 2020, the FDIC published a notice of proposed rulemaking (NPR or “proposal”) regarding the removal of part 390, subpart G (85 FR 60389). Although few provisions of part 390, subpart G, have a direct counterpart within the FDIC’s regulations, the provisions are largely duplicative of regulations implementing Federal laws (Equal Credit Opportunity Act (ECOA), Fair Housing Act (FHA), Equal Employment Opportunity Act (EEOA), and other laws concerning nondiscrimination in lending, employment, and services) implemented by other agencies. Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act⁹ provides that the former OTS regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After careful review of part 390, subpart G, the FDIC, as the appropriate Federal banking agency for State savings associations, proposed to rescind and remove part 390, subpart G, in its entirety, because, as discussed in the NPR, it is duplicative, unnecessary, and burdensome to require State savings associations to comply with additional requirements to which insured State nonmember banks are not subject. The FDIC received no comments on the proposal to rescind and remove part 390, subpart G.

For a statement of the rationale for rescission and removal of each section of subpart G, the reader is referred to the fulsome explanations provided in the NPR, 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 G was coupled with a proposed amendment to part 338 of the FDIC’s regulations. These amendments are also discussed below.

B. Amendments to Part 338 Fair Housing

⁹ 12 U.S.C. 5414(b)(3).

The FDIC’s part 338, Fair Housing, applies to insured State nonmember banks and addresses discrimination in advertising and recordkeeping requirements under ECOA and the Home Mortgage Disclosure Act (HMDA). The FDIC proposed to make technical conforming edits to part 338 to encompass State savings associations and update the regulation. In short, the FDIC proposed to: (1) revise § 338.1 to reflect that the advertising provisions of subpart A apply to State savings associations and their subsidiaries, to conform to and reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency for State savings associations; (2) in § 338.2, add a defined term “FDIC-supervised institution,” defined to mean “either a bank [defined in § 338.2(a) to mean “an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act”] or a State savings association”; (3) add a new subsection to define “State savings association” as having “the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act¹⁰”; (4) make conforming technical edits throughout, including replacing the term “FDIC-supervised institution” or “institution” in place of “bank” throughout the rule where necessary and revising references to the FRB’s 12 CFR parts 202 and 203 throughout part 338 to refer to the Bureau of Consumer Financial Protection’s (CFPB) 12 CFR parts 1002 and 1003, respectively; and (5) amend § 338.4 to update the text required for the Equal Housing Lender poster to the correct address for the FDIC Consumer Response Center. The FDIC received no comments on the proposal to amend part 338.

The Supplementary Information section of this final rule sets forth the rationales for the amendments to the FDIC’s regulations located in part 338 because, as proposed, the final rule revises FDIC regulations that will remain in place, albeit in an amended form.

¹⁰ 12 U.S.C. 1813(b)(3).

1. *Section 338.1—Purpose*

Section 338.1 states that its purposes are to prohibit insured State nonmember banks from engaging in discriminatory advertising with regard to residential real estate-related transactions and require them to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) of the FDIC's regulations or the Equal Housing Opportunity poster prescribed in 24 CFR part 110 in HUD's regulations. The FDIC proposed to amend § 338.1 to change references to "insured State nonmember banks" to refer to "FDIC-supervised institutions" to reflect that § 338.1 applies to all institutions for which the FDIC is the appropriate Federal banking agency.

2. *Section 338.2—Definitions applicable to this subpart*

Section 338.2 defines terms used in subpart A of part 338, including the term "bank" defined in § 338.2(a) to mean "an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act." The FDIC proposed to add a new defined term "FDIC-supervised institution" meaning a bank or a State savings association to § 338.2(c) and to add to § 338.2(f), a new defined term "State savings association" having "the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3)." The FDIC also proposed to make conforming technical edits to other subsections in § 338.2 to reflect the re-ordering of definitions.

3. *Section 338.3—Nondiscriminatory advertising*

Section 338.3 provides certain requirements with respect to dwelling-related advertisements to reflect the bank's nondiscrimination lending practice and prohibits such advertisements from including "words, symbols, models, or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the FHA or ECOA. To reflect that § 338.3 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend § 338.3 to change references to "bank" to refer to "FDIC-

supervised institution.”

