



12 CFR Parts 308 and 390

RIN 3064-AF38

Removal of Transferred OTS Regulations Regarding Prompt Corrective Action Directives and Conforming Amendments to Other Regulations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is adopting a final rule to rescind and remove from the Code of Federal Regulations rules entitled “Prompt Corrective Action” that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and amend certain sections of existing FDIC regulations governing the issuance and review of orders pursuant to the prompt corrective action provisions of the Federal Deposit Insurance Act to make it clear that such rules apply to all insured depository institutions for which the FDIC is the appropriate Federal banking agency.

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

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SUPPLEMENTARY INFORMATION:

I. Policy Objective:

The policy objective of the rule is to remove unnecessary and duplicative regulations in order to simplify them and improve the public's understanding of them. Part 390, subpart Y, outlines administrative procedures related to prompt corrective action that are equivalent to procedures outlined in part 308, subpart Q, of the FDIC's existing regulations. Thus, the FDIC is rescinding the regulations in part 390, subpart Y, and reserving the subpart for future use. In addition, the FDIC is amending certain sections of part 308, subpart Q, of the FDIC's existing regulations on the issuance and review of orders pursuant to the prompt corrective action provisions of the Federal Deposit Insurance Act to make it clear that part 308, subpart Q, applies to all insured depository institutions for which the FDIC is the appropriate Federal banking agency.

II. Background:

Part 390, subpart Y, was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹

A. The Dodd-Frank Act

As of 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 other advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. 5301 *et seq.*).

² Codified at 12 U.S.C. 5411.

³ Codified at 12 U.S.C. 5414(b).

provides that if such materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Pursuant to section 316(c) of the Dodd-Frank Act,⁴ on June 14, 2011, the FDIC's Board of Directors (Board) 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, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act (FDI Act)⁷ and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c)(1) of the Dodd-Frank Act⁸ revised the definition of "appropriate Federal banking agency" contained in section 3(q) of the FDI Act,⁹ 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 appropriate Federal banking agency (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify, and rescind regulations involving such associations, as well as for State nonmember banks and insured State-licensed branches of foreign banks.

⁴ Codified at 12 U.S.C. 5414(c).

⁵ 76 FR 39246 (July 6, 2011).

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

⁷ 12 U.S.C. 1811 *et seq.*

⁸ Codified at 12 U.S.C. 5412(c)(1).

⁹ 12 U.S.C. 1813(q).

As noted above, on June 14, 2011, operating pursuant to this authority, the Board issued a list of regulations of the former OTS that the FDIC would enforce with respect to State savings associations. On that same date, the Board reissued and redesignated certain regulations transferred from the former OTS. These transferred OTS regulations were published as new FDIC regulations in the *Federal Register* on August 5, 2011.¹⁰ When the FDIC republished the transferred OTS regulations as new FDIC regulations, it specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC regulations, amending them, or rescinding them, as appropriate.¹¹

B. Transferred OTS Regulations (Transferred to the FDIC's Part 390, Subpart Y)

A subset of the regulations transferred to the FDIC from the OTS concerns prompt corrective action provisions applicable to State savings associations. The OTS regulations, formerly found at 12 CFR part 565, §§ 565.7, 565.8, 565.9 and 565.10, were transferred to the FDIC with only nomenclature changes and now comprise part 390, subpart Y. Each provision of part 390, subpart Y, is discussed in Part III of this SUPPLEMENTARY INFORMATION section, below. The FDIC has conducted a careful review and comparison of part 390, subpart Y. As discussed in Part III of this SUPPLEMENTARY INFORMATION section, the FDIC is rescinding part 390, subpart Y, because the FDIC considers the provisions related to State savings associations contained in part 390, subpart Y, substantially similar to similar regulations related to state non-member banks. The FDIC will combine the regulations to make clear the same procedures apply to all FDIC-supervised institutions.

III. Proposed Rule

¹⁰ 76 FR 47652 (Aug. 5, 2011).

¹¹ See 76 FR 47653.

