FEDERAL DEPOSIT INSURANCE CORPORATION

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

RIN 3064–AF14

Removal of Transferred OTS Regulations Regarding Certain Regulations for the Operations of State Savings Associations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking (NPR), the Federal Deposit Insurance Corporation (FDIC) proposes to rescind and remove certain regulations transferred in 2011 to the FDIC from the former Office of Thrift Supervision pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). In addition to the removal of part 390, subpart S, the FDIC proposes to make technical changes to other parts of the FDIC's regulations so that they may be applicable on their terms to State savings associations. Following the removal of the identified regulations, the regulations governing the operations of State savings associations will be substantially the same as those for all other FDIC-supervised institutions. The FDIC invites comments on all aspects of this proposed rulemaking.

DATES: Comments must be received on or before December 2, 2019.

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

- *FDIC Website: https://www.fdic.gov/regulations/laws/federal/.* Follow instructions for submitting comments on the agency website.
- *Email: Comments@fdic.gov.* Include RIN 3064–AF14 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7 a.m. and 5 p.m.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *https://www.fdic.gov/regulations/laws/federal/,* including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 877–275–3342 or 703–562–2200.

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SUPPLEMENTARY INFORMATION:

I. Background

A. The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] provided for a substantial reorganization of the 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 of the former Office of Thrift Supervision (OTS) were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act,[3] 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.[4] The section provides that if such issuances 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.

The Dodd-Frank Act directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations to be enforced by each respective agency. The list was published by the FDIC and OCC as a Joint Notice in the **Federal Register** on July 6, 2011,[5] and shortly thereafter, the FDIC published its transferred OTS regulations as new FDIC regulations in 12 CFR parts 390 and 391.[6] When it republished the transferred OTS regulations, the FDIC noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS rules into other FDIC rules, amending them or rescinding them, as appropriate.

Section 312(b)(2)(C) of the Dodd-Frank Act [7] amended the definition of ''appropriate Federal banking agency'' contained in section 3(q) of the Federal Deposit Insurance Act (FDI Act) [8] to add State savings associations to the list of entities for which the FDIC is designated as the ''appropriate Federal banking agency.'' As a result, when the FDIC acts as the designated ''appropriate Federal banking agency'' (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify, and rescind regulations involving such associations and for State nonmember banks and insured branches of foreign banks.

B. 12 CFR Part 390, Subpart S

One of the rules of the former OTS that was transferred to the FDIC, 12 CFR part 563, governs many of the operations of State savings associations. The former OTS's rule was transferred to the FDIC with nominal changes and is now found in the FDIC's rules at part 390, subpart S, entitled ''*State Savings Associations—Operations.*'' [9] Subpart S governs a wide range of operations of State savings associations, as further discussed below.[10]

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] 12 U.S.C. 5411.

[3] 12 U.S.C. 5414(b).

[4] 12 U.S.C. 5414(b).

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

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

[7] 12 U.S.C. 5412(b)(2)(C).

[8] 12 U.S.C. 1813(q).

[9] 12 CFR part 390, subpart S.

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

II. The Proposal

Section 316(b)(3) of the Dodd-Frank Act in pertinent part, provides that the regulations of the former OTS, as they apply to State savings associations, will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law.[11] Consistent with the FDIC's stated intention to evaluate transferred OTS regulations before taking action on them, the FDIC has carefully reviewed the provisions of subpart S, and proposes to take action as described below with respect to certain sections of this subpart.

A. Section 390.330—Chartering Documents

Section 390.330 requires a de novo State savings association, prior to commencing operations, to file its charter and bylaws with the FDIC for approval. This section also requires a de novo State savings association to certify to the FDIC that its charter and bylaws are permissible under all applicable laws, rules, and regulations. In addition, this section requires each State savings association to make available to its accountholders a copy of its charter and bylaws, including amendments thereto, in each office or by request.

Unlike the OCC or state banking supervisors, the FDIC does not charter insured depository institutions. Thus, as it does with State nonmember banks, the FDIC proposes to defer to state law as to whether and how a State savings association should disclose or provide copies of its organizational documents to interested parties. Consistent with this position, the FDIC proposes to rescind and remove this section of Subpart S.

B. Section 390.331—Securities: Statement of Non-Insurance

Section 390.331 requires that every security issued by a State savings association include in its provisions a clear statement that the security is not insured by the FDIC. Although the FDIC does not have an identical companion rule to § 390.331, provisions of the Federal Deposit Insurance Act (the FDI Act), and the FDIC regulations clarify (and require FDIC-supervised institutions to clarify) that securities are not deposits under the FDI Act and are not insured by the FDIC.

Section 3(*l*) of the FDI Act defines ''deposit'' for the purposes of the FDI Act and does not include any securities, regardless of issuer.[12] The definition of ''insured deposit'' at section 3(m) of the FDI Act, also does do not include securities, including those issued by a State savings association.[13]

Further, part 328 governs the use of the official sign of the FDIC and prescribes its use by insured depository institutions. It also provides the official advertising statement that insured depository institutions must include in their advertisements. For purposes of part 328, the term ''insured depository institution'' includes insured branches of a foreign depository institution, as well as State savings associations. In particular, the advertising of non-deposit products (which includes securities) is governed by § 328.3(e). That section prohibits an insured depository institution from including the official advertising statement, or any other statement or symbol which implies or suggests the existence of Federal deposit insurance, in any advertisement that relates solely to non-deposit products.

Because § 390.331 largely is redundant to current FDIC rules and regulations that govern advertising of non-deposit products, including securities, for all insured depository institutions, the FDIC proposes to rescind and remove § 390.331.

C. 12 CFR 390.332—Merger, Consolidation, Purchase or Sale of Assets, or Assumption of Liabilities

Section 390.332 addresses the application requirements for mergers, consolidations, purchases or sales of assets, and assumptions of liabilities that apply to State savings associations. The FDIC proposes to rescind § 390.332 and to amend 12 CFR part 303, subpart D, the section of the FDIC's regulations governing merger transactions. The proposed amendments to subpart D would make that section applicable to any FDIC-supervised institution, including State savings associations, and would make other conforming changes. The proposed revisions to subpart D would make subpart D applicable to mergers in which the resulting institution is a State savings association, while observing the necessary requirements of the Bank Merger Act and Home Owners' Loan Act (HOLA).[14] The FDIC specifically proposes amending § 303.62(a)(1) of the FDIC's regulations to clarify that this section applies to merger transactions in which the resulting institution is either an insured State nonmember bank or a State savings association.

HOLA generally provides for a 60-day expedited processing period for applications involving State or Federal savings associations that acquire or are acquired by another insured depository institution.[15] The FDIC proposes to amend § 303.64 of its regulations to reflect HOLA's expedited statutory processing requirement as it applies to State savings associations. Specifically, a proposed new paragraph (c) of section 303.64 would clarify that the FDIC will act on merger applications submitted by State savings associations within 60 days after the date of the FDIC's receipt of a substantially complete merger application, subject to the FDIC's authority to extend such period by an additional 30 days in cases where material information is substantially inaccurate or incomplete.[16] Although the FDIC proposes to incorporate this 60-day processing requirement with respect to State savings associations, the FDIC proposes to rescind the provisions of § 390.332 that deem certain merger applications involving state savings associations to be automatically approved.[17] The FDIC does not consider such provisions to be statutorily required by the HOLA, and their inclusion in subpart D would be inconsistent with the treatment of State nonmember banks under subpart D, which clarifies that merger applications processed under expedited processing are not deemed to be automatically approved upon the conclusion of the expedited processing period.[18] After the proposed amendment to subpart D and proposed removal and rescission of § 390.332, all FDIC-supervised institutions would be subject, in substantially the same manner, to the regulations for merger applications found in part 303, subpart D.