4. *Section 338.4—Fair housing poster*

Section 338.4(a) requires insured State nonmember banks engaged in extending dwelling-related loans to conspicuously display either an Equal Housing Lender poster or an Equal Housing Opportunity poster “in a central location within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering the area, where the poster is displayed.” This requirement is substantially similar to the requirement in § 390.146 for State savings associations to display an Equal Housing Lender poster, which the FDIC proposed to rescind and remove. To reflect that § 338.4(a) applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend § 338.4(a) to change references to “insured State nonmember banks” to refer to “FDIC-supervised institutions.”

Section 338.4(b) sets forth the required text of the FDIC’s Equal Housing Lender poster, including the former mailing address of the FDIC’s Consumer Response Center (CRC), formatted as a Portable Document Format (PDF) image. When the CRC mailing address changed in 2011, the FDIC made available to FDIC-supervised institutions an Equal Housing Lender poster with the correct address of the CRC, both in English and in Spanish.¹¹ However, because the CRC mailing address may change in the future, the FDIC proposed to amend § 338.4(b) to reflect that the mailing address stated on the Equal Housing Lender poster should be the address for the CRC stated on the FDIC’s website at www.fdic.gov.¹² Furthermore, the FDIC proposed to set forth the required text

¹¹ The poster is available to both insured State nonmember banks and State savings associations. Moreover, the current CRC mailing address is correctly stated in FDIC regulations applicable to State savings associations. 12 CFR 390.146.

¹² Currently, the mailing address for the Consumer Response Center (1100 Walnut St., Box #11 Kansas City, MO 64106) is provided at <https://www.fdic.gov/consumers/assistance/filecomplaint.html>. Since May 31, 2012, Regulation B has required the use of that address in adverse action notices, as

of the Equal Housing Lender poster in § 338.4(b) as a text statement rather than as a PDF image.

To assist FDIC-supervised institutions, the FDIC expects to continue to provide them with access to a poster stating the required text, including the accurate CRC mailing address. With the FDIC adopting the proposal as final, no change to posters would be required of FDIC-supervised institutions that use an Equal Housing Lender poster obtained from the FDIC, because the CRC mailing address was updated in 2011. The FDIC believes that few insured State nonmember banks make their own Equal Housing Lender poster based on the text of § 338.4(b). Nonetheless, to facilitate the transition to the updated poster, the FDIC is providing a one-year transition period for FDIC-supervised institutions to change their posters to reflect the current CRC mailing address, if needed. That is, the effective date of § 338.4(b), as amended, is one year after this final rule amending the provision is published in the *Federal Register*.

5. *Section 338.5—Purpose*

Section 338.5 states that its purpose is to notify insured State nonmember banks of their duty both to collect and retain certain information about a home loan applicant's personal characteristics in accordance with Regulation B and to maintain, update and report a register of home loan applications in accordance with Regulation C. To reflect that § 338.5 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend § 338.5 to change references to “insured State nonmember banks” to refer to “FDIC-supervised institutions.” The FDIC also proposed to make technical amendments to § 338.5 to reflect that Regulation B and Regulation C have been re-designated as 12 CFR part 1002 and 12 CFR part 1003, respectively, and are implemented by the CFPB.

applicable. See Board of Governors of the Federal Reserve System, Final Rule, Equal Credit Opportunity, 76 FR 31451 (Jun. 1, 2011).

6. *Section 338.6—Definitions applicable to this subpart*

Section 338.6 defines terms used in subpart B of part 338, including the term “bank” defined in § 338.6(a) to mean “an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.” The FDIC proposed to add to § 338.2(c) a new defined term “FDIC-supervised institution” meaning a bank or a State savings association and add to § 338.6(d) a new defined term “State savings association” having “the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).”