On September 28, 2020, the FDIC published a notice of proposed rulemaking (NPR) regarding the removal of part 390, subpart Y (formerly OTS 12 CFR part 565, §§ 565.7, 565.8, 565.9 and 565.10), which addressed prompt corrective action provisions applicable to State savings associations.¹² The NPR proposed removing part 390, subpart Y, from the Code of Federal Regulations, because, after careful review, the FDIC concluded that the retention of part 390, subpart Y, is unnecessary and that rescission of subpart Y in its entirety would streamline the FDIC rules and regulations. The regulations related to State savings associations will be incorporated into part 308, subpart Q as described below. Part 390, subpart Y, also references savings and loan holding companies. When the regulation was transferred from the OTS, the references to “any company that controls the State savings association” were not deleted with the other technical amendments. The FDIC is not the appropriate successor agency for supervision of savings and loan holding companies. Under the Dodd-Frank Act, supervision of savings and loan holding companies was transferred to the Federal Reserve Board.¹³ The provisions in the FDIC regulations relating to “any company that controls the State savings association” will therefore be set aside and not incorporated into the existing FDIC regulations at part 308, subpart Q, addressing FDIC-supervised institutions.

Consistent with its legal authority to issue and modify regulations as the appropriate Federal banking agency under section 3(q) of the Federal Deposit Insurance Act, the FDIC also proposed to amend and revise provisions of part 308, subpart Q, to clarify and state explicitly the regulations apply to all FDIC-supervised institutions.

¹² 85 FR 60738 (Sept. 28, 2020).

¹³ 12 U.S.C. 5412(b)(1).

A. Comparison of Other Applicable Statutes and Regulations with the Transferred OTS Regulations to Be Rescinded

12 CFR 390.456 – Directives to take prompt corrective action.

Section 390.456 describes the administrative procedures for the FDIC to issue a directive to take prompt corrective action against a State savings association. These administrative procedures were initially found at 12 CFR 565.7 and are equivalent to the administrative procedures relating to FDIC-supervised banks found at 12 CFR 308.201.

The FDIC proposed that § 390.456 be rescinded in its entirety. The amendments to subpart Q will clarify in a single location that the regulations apply to all FDIC-supervised institutions. Therefore, it is not necessary to have a regulation specifically applicable to State savings associations.

12 CFR 390.457 – Procedures for reclassifying a State savings association based on criteria other than capital.

Section 390.457 describes the administrative procedures to reclassify a State savings association based on criteria other than capital. This section describes how the FDIC may consider other unsafe or unsound practices to lower a State saving association's capital category under part 324. The section also details the procedures for notifying the State saving association and contesting the determination. These administrative procedures were initially found at 12 CFR 565.8 and were recently modified to account for changes made to part 324.¹⁴ Section 390.457 is equivalent to the administrative procedures relating to FDIC-supervised banks found at 12 CFR 308.202.

The FDIC proposed that § 390.457 be rescinded in its entirety. The amendments to subpart Q will clarify in a single location that the regulations apply to all FDIC-supervised institutions. Therefore, it is not necessary to have a regulation specifically applicable to State savings associations.

¹⁴ See 83 FR 17737.

12 CFR 390.458 – Order to dismiss a director or senior executive officer.

Section 390.458 describes the additional administrative procedures related to prompt corrective action directives that require the State savings association to terminate the employment of a director or officer. This section also includes provisions to challenge this type of prompt corrective order directive. These administrative procedures were initially found at 12 CFR 565.9. Section 390.458 is equivalent to the administrative procedures relating to FDIC-supervised banks found at 12 CFR 308.203.

The FDIC proposed that § 390.458 be rescinded in its entirety. The amendments to subpart Q will clarify in a single location that the regulations apply to all FDIC-supervised institutions. Therefore, it is not necessary to have a regulation specifically applicable to State savings associations

12 CFR 390.459 – Enforcement of directives.

Section 390.459 describes the additional remedies the FDIC may take to seek compliance with prompt corrective action directives. These procedures were initially found at 12 CFR 565.10. Section 390.459 is equivalent to the administrative procedures relating to FDIC-supervised banks found at 12 CFR 308.204.