The FDIC is including a technical amendment to § 303.62(b)(5) of the FDIC's regulations. Currently, § 303.62(b)(5) provides that an insured depository institution assuming deposit liabilities of another insured institution must provide certification of assumption of deposit liability to the FDIC in accordance with part 307. This provision no longer accurately reflects the requirements of part 307, which was amended to clarify that the transferring institution file the certification, rather than the assuming institution.[19]

Agencies of Foreign Banks, 81 FR 90949 (Dec. 16, 2016).

[11] 12 U.S.C. 5414(b)(3).

[12] 12 U.S.C. 1813(*l*).

[13] 12 U.S.C. 1813(m).

[14] 12 U.S.C. 1461 *et seq.*

[15] 12 U.S.C. 1467a(s)(2).

[16] 12 U.S.C. 1467a(s)(2)(B).

[17] *See* 12 CFR 390.332(f) and (h).

[18] 12 CFR 303.64(a)(3).

[19] 71 FR 8789 (Feb. 21, 2006), codified at 12 CFR 307.1 *et seq.*

D. 12 CFR 390.333—Advertising

Section 390.333 prohibits State savings associations from making inaccurate representations about services, contracts, investments, or financial condition in their advertising. It appears that the former OTS used this regulation sparingly. FDIC staff identified only ten occasions in which the former OTS cited this provision in guidance letters and no circumstances in which the former OTS cited the regulation in an adjudicated enforcement proceeding.

The prohibition of misrepresentations in advertising contained in § 390.333 is substantially similar to the more general prohibition of unfair or deceptive acts or practices under section 5(a) of the Federal Trade Commission Act (Section 5). The FDIC enforces this provision pursuant to its authority under Section 8 of the FDI Act.[20] Section 390.333 prohibits advertising and representations that are inaccurate or that misrepresent a State savings association's services, contracts, investments, or financial condition. The prohibition contained in Section 5 is broader than § 390.333 because it prohibits all ''unfair or deceptive acts or practices in or affecting commerce,'' and it applies to all FDIC-supervised institutions, not only State savings associations.[21] Because the narrower prohibitions of § 390.333 appear subsumed within the broader prohibitions of Section 5, the FDIC proposes to rescind and remove § 390.333.

In interpreting Section 5, the Federal Trade Commission (FTC) and the courts have concluded that an advertisement is not misleading unless the representation, omission, or practice is material, meaning that it is likely to affect a consumer's decision regarding a product or service.[22] Arguably, then, § 390.333 sets a higher standard than Section 5 because § 390.333 lacks an explicit materiality requirement. That is, if § 390.333 is read strictly, an advertisement could violate that section even if the misrepresentation in the advertisement is not material. As a practical matter, however, it is unlikely that the FDIC would cite a violation of § 390.333 for an immaterial misrepresentation. Therefore, the FDIC does not believe that § 390.333 provides additional meaningful supervisory or enforcement authority to regulate misrepresentations by State savings associations. As a result, the FDIC proposes to rescind and remove § 390.333.

E. 12 CFR 390.334—Directors, Officers, and Employees

Section 390.334 limits who may serve on the board of directors of a State savings association by providing that: A majority of the directors must not be employees of the State savings association or its affiliates; no more than two directors may come from the same family; and no more than one director may be an attorney with a particular law firm.

The FDIC proposes to remove and rescind § 390.334. The FDIC expects State nonmember banks to comply with the laws and regulations of their chartering authority regarding the composition of their boards of directors and will expect State savings associations to do the same. The provisions of § 390.334 are not statutorily mandated and were initially adopted in 1976 by the former OTS' precursor, the Federal Home Loan Bank Board (FHLBB) to increase the independence of boards of directors of insured institutions.[23]

The FDIC expects State savings associations to comply with the laws of their chartering authorities regarding the composition of boards of directors and to look to FDIC-issued guidance for examples of practices that the FDIC considers consistent with safety-and-soundness standards or other applicable laws and regulations. For example, the FDIC's Pocket Guide for Directors contains examples of appropriate conduct by directors' and boards' conduct.[24] The FDIC believes that this Statement of Policy adequately advances the policy objectives of § 390.334. Accordingly, the FDIC proposes to rescind and remove § 390.334.

F. 12 CFR 390.335—Tying Restriction Exception

Section 390.335 is entitled ''Tying restriction exception'' and refers solely to the regulations issued by the FRB. This section is a re-designation of the former OTS regulation 12 CFR 563.36. That section provided for an anti-tying safe harbor for discounts related to a customer's continued minimum balance in certain eligible products. This safe harbor was adopted to conform to a similar safe harbor adopted by the FRB. When the former OTS regulations were transferred to the FDIC, the FDIC replaced the substantive regulations of § 563.36 with the following statement: ''For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.'' This reflects the fact that section 312(b)(2) of the Dodd-Frank Act transferred the authority to grant exceptions from the anti-tying regulations of HOLA to the FRB in consultation with the FDIC or OCC as appropriate, rather than to the FDIC, upon the dissolution of the OTS.[25]

The FDIC proposes rescinding and removing § 390.335 because the FRB's Regulation LL[26] sets forth regulatory exceptions to the anti-tying provisions of HOLA.[27] The authority to grant such exceptions rests with the FRB, in consultation with the FDIC, and the FDIC retains the authority to enforce the anti-tying provisions of HOLA.[28] The FDIC, therefore, considers it appropriate to rescind and remove § 390.335 from the FDIC's rules and regulations.

G. 12 CFR 390.336—Employment Contracts

Section 390.336 sets forth requirements with which a State savings association must comply when entering into an employment contract with its officers and other employees. This section is a re-designation of the former OTS regulation 12 CFR 563.39, which relies on the general statutory authority in HOLA to promulgate regulations concerning the savings and loan industry.[29]

The FDIC proposes to rescind and remove § 390.336. State savings associations are subject to existing statutory authority regarding employment contracts with institution-affiliated parties. For instance, section 30 of the FDI Act prohibits an insured depository institution from entering into a contract with any person for services or goods if the contract would adversely affect the institution's safety or soundness.[30] Further, the FDIC expects that State savings associations will be guided by the Interagency Guidelines Establishing Standards for Safety and Soundness (the Interagency Safety and Soundness Guidelines) prescribed

[20] 12 U.S.C. 1818.

[21] 15 U.S.C. 45(a)(1).

[22] FTC Policy Statement on Deception, October 14, 1983 (appended to *Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984)); *Novartis Corp.* v. *F.T.C.,* 223 F.3d 783, 786 (D.C. Cir. 2000); *F.T.C.* v. *Pantron I Corp.,* 33 F.3d 1088, 1095 (9th Cir. 1994).

[23] Director Guidelines and Certain Prohibitions and Disclosures, 41 FR 35812, 35814 (Aug. 24, 1976).

[24] Available at *https://www.fdic.gov/regulations/resources/director/pocket/index.html* (last updated Dec. 13, 2007). *See also* Interagency Guidelines Establishing Standards for Safety and Soundness, 12 CFR part 364, app. A.