7. *Section 338.7—Recordkeeping requirements*

Section 338.7 requires banks that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling to request and retain the monitoring information required by Regulation B.¹³ To reflect that § 338.7 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend § 338.7 to change references to “bank” to refer to “FDIC-supervised institution.” The FDIC also proposed to make technical amendments to § 338.7 to reflect that Regulation B has been re-designated as 12 CFR part 1002 and is implemented by the CFPB.

8. *Section 338.8—Compilation of loan data in register format*

Section 338.8 requires banks and other lenders required to file a HMDA loan/application register (LAR) with the FDIC to maintain, update and report such LAR in accordance with Regulation C. To reflect that § 338.8 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend § 338.8 to change references to “bank” to refer to “FDIC-supervised institution.”

¹³ This requirement relates to the collection of information for monitoring purposes required by 12 CFR 1002.13.

Additionally, to reflect amendments made to Regulation C regarding the responsibilities of a financial institution with respect to HMDA LAR data, the FDIC proposed to amend § 338.8 to require banks and other lenders required to file a HMDA LAR with the FDIC to collect, record, and report such LAR in accordance with Regulation C. The FDIC also proposed to make technical amendments to § 338.8 to reflect that Regulation C has been re-designated as 12 CFR part 1003 and is implemented by the CFPB.

9. *Section 338.9—Mortgage lending of a controlled entity*

Section 338.9 establishes requirements that apply if a bank refers applicants to a “controlled entity,” as defined in § 338.6, and purchases any home purchase loans or home improvement loans (as defined in Regulation C) that are originated by the controlled entity, as a condition to transacting any business with the controlled entity.¹⁴ In such cases, § 338.9 provides that the bank must require the controlled entity to enter into a written agreement with the bank that states that the controlled entity must comply with the requirements of §§ 338.3, 338.4 and 338.7 and, if the controlled entity is subject to Regulation C, § 338.8. Further, the written agreement must provide that the controlled entity must open its books and records to FDIC examination and comply with all FDIC instructions and orders with respect to its home loan practices.

Because this final rule is intended to rescind and remove former OTS regulations that are duplicative of regulations under ECOA, FHA, or EEOA, the FDIC did not propose to impose substantive requirements regarding the business transactions between a State savings association and any entity it controls and therefore did not propose to replace the term “bank” with the term “FDIC-supervised institution” in § 338.9.

However, the FDIC proposed to make technical amendments to § 338.9 to reflect that

¹⁴ Pursuant to § 338.6(b), “controlled entity” means “a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise.”

Regulation C has been re-designated as 12 CFR part 1003 and is implemented by the CFPB.

III. Comments

The FDIC received no comments on the rescission and removal of part 390, subpart G, nor to the amendments to part 338.

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, 2020, the FDIC supervised 3,270 depository institutions,¹⁵ of which 35 are State savings associations.¹⁶

The final rule rescinds §§ 390.140 and 390.141. As discussed previously, these sections include definitions and cross-references to other parts of section 390, so their rescission has no independent significance for institutions or applicants, but rather is a technical amendment associated with the rescission of subpart G of part 390 in its entirety.

The final rule rescinds § 390.142. As discussed in the NPR, this section has substantial overlap with the requirements of ECOA and Regulation B and the FHA and HUD's FHA regulations. Therefore, the FDIC believes that these aspects of the final rule are unlikely to significantly affect FDIC-supervised institutions or applicants.

The final rule rescinds § 390.143. As discussed in the NPR, aspects of § 390.143 are either duplicative of prohibitions under the general fair lending laws. With regard to § 390.143(b), the rule reduces compliance requirements associated with maintaining and distributing relevant paperwork. The FDIC believes that this is likely to pose a relatively

¹⁵ FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

¹⁶ FDIC Call Report data, June 30, 2020.

small benefit to the 35 institutions to which it applies. Further, the FDIC believes that it is unlikely that the rescission of the requirement to establish, maintain, and distribute upon request nondiscriminatory loan underwriting standards for these 35 State savings associations would lead to an increase in discriminatory lending behavior because these institutions are still subject to the general fair lending laws. Therefore, the FDIC does not believe that this aspect of the final rule, if adopted, is likely to have substantive effects on FDIC-supervised institutions or applicants.