The FDIC proposed that § 390.459 be rescinded in its entirety. The amendments to subpart Q will clarify in a single location that the regulations apply to all FDIC-supervised institutions. Therefore, it is not necessary to have a regulation specifically applicable to State savings associations.

B. Changes to FDIC Regulations

As discussed in part III of this SUPPLEMENTARY INFORMATION, the FDIC's part 308, subpart Q, addresses the administrative procedures related to the issuance and enforcement of prompt corrective action directives. The Dodd-Frank Act added State savings associations to the list of entities for which the FDIC is designated as

the appropriate Federal banking agency.¹⁵ To clarify that part 308, subpart Q, applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposed to amend §§ 308.200 through 308.204 to replace the phrases “banks” and “insured branches of foreign banks” throughout subpart Q with the phrase “FDIC-supervised institution.” Section 308.200 will be revised to add the definition of the term “FDIC-supervised institution” 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.¹⁶

Additionally, the FDIC proposed one additional change to conform the FDIC’s regulations relating to prompt corrective action directives that apply to banks and the former OTS regulations relating to State savings associations. Sections 308.202 and 390.457 describe the procedures relating to classifying an institution due to something other than capital. These two regulations differ in one respect. The FDIC regulation at § 308.202(a)(6) provides that when a hearing is ordered, it will begin no later than 30 days from the date of the request unless the bank requests a later date. The former OTS version of this regulation, incorporated by the FDIC at § 390.457, provides that the hearing should be ordered within 30 days of request unless the FDIC allows further time at the request of the State savings association. While both of these provisions demonstrate that a hearing is likely to be delayed at the request of the institution, the former OTS version of the regulation is written with greater clarity that the FDIC will evaluate and may then provide consent to the request. The OTS version of the regulation makes it clear that there is no automatic extension granted to the institution. The greater clarity in this language makes it the preferred choice when reconciling the two regulations into one

¹⁵ See section 312(c) of the Dodd-Frank Act, codified at 12 U.S.C. 1813(q).

¹⁶ 12 U.S.C. 1813(q).

regulation that applies to all FDIC-supervised institutions. The changes to this aspect of the regulation will provide greater clarity to those institutions going forward.

IV. Comments

The FDIC issued the NPR with a 30-day comment period, which closed on October 28, 2020. The FDIC received no comments on its NPR, and consequently the FDIC is adopting the amendments as proposed.

V. Explanation of the Final Rule

As discussed in the NPR, the requirements for State savings associations in part 390, subpart Y, are largely unnecessary, redundant, or duplicative of existing FDIC regulations. To that effect, the Final Rule removes and rescinds 12 CFR part 390, subpart Y, and amends the FDIC's requirements of part 308, subpart Q to expressly apply to all FDIC-supervised insured depository institutions. These initiatives will serve to streamline the FDIC's regulations.

VI. Expected Effects

As explained in detail in Section III of this SUPPLEMENTARY INFORMATION section, certain OTS regulations transferred to the FDIC by the Dodd-Frank Act relating to prompt corrective action directives are either unnecessary or effectively duplicate existing FDIC regulations. This rule will eliminate those transferred OTS regulations. The rule will also clarify that the standards in part 308, subpart Q, apply to State savings associations because the FDIC is the "appropriate Federal banking agency" pursuant to the FDI Act. As of June 30, 2020, the FDIC supervised 3,270 depository institutions, of which 35 (1.1 percent) are State savings associations.¹⁷ The rule primarily would affect regulations that govern State savings associations.

As explained previously, the rule would rescind 12 CFR part 390, subpart Y, which includes the following: § 390.456, which outlines administrative procedures for

¹⁷ Call Report data, June 30, 2020.

issuing a directive to take prompt corrective action against a State savings association; § 390.457, which outlines administrative procedures for reclassifying a State savings association based on criteria other than capital; § 390.458, which outlines administrative procedures related to prompt corrective action that require a State savings association to terminate the employment of a director or officer; and § 390.459, which outlines administrative procedures the FDIC may take to seek compliance with prompt corrective action directives. The FDIC has determined that these sections of 12 CFR part 390 are equivalent to regulations related to prompt corrective action in the FDIC's existing regulations. Therefore, the FDIC does not expect the removal of the regulations in subpart Y to significantly affect FDIC-supervised State savings associations.