[25] 12 U.S.C. 5412(b)(2)(A).

[26] *See* 12 CFR 238.7.

[27] 12 U.S.C. 1464(q).

[28] 12 U.S.C. 1464(d).

[29] 12 U.S.C. 1464(a).

[30] 12 U.S.C. 1831g.

pursuant to section 39 of the FDI Act, which apply to all insured depository institutions, including State savings associations.[31] In addition, part 359 of the FDIC's regulations limits and/or prohibits troubled institutions from paying and making golden parachute and indemnification payments to an institution-affiliated party.

For the reasons stated above, the FDIC proposes to rescind and remove § 390.336.

H. 12 CFR 390.337—Transactions With Affiliates

Section 11(a) of HOLA [32] applies Sections 23A and 23B of the Federal Reserve Act [33] to every savings association in the same manner and to the same extent as if the savings association were a member bank with two additional restrictions. The first restriction prohibits State and Federal savings associations from making a loan or other extension of credit to any affiliate unless the affiliate is engaged only in activities which the FRB, by regulation, has determined to be permissible for bank holding companies under section 4(c) of the Bank Holding Company Act.[34] The second restriction prohibits State and Federal savings associations from entering into any transaction for the purchase or investment in securities issued by the affiliate with any affiliate other than with respect to the shares of a subsidiary.[35]

Similar to section 11 of HOLA, section 18(j) of the FDI Act applies sections 23A and 23B to every nonmember insured bank as if it were a member bank.[36] The scope of the FRB's affiliate transaction regulation, Regulation W, notes that both the FDI Act and HOLA make sections 23A and 23B applicable to insured State nonmember banks and insured savings associations, respectively.[37]

The OTS adopted 12 CFR 563.41 to implement affiliate transaction requirements for State and Federal savings associations and, in the regulation, referenced Regulation W.[38] This regulation was redesignated as 12 CFR 390.337 in the transfer of authority for State savings associations from the OTS to the FDIC. Section 390.337 states only that State savings associations should ''see the regulations issued by Board of Governors of the Federal Reserve System'' for the applicable rules for transactions with affiliates. The FDIC does not have a regulation comparable to § 390.337 that applies to State nonmember banks because the FDI Act specifically states that sections 23A and 23B of the Federal Reserve Act apply to State nonmember banks.[39] Because HOLA similarly applies sections 23A and 23B of the Federal Reserve Act to State savings associations [40] and because the FRB's Regulation W [41] addresses the additional restrictions of HOLA applicable to State and Federal savings associations' transactions with their affiliates, the FDIC believes there is no need to retain § 390.337.[42] The FDIC, therefore, proposes to rescind and remove this section.

I. 12 CFR 390.338—Loans by Savings Associations to Their Executive Officers, Directors and Principal Shareholders

Section 22(g) of the Federal Reserve Act [43] pertains to extensions of credit to executive officers of banks, while section 22(h) of the Federal Reserve Act [44] deals with extensions of credit by member banks to their to executive officers, directors, and principal shareholders (or to related interests of those individuals) (insiders). Section 18(j)(2) of the FDI Act [45] provides that both sections 22(g) and (h) of the Federal Reserve Act are applicable to insured nonmember banks in the same manner and to the same extent as if they were member banks. Section 11(b) of HOLA provides a similar result with respect to both State and Federal savings associations.[46]

The OTS implemented insider lending restrictions for savings associations at 12 CFR 563.43. That section cross-referenced the FRB's Regulation O,[47] with some additional modifications. Section 390.338 is the re-designation of 12 CFR 563.43, a transferred OTS regulation, and the rule merely directs the reader to the regulations issued by the FRB. Section 337.3 of the FDIC's regulations [48] implements these requirements in part by incorporation through reference to Regulation O, as previously accomplished by the OTS in § 563.43, and also by imposing direct regulatory requirements on State nonmember banks.

After careful comparison of § 337.3 with § 390.338, the FDIC has concluded that the transferred OTS rule governing insider loans is substantively redundant. Therefore, based on the foregoing, the FDIC proposes to rescind and remove § 390.338, to make minor conforming changes to § 337.3 to clarify its applicability to State savings associations, and to make technical amendments to § 337.3, discussed in further detail below. If the proposal is adopted in final form, FDIC-supervised institutions—including State savings associations—will be regulated in a uniform manner. As a result, the FDIC proposes to rescind and remove § 390.338 in its entirety.

The FDIC also proposes to amend § 337.3 to apply to ''FDIC-supervised institutions,'' meaning State nonmember banks, State savings associations, and foreign banks having an insured branch, to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency for both State savings associations and State nonmember banks. Finally, the proposal would make technical corrections and changes to § 337.3. Section 337.3(a) currently provides that, with the exception of certain specified sections (namely §§ 215.5(b), 215.5(c)(3), 215.5(c)(4), and 215.11), insured nonmember banks are subject to the restrictions contained in subpart A of Regulation O to the same extent and to the same manner as if they were member banks. The citations to Regulation O in § 337.3(a) are no longer accurate, however, because the FRB amended Regulation O to remove several statutory reporting requirements relating to insider lending consistent with section 601 of the Financial Services Regulatory Relief Act of 2006.[49] A 2006 FRB rulemaking reflected these statutory amendments.[50] Shortly after the FRB made amendments to Regulation O, the FDIC rescinded 12 CFR part 349, the agency's regulations governing reporting on lending by a State nonmember bank and its correspondent banks to executive officers and principal shareholders.[51] In addition to the Regulation O citations related to rescinded reporting requirements, the FDIC's current regulation contains an inaccurate reference to the Regulation O definition

[31] *See* 12 U.S.C. 1831p–1(c); 12 CFR part 364, App. A, § III.

[32] 12 U.S.C. 1468(a).

[33] 12 U.S.C. 371, 371c–1.

[34] 12 U.S.C. 1468(a)(1)(A), 12 U.S.C. 1843(c).

[35] 12 U.S.C. 1468(a)(1)(B).

[36] 12 U.S.C. 1828(j)(1)(A).

[37] 12 CFR 223.1(c).

[38] *Id.*

[39] 12 U.S.C. 1828(j)(1)(A).

[40] 12 U.S.C. 1468(a).

[41] The FDIC has interpreted the language ''in the same manner and to the same extent'' to include the application of Regulation W.

[42] 12 CFR 223.72.

[43] 12 U.S.C. 375a.

[44] 12 U.S.C. 375b.

[45] 12 U.S.C. 1828(j)(2).

[46] 12 U.S.C. 1468(b).

[47] 12 CFR part 215.

[48] 12 CFR 337.3.

[49] Public Law 109–351.

[50] *See* 71 FR 71472 (Dec. 11, 2006). See also 72 FR 30470 (June 1, 2007).

[51] *See* 71 FR 78337 (Dec. 29, 2006).

of ''unimpaired capital and unimpaired surplus'' in footnote 3 of § 337.3(b). The FDIC proposes to correct this error by adding a reference to the correct Regulation O subsection.

In addition to these proposed changes, the FDIC also is proposing another technical, conforming change to § 337.3: The elimination of transitional provisions that are now obsolete. These paragraphs were added to assist insured nonmember banks in complying with the statutory lending limits for executive officers of member banks, as required by the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).[52] To assist insured nonmember banks in making the transition, the FDIC specifically provided for the handling of loans made prior to application of the new restrictions, but which were still outstanding as of that event. These provisions are no longer needed. The FDIC, therefore, proposes to eliminate them.