The final rule rescinds § 390.144. As discussed in the NPR, Section 390.144(a) is substantially similar to, and duplicative of, prohibitions under the general Federal fair lending laws.¹⁷ The FDIC also believes that the requirement to post an Equal Housing Lender poster, discussed above in connection with § 338.4, serves a substantially similar purpose as the requirement to “inform each inquirer of his or her right to file a written loan application” in § 390.144(b). Therefore, the FDIC believes that the rescission of § 390.144 is unlikely to have any substantive effect on FDIC-supervised institutions or applicants.

The final rule rescinds § 390.145. As discussed in the NPR, Section 390.145 is substantially similar to § 338.4 and the rule amends § 338.4 to cover State savings associations in addition to insured State nonmember banks. Therefore, the FDIC believes that this aspect of the final rule is unlikely to have any substantive effect on FDIC-supervised institutions or applicants.

The final rule rescinds § 390.146. As discussed in the NPR, the requirements of § 390.146 are substantially similar to the requirements applicable to insured State nonmember banks under § 338.4. Section 338.4, however, unlike § 390.146, does not include a “recommendation” that a Spanish-language version of the Equal Housing

¹⁷ See, e.g., 15 U.S.C. 1691(a); 42 U.S.C. 3605; 12 CFR 1002.4; 24 CFR 100.120.

Lender poster be posted in offices serving areas with a substantial Spanish-speaking population. The FDIC does, however, make a Spanish-language poster available to the institutions it supervises. Given the substantive similarity of much of § 390.146 to § 338.4, the FDIC believes that rescinding it is unlikely to have substantial effects on covered institutions or applicants.

With the adoption of this final rule the FDIC rescinds § 390.147. As discussed in the NPR, the FDIC believes that § 390.147 is duplicative now that reporting reason for denial is required rather than optional under Regulation C. Further, since Regulation C provides a partial exemption from reporting reason for denial and certain other data points for financial institutions that meet specified conditions, but no such exemption exists for State savings associations, the final rule establishes parity with respect to the reporting requirements for HMDA LARs for State savings associations and other FDIC-supervised institutions. The FDIC believes that this aspect of the final rule is unlikely to significantly affect FDIC-supervised institutions or applicants.

The final rule rescinds § 390.148. As discussed in the NPR, the FDIC believes that there is significant overlap between the requirements of § 390.148(a) through (d) and various aspects of the EEOA. Further, § 390.148(e) and (f) references multiple employment laws, including the EEOA, which with the rescission of the rest of § 390.148, would be unnecessary. Therefore, the FDIC believes that this aspect of the final rule is unlikely to substantively affect FDIC-supervised institutions or applicants.

The final rescinds § 390.149. As discussed in the NPR, the FDIC has procedures for referring complaints to HUD regarding lending discrimination by financial institutions and these procedures apply to complaints involving lending by State savings associations. However, there appears to be no equivalent requirement to the provisions in § 390.149 regarding referring complaints to the Equal Employment Opportunity Commission (EEOC) regarding employment discrimination by FDIC-supervised

institutions. This aspect of the final rule will thus create parity between insured State nonmember banks and State savings associations with respect to complaints about discriminatory lending. Given that FDIC-supervised institutions are still subject to applicable elements of the EEOA and FDIC regulations and procedures, the FDIC does not believe that this aspect of the final rule is likely to have a substantive effect on covered institutions or their employees.

The final rule rescinds § 390.150. As discussed in the NPR, this section contains guidelines intended to serve as a resource for State savings associations when developing and implementing nondiscriminatory lending policies. State savings associations, like other FDIC-supervised banks, remain subject to Federal fair lending laws and regulations and the FDIC does not believe removal of these guidelines will have any meaningful effect on these institutions or their applicants.

Finally, the final rule makes some technical changes to FDIC's part 338 in order to make it applicable to State savings associations and provide for Equal Housing Lender posters to state the accurate CRC mailing address. As previously discussed, these changes are unlikely to have significant effects on State savings associations because those savings associations are already subject to substantively similar regulations.