The final rule would also amend the FDIC's regulations that establish administrative procedures for prompt corrective action in 12 CFR 308.200 through 308.204 to make them applicable to all FDIC-supervised institutions, including State savings associations. As discussed previously, these changes would not change the required procedures related to prompt corrective action that are applicable to State savings associations since the requirements in subpart Y are equivalent to requirements in the FDIC's existing regulations; therefore this aspect of the rule is unlikely to substantively affect FDIC-supervised State savings associations.

Finally, the rule revises 12 CFR 308.202 to clarify the procedures for delaying a hearing if an institution is reclassified based on criteria other than capital. The FDIC's regulation currently states that if a hearing is scheduled, it will be held within 30 days of the request unless the institution requests a later date. The regulations in § 390.457 state that a hearing will be held within 30 days of the request unless the FDIC allows further time at the request of the institution. The FDIC is adopting the language from § 390.457 in its own regulations since § 390.457 clarifies that requests for an extension will not be automatically granted. This aspect of the rule will pose no change for the 35 FDIC-

supervised State savings associations. The FDIC believes that adopting the language from § 390.457 should further clarify for State nonmember institutions that requests for an extension will not automatically be granted, however, this change is unlikely to pose any substantive effects on State nonmember institutions.

Since the prompt corrective action directive provisions in part 390, subpart Y, are substantively similar to existing regulations for state nonmember banks found in part 308, subpart Q, the FDIC does not believe that rescission of §§ 390.456 through 390.459 would have any substantive effects on FDIC-supervised State savings associations.

VII. Alternatives

The FDIC believes that the amendments represent the most appropriate option for covered institutions and, at this time, has not identified significant alternatives to the rule in its current form. 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 prompt corrective actions, including part 308, subpart Q, and part 390, subpart Y. The FDIC has available the status quo alternative of retaining the current regulations but is not choosing to do so because it would be needlessly duplicative for substantively similar regulations regarding prompt corrective action directives for banks and State savings associations to be located in different locations within the Code of Federal Regulations. The FDIC believes it would be redundant and potentially confusing for FDIC-supervised institutions to continue to refer to these separate sets of regulations and is therefore amending and streamlining them in accordance with this final rulemaking.

VIII. Regulatory Analysis and Procedure

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 final rule rescinds and removes from FDIC regulations part 390, subpart Y. With regard to part 308, subpart Q, the final rule amends §§ 308.200 through 308.204 to clarify that State savings associations, as well as State nonmember banks and foreign banks having insured branches are all subject to part 308, subpart Q. The final rule will not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), requires that, in connection with a notice of final rulemaking, 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.¹⁹ 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.²⁰ Generally, the FDIC considers a significant effect to be a quantified

¹⁸ 44 U.S.C. 3501–3521.

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 “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

effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As of June 30, 2020, the FDIC supervised 3,270 depository institutions,²¹ of 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, or 1.3 percent of all depository institutions considered small entities.²³ As discussed previously, the rule rescinds 12 CFR part 390, subpart Y, which includes the following: § 390.456, which outlines administrative procedures for issuing a directive to take prompt corrective action against a State savings association; § 390.457, which outlines administrative procedures for reclassifying a State savings association based on criteria other than capital; § 390.458, which outlines administrative procedures related to prompt corrective action that require a State savings association to terminate the employment of a director or officer; and § 390.459, which outlines administrative procedures the FDIC may take to seek compliance with prompt corrective action directives. The FDIC has determined that these sections of 12 CFR part 390 are equivalent to regulations related to prompt corrective action in the FDIC's existing regulations. Therefore, the FDIC does not expect

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.

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

²² FDIC Call Report data, June 30, 2020.

²³ Id.

the removal of the regulations in subpart Y to significantly affect small FDIC-supervised State savings associations.

The final rule also amends the FDIC's regulations that establish administrative procedures for prompt corrective action in 12 CFR 308.200 through 308.204 to make them applicable to all FDIC-supervised institutions, including State savings associations. As discussed previously, these changes would not change the required procedures related to prompt corrective action that are applicable to small State savings associations since the requirements in subpart Y are equivalent to requirements in the FDIC's existing regulations.