In sum, if the proposal is finalized, oversight of insider loans in § 337.3 would apply to all FDIC-supervised institutions, including State savings associations; § 337.3 would reflect technical amendments; and § 390.338 would be rescinded and removed because it is largely duplicative of those rules found in § 337.3.

J. 12 CFR 390.339—Pension Plans

Section 390.339 prohibits State savings associations from sponsoring an employee pension plan which, because of unreasonable costs or for any other reason, could lead to material financial loss or damage to the sponsor. It further requires a State savings association that serves as a pension plan sponsor to retain detailed pension plan records and actuarial funding reports and to provide advance notice of a pension plan termination. The FDIC proposes to rescind and remove § 390.339 because the section is substantially similar to the existing compensation regulations contained in the Interagency Safety and Soundness Guidelines.[53]

The Interagency Safety and Soundness Guidelines apply to all insured depository institutions, including State savings associations. Section III of the Interagency Safety and Soundness Guidelines explicitly prohibits compensation that could lead to material financial loss as an unsafe and unsound practice. The Interagency Safety and Soundness Guidelines also address excessive compensation as an unsafe and unsound practice, taking into account factors such as compensation history, the institution's financial condition, comparable compensation practices, the projected costs and benefits of postemployment benefits, fraudulent or other inappropriate activity, and any other factors the agencies deem relevant. ''Compensation'' is defined as ''all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement Moreover, the requirements of the Employee Retirement Security Act of 1974 [54] and Internal Revenue Code [55] and the implementing regulations of the Pension Benefit Guaranty Corporation, including recordkeeping, would apply to any pension plan offered by an FDIC-supervised institution.[56] On this basis, FDIC staff proposes to rescind and remove § 390.339.

K. 12 CFR 390.340—Offers and Sales of Securities at an Office of a Savings Association

Section 390.340 generally prohibits the offer or sale of debt or equity securities issued by a State savings association or an affiliate of the State savings association at an office of the State savings association with the exception of equity securities issued in connection with the State savings association's conversion from mutual to stock form in a transaction that has been approved by the FDIC or if the sale is conducted in accordance with the conditions set forth in § 390.340. This section is a re-designation of former OTS regulation 12 CFR 563.76.

Section 563.76 was added to the former OTS' regulations in 1992 to minimize potential customer confusion and to promote understanding of the nature and risks associated with securities sold at a State savings association's offices, while still preserving an effective means for a State savings association to raise capital in the conversion process. The FDIC does not have a similar regulation but has published the NDIP Statement of Policy,[57] which addresses all sales of nondeposit products (such as annuities, mutual funds, and other securities) by depository institutions; disclosures and advertising; the setting and circumstances of sales of securities; qualification and training for personnel who sell securities; standards for suitability of the products for customers and sales practices; compensation practices; and compliance policies and procedures. In addition, the FDIC Statement of Policy Regarding the Use of Offering Circulars in Connection with Public Distribution of Bank Securities (Offering Circular Statement of Policy) addresses sales and distribution of bank securities and disclosures that should be included in offering circulars for bank securities to ensure disclosure of material facts to investors.

The content requirements in § 390.340 that are designed to prevent consumer confusion are included in these two Statements of Policy. It is the FDIC's view that specifically imposing these requirements on State savings associations through regulation is unnecessary. According, the FDIC proposes that § 390.340 be rescinded and removed.

L. 12 CFR 390.341—Inclusion of Subordinate Debt Securities and Mandatorily Redeemable Preferred Stock as Supplementary Capital

Section 403(b) of the National Housing Act, as amended, provided that no institution insured by the Federal Savings and Loan Insurance Corporation (FSLIC) may ''issue securities which guarantee a definite return or which have a definite maturity except with the specific approval of the'' FSLIC. Because a number of insured institutions had applied to the FSLIC for approval of the issuance of various types of subordinated debt securities to provide a broader base for capital operations, in 1972, the FHLBB, as the operating head of the FSLIC, adopted a number of rules to provide for uniform requirements for the issuance of such securities.[58] That rule was transferred to the OTS pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and codified at 12 CFR 563.81.[59]

In 2007, the OTS adopted a final rule amending 12 CFR 563.81 to delete several unnecessary or outdated requirements and to conform certain regulations, such as maturity period requirements and purchaser restrictions, to the rules issued by the other Federal

[52] Public Law 102–242.

[53] 12 CFR 364, App. A. III.

[54] Public Law 93–406, 88 Stat. 829, codified in part at 29 U.S.C. 1001, *et seq.*

[55] 26 U.S.C. 1, *et seq.*

[56] 29 U.S.C. 1003; 29 CFR 4000, *et seq.*

[57] Interagency Statement on Retail Sales of Nondeposit Investment Products (Feb.15, 1994), *https://www.fdic.gov/regulations/laws/rules/5000-4500.html.*

[58] 37 FR 21179 (Oct. 6, 1972).

[59] 54 FR 49411.

banking agencies. In addition, the rule reconciled conflicting rules, included appropriate statutory cross-references, and reflected plain language.

Section 390.341 is the re-designation of § 563.81. Section 390.341 provides application and notice procedures and form and content requirements for subordinate debt securities and mandatorily redeemable preferred stock that a State savings association seeks to include in its tier 2 capital. There is no corresponding requirement applicable to State nonmember banks. For the following reasons, the FDIC is proposing to rescind § 390.341.

The FDIC believes that it is not necessary for a State savings association to apply or provide notice to the FDIC before issuing subordinate debt securities or mandatorily redeemable preferred stock. Moreover, many of the form and content requirements in § 390.341 that are designed to prevent consumer confusion are included in the FDIC's Offering Circular Statement of Policy.[60] It is the FDIC's view that specifically imposing these requirements on State savings associations through a regulation is unnecessary.

Section 390.341 also includes a number of criteria that subordinate debt securities and mandatorily redeemable preferred stock must satisfy in order to qualify as tier 2 capital. The criteria for inclusion in tier 2 capital are included in the FDIC's capital rules in 12 CFR part 324.[61] Accordingly, it is not necessary to specify them separately in a regulation applicable to State savings associations alone. Therefore, the FDIC proposes to rescind and remove § 390.341.

M. 12 CFR 390.342–348—Capital Distributions

1. Regulations Governing Capital Distributions

Sections 390.342 through 390.348 govern capital distributions by State savings associations. Certain of these provisions were adopted by the OTS to implement statutory prompt corrective action (PCA) requirements that apply to all insured depository institutions, and others were adopted by the OTS for supervisory or policy reasons. The requirements that are statutorily mandated have analogous provisions in the FDIC's regulations implementing PCA with respect to State nonmember banks and insured branches of foreign banks. Other regulatory requirements that the FDIC has adopted with respect to State nonmember banks, including those related to retirements and reductions in capital, advance some of the policy objectives that underlay the non-statutorily mandated provisions that were previously adopted by the OTS. Therefore, and as more fully explained below, the FDIC proposes to rescind the provisions of subpart S that govern capital requirements and to revise the FDIC's regulations related to PCA, as well as those related to retirements and reductions of capital, so that State savings associations are subject to the same requirements that govern capital distributions by State nonmember banks.