Rescinding part 390, subpart G, also will serve to streamline the FDIC's rules and eliminate unnecessary, inconsistent, and duplicative regulations. The final rule will ensure that insured State nonmember banks and State savings associations will be subject to the same antidiscrimination requirements.

VI. Alternatives

Several alternatives to the final rule were available to the FDIC. The FDIC could have retained the current regulations in part 390, subpart G, but chose not to do so since most of the requirements in subpart G are duplicative of or substantively similar to existing requirements under Federal law or under the FDIC's current fair housing

requirements in part 338. As discussed in the NPR, the FDIC also could have retained certain requirements in subpart G that the OTS issued pursuant to the Home Owners' Loan Act, but chose not to do.

In the instances where the regulations in part 390, subpart G, were more stringent than similar requirements for insured State nonmember banks, the FDIC could have applied those requirements to insured State nonmember banks. However, the FDIC chose not to adopt this alternative because it believes the fair lending laws and regulations that already apply to insured State nonmember banks provide an appropriate and sufficient framework to prohibit discrimination.

The FDIC believes that this final rule, which removes and rescinds part 390, subpart G, and makes the FDIC's existing nondiscrimination regulations applicable to State savings associations, is less burdensome to State savings associations and the public than the alternatives discussed above since it would promote consistency among the regulatory requirements for all FDIC-supervised institutions and improve the public's understanding and ease of reference. Additionally, the FDIC believes that the final rule does not materially change the nondiscrimination requirements to which insured State nonmember banks and State savings associations are required to adhere, relative to the alternatives discussed.

VII. Administrative Law Matters

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),¹⁸ the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The rescission and removal from FDIC

¹⁸ 44 U.S.C. 3501–3521.

regulations of part 390, subpart G, does not create new or modify existing information collection requirements. Accordingly, no submission to OMB will be made with respect to the final rule.

B. *The Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the final rule on small entities.¹⁹ However, a regulatory flexibility analysis is not required if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or owned by a holding company with less than or equal to \$600 million in total assets.²⁰ 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 described below and under section 605(b) of the RFA, the FDIC certifies that this rule will not have a significant economic impact on a substantial number of small entities.

As of June 30, 2020, the FDIC supervised 3,270 depository institutions,²¹ of

¹⁹ 5 U.S.C. 601 *et seq.*

²⁰ The SBA defines a small banking organization as having \$600 million or less in assets, where an organization’s “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” See 13 CFR 121.103.

Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

²¹ FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

which 2,492 were considered small entities for the purposes of RFA.²² There are 33 State savings associations that are small entities for the purposes of RFA.²³ This final rule rescinds §§ 390.140 and 390.141. As discussed previously, these sections include definitions and cross-references to other parts of section 390, so their rescission has no independent significance for institutions or borrowers, but rather is a technical amendment associated with the proposal to rescind subpart G of part 390 in its entirety.

As previously discussed, this final rule rescinds § 390.142. This section has substantial overlap with the requirements of ECOA and Regulation B and the FHA and HUD's FHA regulations. Therefore, the FDIC believes that these aspects of the final rule are unlikely to significantly affect small FDIC-supervised institutions or borrowers.

The final rule rescinds § 390.143. As discussed previously, aspects of § 390.143 are duplicative of prohibitions under the general fair lending laws. With regard to § 390.143(b), the final rule reduces compliance requirements associated with maintaining and distributing relevant paperwork. The FDIC believes that this is likely to pose a relatively small benefit to the 33 small institutions to which it applies. Further, the FDIC believes that it is unlikely that the rescission of the requirement to establish, maintain, and distribute upon request nondiscriminatory loan underwriting standards for these 33 small State savings associations will lead to an increase in discriminatory lending behavior because these institutions are still subject to the general fair lending laws. Therefore, the FDIC does not believe that this aspect of the final rule is likely to have substantive effects on small FDIC-supervised institutions or borrowers.