Finally, the rule revises 12 CFR 308.202 to clarify the procedures for delaying a hearing if an institution is reclassified based on criteria other than capital. The FDIC's regulation currently states that if a hearing is scheduled, it will be held within 30 days of the request unless the institution requests a later date. The regulations in § 390.457 state that a hearing will be held within 30 days of the request unless the FDIC allows further time at the request of the institution. The FDIC is adopting the language from § 390.457 in its own regulations since § 390.457 clarifies that requests for an extension will not be automatically granted. This aspect of the rule will pose no change for the 33 small FDIC-supervised State savings associations. The FDIC believes that adopting the language from § 390.457 should further clarify for small State nonmember institutions that requests for an extension will not automatically be granted; however, this change is unlikely to pose any substantive effects on small State nonmember institutions.

Since the prompt corrective action directive provisions in part 390, subpart Y, are substantively similar to existing regulations for state nonmember banks found in part 308, subpart Q, the FDIC believes it is unlikely that that rescission of §§ 390.456 through

390.459 would have any substantive effects on small FDIC-supervised State savings associations.

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

C. The Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major rule.”²⁴ 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.²⁵

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 the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.²⁶

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 Act²⁷ requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1,

²⁴ Codified at 5 U.S.C. 801 et seq.

²⁵ Codified at 5 U.S.C. 801(a)(3).

²⁶ Codified at 5 U.S.C. 804(2).

²⁷ Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (codified at 12 U.S.C. 4809).

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.²⁸ 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 burdens, and further measures the FDIC will take to address issues that were identified.²⁹ 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 Y, this rule complements other actions that the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

F. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),³⁰ 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

²⁸ Pub. L. 104-208, 110 Stat. 3009 (1996).

²⁹ 82 FR 15900 (March 31, 2017).

³⁰ 12 U.S.C. 4802(a).

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.³¹ The FDIC has determined that the final rule would not impose any additional reporting, disclosure, or other new requirements on IDIs, and thus the requirements of the RCDRIA do not apply.

List of Subjects

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties.

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 Federal Deposit Insurance Corporation amends parts 308 and 390 of title 12 of the Code of Federal Regulations as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330,

³¹ *Id.*

5321; 42 U.S.C. 4012a; Pub. L. 104-134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109-351, 120 Stat. 1966; Pub. L. 111-203, 124 Stat. 1376; Pub. L. 114-74, sec. 701, 129 Stat. 584.

2. Revise subpart Q to read as follows:

Subpart Q—Issuance and Review of Orders Pursuant to the Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

Sec.

308.200 Scope.

308.201 Directives to take prompt corrective action.

308.202 Procedures for reclassifying an FDIC-supervised institution based on criteria other than capital.

308.203 Order to dismiss a director or senior executive officer.

308.204 Enforcement of directives.

§ 308.200 Scope.

The rules and procedures set forth in this subpart apply to FDIC-supervised institutions and senior executive officers and directors of the same that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) (12 U.S.C. 1831o) and subpart H of part 324 of this chapter. For purposes of this subpart, the term “FDIC-supervised institution” means any insured depository institution 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).

§ 308.201 Directives to take prompt corrective action.

(a) *Notice of intent to issue directive--(1) In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized FDIC-supervised institution prior written notice of the FDIC's intention to issue a directive requiring such FDIC-supervised institution to take actions or to follow proscriptions

described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). The FDIC-supervised institution shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring an FDIC-supervised institution immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). An FDIC-supervised institution that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the FDIC-supervised institution's capital measures and capital levels;

(2) A description of the restrictions, prohibitions, or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the FDIC-supervised institution subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice--(1) Time for response.* An FDIC-supervised institution may file a written response to a notice of intent to issue a directive within the time period set by the FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the FDIC-supervised institution or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the FDIC-supervised institution regarding the proposed directive.

(d) *FDIC consideration of response.* After considering the response, the FDIC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the FDIC-supervised institution; or

(3) Seek additional information or clarification of the response from the FDIC-supervised institution or any other relevant source.