2. Other FDIC Regulations

a. 12 CFR 303.203—Applications for Capital Distributions

Part 303 of the FDIC's regulations includes procedures to implement the filing requirements for capital distributions under section 38 of the FDI Act.[62] Section 38 applies to all insured depository institutions, and, among other things, generally prohibits an insured depository institution from making a capital distribution if, after making the distribution, the institution would be undercapitalized.[63] Section 38 provides an exception to this prohibition that authorizes the Federal banking agencies to permit certain repurchases, redemptions, retirements, or other acquisitions of shares or other ownership interests that are made in connection with the issuance of additional shares or obligations and that would reduce the institution's financial obligations or otherwise improve the institution's financial condition.[64] Section 38 defines a ''capital distribution'' to include certain dividends; repurchases, redemptions, retirements, or other acquisitions of shares or other ownership interests, including extensions of credit to finance an affiliated company's acquisition of such shares; and any other transaction that the Federal banking agencies find to be in substance a distribution of capital.[65]

Section 303.203 implements the above provisions of section 38 by requiring an insured State nonmember bank and any insured branch of a foreign bank to submit an application to the FDIC for a capital distribution if, after having made a capital distribution, the institution would be undercapitalized, significantly undercapitalized, or critically undercapitalized.[66] Section 303.203 sets forth the filing requirements for proposed capital distributions that are within the scope of section 38. Specifically, such filings must describe the nature of the proposal, including the shares or obligations that are the subject of the proposal, and must include an explanation of how the proposal would reduce the applicant institution's financial obligations or otherwise improve its financial condition.[67] Section 303.203 also clarifies that if a proposed action also requires an application under § 303.241, such an application should be filed concurrently with the application filed pursuant to section 38.[68]

Although section 38 applies to all insured depository institutions, Subpart K, including § 303.203, applies by its terms only to State nonmember banks and insured branches of foreign banks. As discussed below, the FDIC proposes to rescind the provisions related to capital distributions by State savings associations in Subpart S and to make State savings associations subject to the same capital distribution requirements that apply to State nonmember banks and insured branches of foreign banks. Accordingly, the FDIC proposes to amend § 303.203 so that it expressly applies to State savings associations. In addition, the FDIC proposes a corresponding technical change to the scope section of Subpart K, 12 CFR 303.200, so that it applies to State savings associations.[69] As noted, with respect to transactions that are subject to filing requirements under both section 38 and section 18(i), § 303.203(b) provides that applicants should file such applications concurrently or as part of the same application. For the reasons described below, the FDIC proposes replacing the reference to section 18(i) with a direct reference to § 303.241.

b. 12 CFR 303.241—Reduce or Retire Capital Stock or Capital Debt Instruments

Section 303.241 implements section 18(i)(1) of the FDI Act. Section 18(i)(1) generally prohibits an insured State nonmember bank from reducing the amount or retiring any part of its common or preferred capital stock or

[60] *See* 61 FR 46807 (Sept. 5, 1996).

[61] *See* 12 CFR 324.20(d)(1).

[62] 12 U.S.C. 1831*o*; *see also* 12 CFR 324.405.

[63] 12 U.S.C. 1831*o*(d)(1)(A).

[64] 12 U.S.C. 1831*o*(d)(1)(B).

[65] 12 U.S.C. 1831*o*(b)(2)(B).

[66] 12 CFR 303.203(a).

[67] 12 CFR 303.203(b).

[68] *Id.*

[69] The FDIC is also aware that this proposal, as well as other regulatory developments, would also necessitate certain technical changes to the FDIC's regulations related to annual independent audits and reporting requirements, 12 CFR part 363, including Table 1 to Appendix A of Part 363. The FDIC intends to address such technical changes in a separate notice.

retiring any part of its capital notes or debentures, without the prior consent of the FDIC.[70] In considering an application to reduce or retire such instruments, section 18(i)(4) directs the FDIC to consider various statutory factors, including those related to financial history and condition, capital adequacy, future earnings prospects, general character and fitness of management, the convenience and needs of the community to be served, and consistency with the purposes of the FDI Act.[71]

Section 303.241 sets forth various requirements related to the content of filings submitted to the FDIC pursuant to section 18(i)(1), including, where applicable: The type and amount of the change to the applicant's capital structure; a schedule detailing the applicant's present and proposed capital structure; the time period encompassed by the proposal; certain certifications related to the capital adequacy of the applicant; the repurchase price of capital instruments and the basis for establishing fair market value; a statement that the proposal is available to all holders of a particular class of instruments, and if not, the details of any restrictions; and the date that the applicant's board of directors approved the proposal.[72] Section 303.241 also authorizes the FDIC to seek additional information while processing applications under section 18(i)(1); permits applications that are subject to both section 18(i)(1) and section 38 to be filed concurrently, or as a single application; sets forth expedited processing procedures for eligible depository institutions, and provides that applications that qualify for, and are not removed from, expedited processing will be deemed approved 20 days after receipt of a substantially complete application; and sets forth standard processing procedures.[73]

Consistent with section 18(i)(1)'s specific applicability to State nonmember banks, § 303.241 by its terms applies only to State nonmember banks. However, the FDIC believes that, consistent with the FDIC's authority under section 39 of the FDI Act,[74] it would be a sound operational standard for the FDIC to consider transactions by State savings associations that would result in the reduction or retirement of capital stock or capital debt instruments. Reviewing proposals by State savings associations to reduce or retire capital stock or debt instruments would preserve the FDIC's ability to review such transactions by a State savings association, as currently required under § 390.345 of the FDIC's regulations. Because section 18(i)(1) by its terms applies only to State nonmember banks, the FDIC proposes to amend § 303.241 to clarify that § 303.241 applies to a State savings association seeking to reduce or retire any part of its common stock or preferred stock, or capital notes or debentures, as if the State savings association were a State nonmember bank subject to section 18(i)(1). Accordingly, in considering such an application by an insured State savings association, the FDIC would take into consideration the statutory factors enumerated in section 18(i)(4).[75] As noted above, § 303.241 permits applications that are subject to both section 18(i)(1) and section 38 to be filed concurrently, or as a single application. Because State savings associations are not technically subject to section 18(i)(1) and would be made subject to § 303.241 by the proposed rule under the FDIC's section 39 authority, the FDIC proposes to change this provision so that it refers directly to applications subject to § 303.241, rather than to section 18(i)(1). Furthermore, to achieve consistency with the filing procedures set forth in § 303.203, which states that filings subject to §§ 303.203 and 303.241 ''should'' be made concurrently or as part of the same application, the FDIC proposes to amend § 303.241 to advise institutions that filings subject to both §§ 303.203 and 303.241 should be filed concurrently or as part of the same application.

Question 1: Using the authority granted the FDIC as the appropriate Federal banking agency for State savings associations, is it appropriate for the FDIC to make § 303.241 applicable to State savings associations? Would doing so effectively maintain the FDIC's regulatory consideration of reductions or retirements of capital by State savings association currently provided for in 12 CFR 390.345?

3. 12 CFR 390.342—Capital Distributions by State Savings Associations

Section 390.342 states that §§ 390.342 through 390.348 apply to capital distributions by a State savings association.[76] Because the FDIC proposes to rescind all of these sections, the FDIC proposes that § 390.342 be rescinded and removed.

4. 12 CFR 390.343—What is a capital distribution?