As discussed previously, the final rule rescinds § 390.144. Section 390.144(a) is substantially similar to, and duplicative of, prohibitions under the general Federal fair lending laws.²⁴ The FDIC also believes that the requirement to post an Equal Housing

²² FDIC Call Report data, June 30, 2020.

²³ *Id.*

Lender poster, discussed above in connection with 12 CFR 338.4, serves a substantially similar purpose as the requirement to “inform each inquirer of his or her right to file a written loan application” in 12 CFR 390.144(b). Therefore, the FDIC believes that the rescission of § 390.144 is unlikely to have any substantive effect on small FDIC-supervised institutions or borrowers.

As discussed previously, the final rule rescinds § 390.145. Section 390.145 is substantially similar to § 338.4 and the final rule amends § 338.4 to cover State savings associations in addition to insured State nonmember banks. Therefore, the FDIC believes that this aspect of the final rule is unlikely to have any substantive effect on small FDIC-supervised institutions or borrowers.

As discussed previously, the final rule rescinds § 390.146. The requirements of § 390.146 are substantially similar to the requirements applicable to insured State nonmember banks under § 338.4. However, § 338.4, unlike § 390.146, does not include a “recommendation” that a Spanish-language version of the Equal Housing Lender poster be posted in offices serving areas with a substantial Spanish-speaking population. The FDIC does make a Spanish-language poster available to the institutions it supervises. Given the substantive similarity of much of §§ 390.146 to 338.4, the FDIC believes that rescinding it is unlikely to have substantial effects on small covered institutions or borrowers.

The final rule rescinds § 390.147. As previously discussed, the FDIC believes that § 390.147 is duplicative now that reporting reason for denial is required rather than optional under Regulation C. Further, since Regulation C provides a partial exemption from reporting reason for denial and certain other data points for financial institutions that meet specified conditions, but no such exemption exists for State savings associations, the final rule establishes parity with respect to the reporting requirements for HMDA LARs for State savings associations and other FDIC-supervised institutions.

The FDIC believes that this aspect of the final rule is unlikely to substantively affect small FDIC-supervised institutions or borrowers.

As previously discussed, the final rule rescinds § 390.148. The FDIC believes that there is significant overlap between the requirements of § 390.148(a)-(d) and various aspect of the EEOA. Further, § 390.148(e) & (f) references multiple employment laws, including the EEOA, which if the rest of § 390.148 were rescinded as proposed, would be unnecessary. Therefore, the FDIC believes that this aspect of the final rule is unlikely to substantively affect small FDIC-supervised institutions or borrowers.

As previously discussed, the final rule rescinds § 390.149. The FDIC has procedures for referring complaints to HUD regarding lending discrimination by financial institutions and these procedures apply to complaints involving lending by State savings associations. However, there appears to be no equivalent requirement to the provisions in § 390.149 regarding referring complaints to the EEOC regarding employment discrimination by FDIC-supervised institutions. This aspect of the final rule thus creates parity between State nonmember banks and State savings associations with respect to discriminatory complaints. Given that FDIC-supervised institutions are still subject to applicable elements of the EEOA and FDIC regulations and procedures, the FDIC does not believe that this aspect of the final rule is likely to have a substantive effect on covered institutions or their employees.

As previously discussed, the final rule rescinds § 390.150. This section contains guidelines intended to serve as a resource for State savings associations when developing and implementing nondiscriminatory lending policies. Small State savings associations, like other FDIC-supervised banks, remain subject to Federal fair lending laws and regulations and the FDIC does not believe removal of these guidelines will have any meaningful effect on these institutions or their borrowers.

Finally, the final rule makes some technical changes to FDIC's part 338 in order

to make it applicable to State savings associations and provide for Equal Housing Lender posters to state the accurate CRC mailing address. As previously discussed, these changes are unlikely to pose significant effects for small State savings associations because they are already subject to substantively similar regulations.

Rescinding part 390, subpart G, also will serve to streamline the FDIC's rules and eliminate unnecessary, inconsistent, and duplicative regulations. The final rule generally provides for all small insured State nonmember banks and State savings associations to be subject to the same nondiscrimination requirements.