(e) *Failure to file response.* Failure by an FDIC-supervised institution to file with the FDIC, within the specified time period, a written response to a proposed directive

shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any FDIC-supervised institution that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

§ 308.202 Procedures for reclassifying an FDIC-supervised institution based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice--*(1) *Issuance of notice of proposed reclassification--*(i) *Grounds for reclassification.* (A) Pursuant to § 324.403(d) of this chapter, the FDIC may reclassify a well-capitalized FDIC-supervised institution as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(1) The FDIC determines that the FDIC-supervised institution is in unsafe or unsound condition; or

(2) The FDIC, pursuant to section 8(b)(8) of the FDI Act (12 U.S.C. 1818(b)(8)), deems the FDIC-supervised institution to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall be referred to in this section as *reclassification*.

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 324.403(d) of this chapter, the FDIC shall issue and serve on the FDIC-supervised institution a written notice of the FDIC's intention to reclassify it.

(2) *Contents of notice.* A notice of intention to reclassify an FDIC-supervised institution based on unsafe or unsound condition shall include:

(i) A statement of the FDIC-supervised institution's capital measures and capital levels and the category to which the FDIC-supervised institution would be reclassified;

(ii) The reasons for reclassification of the FDIC-supervised institution; and

(iii) The date by which the FDIC-supervised institution subject to the notice of reclassification may file with the FDIC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the FDIC-supervised institution or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* An FDIC-supervised institution may file a written response to a notice of proposed reclassification within the time period set by the FDIC. The response should include:

(i) An explanation of why the FDIC-supervised institution is not in an unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the FDIC-supervised institution regarding the reclassification.

(4) *Failure to file response.* Failure by an FDIC-supervised institution to file, within the specified time period, a written response with the FDIC to a notice of proposed

reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the FDIC under this section. If the FDIC-supervised institution desires to present oral testimony or witnesses at the hearing, the FDIC-supervised institution shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the FDIC allows further time at the request of the FDIC-supervised institution. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC before a presiding officer(s) designated by the FDIC to conduct the hearing.

(7) *Hearing procedures.* (i) The FDIC-supervised institution shall have the right to introduce relevant written materials and to present oral argument at the hearing. The FDIC-supervised institution may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the FDIC-supervised institution upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC will decide whether to reclassify the FDIC-supervised institution and notify the FDIC-supervised institution of the FDIC's decision.

(b) *Request for rescission of reclassification.* Any FDIC-supervised institution that has been reclassified under this section, may, upon a change in circumstances, request in writing that the FDIC reconsider the reclassification and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the FDIC, the FDIC-supervised institution shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the FDIC.

§ 308.203 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the FDIC issues and serves a directive on an FDIC-supervised institution pursuant to § 308.201 requiring the FDIC-supervised institution to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the FDIC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive--(1) Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the FDIC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated and may include a request for an informal hearing before the FDIC under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the FDIC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring an FDIC-supervised institution to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30

days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the FDIC-supervised institution would materially strengthen the FDIC-supervised institution's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the FDIC-supervised institution's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the FDIC-supervised institution based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC concerning the Respondent's request for reinstatement with the FDIC-supervised institution.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC shall grant or deny the request for reinstatement and notify the Respondent of the FDIC's decision. If the FDIC denies the request for reinstatement, the FDIC shall set forth in the notification the reasons for the FDIC's action.

§ 308.204 Enforcement of directives.

(a) *Judicial remedies.* Whenever an FDIC-supervised institution fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act (12 U.S.C. 1818(i)(1)).

(b) *Administrative remedies--(1) Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any FDIC-supervised institution that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of an FDIC-supervised institution to implement a capital restoration plan required under section 38, or subpart H of part 324 of this chapter, or the failure of a company having control of an FDIC-supervised institution to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the FDIC-supervised institution to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or subpart H of part 324 of this chapter through any other judicial or administrative proceeding authorized by law.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

3. The authority citation for part 390 continues 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 Y—[Removed and Reserved]

4. Remove and reserve subpart Y, consisting of §§ 390.450 through 390.459.

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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