Section 390.343 defines a ''capital distribution'' for the purposes of §§ 390.342–348. Section 390.343(a) defines a capital distribution as a distribution of cash or other property made to a savings association's owners on account of their ownership, but excludes dividends consisting of shares or rights to purchase shares, and also excludes a payment that a mutual State savings association is required to make under the terms of a deposit instrument and any other amount paid on deposits that the FDIC determines is not a capital distribution.[77] This prong of § 390.343's definition of ''capital distribution'' is mirrored in section 38's definition of ''capital distribution.''[78]

Section 390.343(b) includes within the definition of ''capital distribution'' a payment to repurchase, redeem, retire, or otherwise acquire any of a State savings association's shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in a savings association's total capital, and any extension of credit to finance an affiliate's acquisition of a State savings association's shares or interests.[79] This prong is also mirrored in section 38, except that section 38's analogous provision does not expressly extend to debt instruments that are included in an institution's total capital.

Section 390.343(c) further defines ''capital distribution'' to include any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring, including the payment of cash or property to shareholders of another savings association of its holding company to acquire ownership in that savings association, other than by a distribution of shares.[80] This prong of § 390.343's definition of ''capital distribution'' is not matched by an analogous prong in section 38. The OTS adopted this provision pursuant to the

[70] 12 U.S.C. 1828(i)(1).

[71] 12 U.S.C. 1828(i)(4).

[72] 12 CFR 303.241(c).

[73] 12 CFR 303.241(d)–(g).

[74] 12 U.S.C. 1831p–1.

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

[76] 12 CFR 390.342.

[77] 12 CFR 390.343(a)(2).

[78] FDI Act § 38(b)(2)(B), 12 U.S.C. 1831*o*(b)(2)(B).

[79] 12 CFR 390.343(b).

[80] 12 CFR 390.343(c).

authority under section 38(b)(2)(B)(iii), which authorizes the Federal banking agencies to, by order or regulation, consider a transaction that is in substance a distribution of capital to be deemed a ''capital distribution'' for the purposes of section 38.[81] OTS adopted this provision in order to capture certain corporate restructurings, such as cash-out mergers, based on the rationale that such transactions are in substance distributions of capital.[82]

Section 390.343(d) captures as a ''capital distribution'' any capital distribution that is charged against a State savings association's capital accounts if the State savings association would not be well capitalized following the distribution.[83] As with payments made in connection with a corporate restructuring, this element of § 390.343's regulatory definition is not expressly addressed in section 38. The OTS adopted this prong in its regulatory definition of ''capital distribution'' in order to capture distributions by a savings association's operating subsidiary to minority shareholders that would affect the capital accounts of the savings association.[84]

Lastly, § 390.343(e) incorporates FDI Act section 38(b)(2)(B)(iii), which authorizes the Federal banking agencies to, by order or regulation, deem as a ''capital distribution'' any transaction that the FDIC determines to be in substance a distribution of capital.[85]

The FDIC's PCA capital distribution filing procedures, 12 CFR 303, subpart K, do not adopt a regulatory definition of ''capital distribution'' specific to subpart K, but instead directly rely on the statutory definition of ''capital distribution'' found in section 38(b)(2)(B) of the FDI Act. As described above, the regulatory definition of ''capital distribution'' applicable to State savings associations found in § 390.343 incorporates all of the elements of the statutory definition of ''capital distribution.'' In addition, § 390.343's definition of ''capital distribution'' expressly extends to certain transactions not specifically addressed in section 38, such as: Repurchases, redemptions, retirements, or other acquisitions of debt instruments; payments made in connection with corporate restructurings; or other distributions that would be charged against a State savings association's capital accounts and that would cause the association to be less than well capitalized. The FDIC does not propose to adopt a regulatory definition of ''capital distribution'' specific to subpart K and proposes to continue to directly rely on the statutory definition of ''capital distribution'' found in section 38(b)(2)(B). Therefore, the FDIC proposes to rescind and remove § 390.343.

Question 2: Should the FDIC adopt a regulatory definition of ''capital distribution'' in its PCA regulation, 12 CFR 303.203? In addition to incorporating the elements of section 38's definition of ''capital distribution,'' should the FDIC exercise its authority under section 38(b)(2)(B)(iii) to adopt by regulation certain provisions that are not specifically addressed in the statutory definition of ''capital distribution,'' such as: Repurchases, redemptions, retirements, or other acquisitions of debt instruments; payments made in connection with corporate restructurings; or other distributions that would be charged against an institution's capital accounts and that would cause the institution to be less than well capitalized? Should such a definition apply to all FDIC-supervised institutions?

5. 12 CFR 390.344—Definitions Applicable to Capital Distributions

Section 390.344 adopts additional definitions specifically for the capital distribution provisions of §§ 390.342 through 390.348.[86] These defined terms include affiliate, capital, net income, retained net income, and shares. Because the FDIC proposes to rescind §§ 390.342 through 390.348, this definition section would no longer be necessary. Accordingly, the FDIC proposes to rescind and remove § 390.344.

6. 12 CFR 390.345—Must I file with the FDIC?

Under § 390.345, a State savings association is required to file an application for a proposed capital distribution in certain circumstances, and in others is required to file a notice. An application is required under § 390.345(a)(1) through (4) in cases where: (1) A State savings association is not eligible for expedited processing under § 390.101; (2) the total amount of all capital distributions by a State savings association for the applicable calendar year exceeds the association's net income for that year to date plus retained net income for the preceding two years; (3) a State savings association would not be at least adequately capitalized following the distribution; or (4) a State savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement with the FDIC, or violate a condition imposed on the State savings association in an FDIC-approved application or notice.[87] A notice is required under § 390.345(b)(1)–(2) in cases where: (1) A State savings association would not be well capitalized following the distribution; or (2) a State savings association's proposed capital distribution would reduce the amount of or retire any part of the association's common or preferred stock or retire any part of debt instruments included in capital.[88]

The FDIC proposes to make capital distributions by State savings associations subject to the same requirements that govern capital distributions by State nonmember banks. As discussed above, the requirements applicable to State nonmember banks are those imposed by section 38 of the FDI Act, implemented at § 303.203 of the FDIC's regulations,[89] and by FDI Act section 18(i), implemented at § 303.241 of the FDIC's regulations.

The application requirements of § 303.203 are analogous to those imposed on State savings associations by § 390.345(a)(3), as both sections require applications to the FDIC in cases where an institution would be undercapitalized following a capital distribution, as mandated by section 38 of the FDI Act. Because section 38 prohibits capital distributions in cases where an insured depository institution would be undercapitalized, the substantive requirements of § 390.345(a)(3) would be preserved by making § 303.203 applicable to State savings associations. Accordingly, the FDIC proposes to rescind and remove § 390.345(a)(3) and, as noted above, the FDIC also proposes to amend § 303.241 so that it applies to State savings associations. This proposal would preserve the regulatory consideration that is required under section 38 and would provide for consistency of treatment between State nonmember banks and State savings associations with respect to capital distributions.

The application requirements of § 303.241 are analogous to the notice requirements imposed on State savings associations by § 390.345(b)(2), as both sections require regulatory consideration of transactions that would

[81] 63 FR 1044, 1046 (Jan. 7, 1998).

[82] *Id.*

[83] 12 CFR 390.343(d).

[84] 64 FR 2805, 2806 (Jan. 19, 1999).