The FDIC does not have data with which to estimate the costs that State savings associations currently incur to comply with subpart G or how those costs will change pursuant to this final rule. However, since this final rule affects only 33 small entities, and since the differences between subpart G and existing regulation and law are modest, the FDIC certifies that this final rule will not have a significant economic effect on a substantial number of small entities.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act²⁵ 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.

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.²⁶ The FDIC, along with the other Federal

²⁵ 12 U.S.C. 4809.

²⁶ Pub. L. 104-208, 110 Stat. 3009 (1996).

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 burdens, and further measures the FDIC will take to address issues that were identified.²⁷ As noted in the EGRPRA Report, the FDIC is continuing to streamline and clarify its regulations through the OTS rule integration process. By removing outdated or unnecessary regulations, such as part 390, subpart G, this final rule complements other actions that the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),²⁸ in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.²⁹

As previously stated, the final rule removes part 390, subpart G, from the Code of Federal Regulations because, after careful review and consideration, the FDIC believes it is largely unnecessary, redundant, or duplicative of existing statutes and regulations. In

²⁷ 82 FR 15900 (March 30, 2017).

²⁸ 12 U.S.C. 4802(a).

²⁹ 12 U.S.C. 4802(b).

addition, the final also includes amendments to the FDIC's part 338 to make it applicable to State savings associations, introduce new definitions, and to make technical conforming edits. 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.

F. *Congressional Review Act*

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule. If a rule is deemed a “major rule”³⁰ by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.³¹

The Congressional Review Act (CRA) 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 the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets.³²

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

³⁰ 5 U.S.C. 801 *et seq.*

³¹ 5 U.S.C. 801(a)(3).

³² 5 U.S.C. 804(2).

List of Subjects

12 CFR Part 338

Aged, Banks, banking, Civil rights, Credit, Fair housing, Individuals with disabilities, Marital status discrimination, Mortgages, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination, Signs and symbols.

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.

Authority and Issuance

For the reasons stated in the preamble, the FDIC amends 12 CFR parts 338 and 390 as follows:

1. Revise part 338 to read as follows:

PART 338—FAIR HOUSING

Subpart A—Advertising

Sec.

338.1 Purpose.

338.2 Definitions applicable to this subpart.

338.3 Nondiscriminatory advertising.

338.4 Fair housing poster.

Subpart B—Recordkeeping

338.5 Purpose.

338.6 Definitions applicable to this subpart.

338.7 Recordkeeping requirements.

338.8 Compilation of loan data in register format.

338.9 Mortgage lending of a controlled entity.

Authority: 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR parts 1002, 1003; 24 CFR part 110.

Subpart A—Advertising

§ 338.1 Purpose.

The purpose of this subpart is to prohibit FDIC-supervised institutions from engaging in discriminatory advertising with regard to residential real estate-related transactions. This subpart also requires FDIC-supervised institutions to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) or the Equal Housing Opportunity poster prescribed by 24 CFR part 110 of the United States Department of Housing and Urban Development's regulations. This subpart enforces section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619 (Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988.

§ 338.2 Definitions applicable to this subpart.

For purposes of this subpart:

(a) *Bank* means an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Dwelling* means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

(d) *Handicap* means, with respect to a person:

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) A record of having such an impairment; or

(3) Being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

(e) *Familial status* means one or more individuals (who have not attained the age of 18 years) being domiciled with:

(1) A parent or another person having legal custody of such individual or individuals;

or

(2) The designee of such parent or other person having such custody, with the written permission of such parent or other person; and

(3) The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(f) *State savings association* has the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

§ 338.3 Nondiscriminatory advertising.

(a) Any FDIC-supervised institution which directly or through third parties engages in any form of advertising of any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall prominently indicate in such advertisement, in a manner appropriate to the advertising medium and format utilized, that the FDIC-supervised institutions makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.

(1) With respect to written and visual advertisements, this paragraph (a) may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing

Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in 24 CFR 110.25(a) of the United States Department of Housing and Urban Development's regulations.

(2) With respect to oral advertisements, this paragraph (a) may be satisfied by a statement, in the spoken text of the advertisement, that the FDIC-supervised institution is an “Equal Housing Lender” or an “Equal Opportunity Lender.”

(3) When an oral advertisement is used in conjunction with a written or visual advertisement, the use of either of the methods specified in paragraphs (a)(1) and (2) of this section will satisfy the requirements of this paragraph (a).

(b) No advertisement shall contain any words, symbols, models, or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the Fair Housing Act or the Equal Credit Opportunity Act.

§ 338.4 Fair housing poster.

(a) Each FDIC-supervised institution engaged in extending loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall conspicuously display either the Equal Housing Lender poster set forth in paragraph (b) of this section or the Equal Housing Opportunity poster prescribed by 24 CFR 110.25(a) of the United States Department of Housing and Urban Development's regulations, in a central location within the FDIC-supervised institution where deposits are received or where such loans are made, in a manner clearly visible to the general public entering the area, where the poster is displayed.

(b) The Equal Housing Lender Poster shall be at least 11 by 14 inches in size and have the following text:

We Do Business in Accordance with Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

- Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or
- Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

Federal Deposit Insurance Corporation, Consumer Response Center, [Insert address for the Consumer Response Center stated on the FDIC's website at www.fdic.gov]

For processing under the FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

- On the basis of race, color, national origin, religion, sex, marital status, or age;
- Because income is from public assistance; or
- Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, Consumer Response Center, [Insert address for the Consumer Response Center stated on the FDIC's website at www.fdic.gov]

CFR 110.25(b) of the United States Department of Housing and Urban Development's rules and regulations as an authorized substitution for the poster required in § 110.25(a) of those rules and regulations.

Subpart B—Recordkeeping

§ 338.5 Purpose.

The purpose of this subpart is two-fold. First, this subpart notifies all FDIC-supervised institutions of their duty to collect and retain certain information about a home loan applicant's personal characteristics in accordance with 12 CFR part 1002 (Regulation B of the Bureau of Consumer Financial Protection) in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691 *et seq.*). Second, this subpart notifies certain FDIC-supervised institutions of their duty to maintain, update, and report a register of home loan applications in accordance with 12 CFR part 1003 (Regulation C of the Bureau of Consumer Financial Protection), which implements the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*).

§ 338.6 Definitions applicable to this subpart.

For purposes of this subpart--

(a) *Bank* means an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

(b) *Controlled entity* means a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

(d) *State savings association* has the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

§ 338.7 Recordkeeping requirements.

All FDIC-supervised institutions that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling shall request and retain the monitoring information required by Regulation B of the Bureau of Consumer Financial Protection (12 CFR part 1002).

§ 338.8 Compilation of loan data in register format.

FDIC-supervised institutions and other lenders required to file a Home Mortgage Disclosure Act loan/application register (LAR) with the Federal Deposit Insurance Corporation shall collect, record and report such LAR in accordance with Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003).

§ 338.9 Mortgage lending of a controlled entity.

Any bank which refers any applicants to a controlled entity and which purchases any covered loan as defined in Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003) originated by the controlled entity, as a condition to transacting any business with the controlled entity, shall require the controlled entity to enter into a written agreement with the bank. The written agreement shall provide that the entity shall:

(a) Comply with the requirements of §§ 338.3, 338.4, and 338.7, and, if otherwise subject to Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003), § 338.8;

(b) Open its books and records to examination by the Federal Deposit Insurance Corporation; and

(c) Comply with all instructions and orders issued by the Federal Deposit Insurance Corporation with respect to its home loan practices.

**PART 390 – REGULATIONS TRANSFERRED FROM THE OFFICE OF
THRIFT SUPERVISION**

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

Authority: 12 U.S.C. 1819.

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 G – [Removed and Reserved]

3. Remove and reserve subpart G, consisting of §§ 390.140 through 390.150.

Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on December 15, 2020.
James P. Sheesley,
Assistant Executive Secretary.

BILLING CODE 6714-01-P

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