[85] 12 CFR 390.343(e), 12 U.S.C. 1831*o*(b)(2)(B)(iii).

[86] 12 CFR 390.344.

[87] 12 CFR 390.345(a).

[88] 12 CFR 390.345(b).

[89] *See* 12 CFR 324.405.

reduce or retire common or preferred stock or capital notes or debentures. Although § 303.241 implements section 18(i) of the FDI Act, which applies by its terms only to State nonmember banks, the FDIC believes that it would be advisable to use its authority under section 39 to maintain a regulatory filing requirement for a capital distribution by a State savings association that would reduce or retire the association's capital. Accordingly, the FDIC proposes to rescind and remove § 390.345(b)(2) and, as noted above, the FDIC also proposes to amend § 303.241 so that it applies to State savings associations. Doing so would preserve the regulatory consideration that applies to reductions or retirements of capital by State savings associations, and would achieve consistency of treatment between State nonmember banks and State savings associations with respect to capital distributions.

The FDIC proposes to rescind and remove § 390.345 in its entirety, which would effectively eliminate application requirements for capital distributions in cases where: A State savings association is not eligible for expedited processing under § 390.101; the total amount of all capital distributions by a State savings association for the applicable calendar year exceeds the association's net income for that year to date plus retained net income for the preceding two years; and where a State savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement with the FDIC, or violate a condition imposed on the State savings association in an FDIC-approved application or notice. The rescission and removal of § 390.345 would also effectively eliminate the notice requirements for capital distributions in cases where a State savings association would not be well capitalized following the distribution. The FDIC believes that making §§ 303.203 and 303.241 applicable to State savings associations would preserve adequate regulatory consideration over capital distributions by State savings associations, and therefore proposes to rescind and remove § 390.345 in order to achieve consistency of treatment between State nonmember banks and State savings associations with respect to capital distributions.[90]

7. 12 CFR 390.346—How do I file with the FDIC?

Section 390.346 provides filing instructions for capital distributions that are subject to application or notice requirements under § 390.345, including instructions concerning a filing's content, schedules, and timing.[91] Because the FDIC proposes to rescind and remove § 390.345, these provisions would no longer be applicable. Therefore, the FDIC proposes to rescind and remove § 390.346. As described above, the FDIC also proposes to make §§ 303.203 and 303.241 applicable to State savings associations, and both of these sections set forth requirements related to the content of filings. Furthermore, certain rules of general applicability, including those related to processing, are set forth in subpart A of part 303 of the FDIC's regulations and would apply to filings made by State savings associations under §§ 303.203 and 303.241.

8. 12 CFR 390.347—May I combine my notice or application with other notices or applications?

Section 390.347 authorizes a State savings association to combine a notice or application required under § 390.345 with another related notice or application.[92] Because the FDIC proposes rescinding § 390.345, these provisions would no longer be applicable. Therefore, the FDIC proposes to rescind and remove § 390.347. As noted above, by making State savings associations subject to §§ 303.203 and 303.241, as proposed, State savings associations should file applications that are subject to both sections as a single filing or concurrently with other filings.[93]

9. 12 CFR 390.348—Will the FDIC permit my capital distribution?

Section 390.348 sets forth the bases on which the FDIC may deny, in whole or in part, a notice or application filed under § 390.345. Section 390.348(a) states that if a State savings association would be undercapitalized, significantly undercapitalized, or critically undercapitalized following a capital distribution, the FDIC will determine if the distribution would be permitted under the exemption authorized in section 38(d)(1)(B) of the FDI Act.[94] Section 390.348(b) states that the FDIC may deny a notice or application for a capital distribution that raises safety and soundness concerns. Section 390.348(c) states that the FDIC may deny a capital distribution if it would violate a prohibition contained in any statute, regulation, or condition imposed on the applicant State savings association. Because the FDIC proposes to rescind and remove § 390.345, these provisions would no longer be applicable. Furthermore, the statutory exception that applies to capital distributions subject to section 38 would continue to apply to capital distributions by State savings associations that are subject to section 38. In addition, because the proposal would make reductions or retirements of capital by State savings associations subject to the application requirements of § 303.241, the FDIC would evaluate such applications in light of the statutory factors enumerated in section 18(i)(4) of the FDI Act, and the bases identified in §§ 390.348(b) and 390.348(c) would be preserved insofar as they would be inherent in how the FDIC would review applications in light of the statutory factors of section 18(i)(4).[95] For these reasons, the FDIC proposes to rescind and remove § 390.348 in its entirety.

N. 12 CFR 390.349—Management and Financial Policies

Section 390.349 implements the statutory requirement of section 4 of HOLA. That section requires each State savings association to be operated in a safe and sound manner and encourages State savings associations to provide credit for housing safely and soundly.[96] In particular, § 390.349 includes explicit safety and soundness requirements relating to liquidity and compensation to officers, directors, employees, and consultants. Section 39 of the FDI Act,[97] requires the Federal banking agencies to prescribe safety and soundness standards for internal controls, information systems, and internal audit systems; loan documentation; credit underwriting; interest rate exposure; asset growth; compensation, fees, and

[90] State savings associations also may be subject to capital distribution requirements or restrictions under applicable state law or as required by the appropriate State supervisor.

[91] 12 CFR 390.346.

[92] 12 CFR 390.347.

[93] *See* 12 CFR 303.203(b) and 12 CFR 303.241(e).

[94] 12 CFR 390.348(a). This statutory exception under section 38(d)(1)(B) authorizes the FDIC to permit a capital distribution that would otherwise be prohibited by section 38 if such a distribution is made in connection with the issuance of additional shares of obligations and would reduce the institution's financial obligations or otherwise improve the institution's financial condition. 12 U.S.C. 1831*o*(d)(1)(B).

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

[96] 12 U.S.C. 1463(a).

[97] 12 U.S.C. 1831p–1.

benefits; and such other operational and managerial standards as the agency determines to be appropriate. To this end, the FDIC has adopted part 364 and the related appendices. Part 364 establishes compensation-related standards and provides for other safety- and soundness-related guidelines which apply to all insured State nonmember banks, to state-licensed insured branches of foreign banks, and to State savings associations.[98] As such, the safety and soundness standards in § 390.349 are generally duplicative of the standards implemented through part 364. To ensure consistent treatment of State nonmember banks and State savings associations, FDIC staff proposes to eliminate the distinct safety and soundness requirements for State savings associations found in § 390.349, because part 364, as amended, provides consistent safety and soundness standards for both State nonmember banks and State savings associations. These standards help to ensure that State savings associations are operated in a safe and sound manner, enabling them to provide credit for housing safely and soundly. For these reasons, the FDIC proposes to rescind and remove § 390.349.

O. 12 CFR 390.350—Examinations and Audits; Appraisals; Establishment and Maintenance of Records

Section 390.350 contains requirements regarding examinations, appraisals, establishing and maintaining books and records, and using data processing services for maintenance of records. The proposed rule would rescind and remove all of § 390.350. The FDIC believes that examination and appraisal requirements should be consistent between State savings associations and State nonmember banks because they are based on the same or similar statutory authority, as described below.

Section 390.350(a) states that each State savings association and affiliate will be examined periodically and may be examined anytime by the FDIC and that appraisals may be required as part of the examination. Section 337.12 states that the FDIC examines State nonmember banks pursuant to section 10 of the FDI Act,[99] State savings associations pursuant to section 10 of the FDI Act and section 4 of HOLA,[100] and implements the frequency of examinations specified by section 10 for insured depository institutions, including State savings associations. Because the examination requirements of §§ 390.350(a) and 337.12 are similar and both based on section 10 of the FDIA, the FDIC proposes to rescind § 390.350(a).

Section 390.350(a) allows the FDIC to require an appraisal during an examination if it is deemed advisable. Section 390.350(b) permits the FDIC to select appraisers in connection with an examination, requires State savings associations to pay for such an appraiser, and mandates that the FDIC furnish the appraisal report to the State savings association within 90 days following the filing of the report to the FDIC. Part 323 of the FDIC's regulations implements Title XI of FIRREA,[101] which requires written appraisals in connection with certain federally related transactions entered into by institutions regulated by the FDIC. Section 323.3(c), which applies to all FDIC-supervised institutions, including State savings associations, allows the FDIC to require an appraisal whenever the agency believes it is necessary to address safety and soundness concerns, which would include during an examination. The FDIC believes the appraisal provisions of § 390.350(a) and (b) are unnecessary because they are duplicative of the FDIC's reservation of authority found in § 323.3(c), which allows the FDIC to require an appraisal whenever the agency believes it is necessary to address safety and soundness concerns.[102]

Section 390.350(c) requires each State savings association and its affiliates to establish and maintain such accounting and other records as will provide an accurate and complete record of all business it transacts to enable the examination of the State savings association and its affiliates by the FDIC. The documents, files, and other material or property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be.

State savings associations are already subject to other FDIC regulations that achieve the purposes of § 390.350(c). For example, as recognized by § 304.3 of the FDIC's regulations, all insured depository institutions, including State savings associations, are required to file quarterly Consolidated Reports of Condition and Income (Call Reports). Under § 304.3(a), all insured depository institutions must prepare the Call Report in accordance with the instructions for the report (Call Report Instructions), which in turn require the institutions to maintain their business records in a manner that supports and reconciles to the contents of the Call Report.[103] In addition, portions of the Call Report also are required to be prepared in accordance with GAAP.[104] In addition, all State savings associations and other FDIC-supervised institutions are subject to 12 CFR part 364 (including its Appendix A).[105] This part requires FDIC-supervised institutions to have internal controls and information systems that are appropriate to their size and the risks posed by their activities and that provide for, among other things: ''timely and accurate financial, operational and regulatory reports.'' [106] Because accurate and complete business records are the very foundation of accurate regulatory and financial reporting, State savings associations must, therefore, maintain accurate and complete records of their business transactions supporting, and readily reconcilable to, the associations' regulatory and financial reports. In the event an FDIC-supervised institution fails to create and maintain the required internal controls and information systems, the FDIC may require the institution to submit a safety and

[98] 12 CFR 364.101. In 2015, 12 CFR 364.101 was amended to apply to both state nonmember banks and state savings associations. *See Removal of Transferred OTS Regulations Regarding Safety and Soundness Guidelines and Compliance Procedures; Rules on Safety and Soundness,* 80 FR 65903 (Oct. 28, 2015).

[99] 12 U.S.C. 1820.

[100] 12 U.S.C. 1463.

[101] Public Law 101–73, 103 Stat. 183; codified at 12 U.S.C. 3331 *et seq.*

[102] Section 390.350(b) contains a cost allocation provision and a timeframe within which appraisals must be provided. These provisions are unnecessary because it is unlikely that the FDIC would purchase an appraisal and seek reimbursement. If the FDIC determines that an appraisal is needed, it will be made in a supervisory recommendation in a report of examination and the response time would be requested in the report transmittal letter or the request would be made as part of an enforcement action with a required timeframe.

[103] See the section entitled ''Preparation of the Reports'' contained in the General Instructions portion of Call Report Instructions for the FFIEC 031, 041 and 051 Report Forms and the section entitled ''Preparation of Information to be Reported'' in the General Instructions portion of the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002 Report Form).

[104] 12 U.S.C. 1831(n); See the section entitled ''Applicability of U.S. Generally Accepted Accounting Principles to Regulatory Reporting Requirements'' contained in the General Instructions portion of Call Report Instructions for the FFIEC 031, 041 and 051 Report Forms and the section entitled ''Accounting Basis'' in the General Instructions portion of the FFIEC 002 Report Form.

[105] 12 CFR 364.101. Part 364 and its appendices implement section 39(a) of the FDI Act. 12 U.S.C. 1831p–1. Taken together, part 364 and Appendix A reflect the FDIC's longstanding expectations for all prudently managed FDIC-supervised institutions while generally leaving the specific methods of achieving these objectives to each institution.

[106] 12 CFR part 364, App. A, § II.

soundness plan designed to correct the deficiencies and, if necessary, compel compliance by means of order.[107]

Section 390.350(d) prohibits State savings associations from transferring the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has authorized the transfer by resolution and notified the appropriate regional director. The FDIC has not promulgated a similar rule for State nonmember banks. Generally, state laws or regulations of the state chartering authority provide for the location of records. The FDIC generally conducts examinations at the home office of FDIC-supervised institutions and requires that records be produced upon request in connection with any examination or investigation under section 10(c) or section 8(n) of the FDI Act. The removal of § 390.350(d) will provide relief to State savings association by not having to notify the appropriate regional director of its intention to relocate records from its home office to a branch or service office and will provide parity with State nonmember banks which do not provide the FDIC with prior notification of transferring records from one location to another.

Section 390.350(e) requires that when a State savings association maintains any of its records by means of data processing services, it will notify the appropriate regional director for the region in which the principal office of such State savings association is located, in writing, at least 90 days prior to the date on which such maintenance of records will begin. Section 304.3(d), implementing section 7 of the Bank Service Company Act,[108] already requires FDIC-supervised institutions, including State savings associations, to notify the FDIC about the existence of a service relationship within thirty days after the making of the contract or the performance of the service and provides for the required information either through a letter or FDIC Form 6120/06 *Notification of Performance of Bank Services.* The removal of § 390.350(e) will eliminate conflicting requirements on State savings associations with respect to Section 7 of the Bank Service Company Act.

For the foregoing reasons, the FDIC proposes to rescind and remove § 390.350 in its entirety.

P. 12 CFR 390.352—Financial Derivatives

Section 390.352 addresses the permissibility of financial derivatives transactions, the responsibility of the board of directors and management of a State savings association with respect to such transactions, and recordkeeping requirements related to such transactions. The FDIC proposes to rescind and remove § 390.352 for the reasons discussed below.

Section 28(a) of the FDI Act,[109] implemented by part 362 of the FDIC's regulations,[110] restricts and prohibits State savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for a Federal savings association and its service corporations. The term ''activities permissible for a Federal savings association'' means, among other things, activities recognized as permissible in OCC regulations.[111] Section 163.172 of the OCC's regulations governs the financial derivatives activities of Federal savings associations, the responsibility of the board of directors and management of a Federal savings association with respect to such transactions, and recordkeeping requirements related to such transactions.[112] Because section 28(a) of the FDI Act and part 362 permit a State savings association to engage in financial derivatives activities to the same extent permitted by the OCC with respect to a Federal savings association, the FDIC proposes to rescind and remove § 390.352.

Q. 12 CFR 390.353—Interest-Rate-Risk-Management Procedures

Former FHLBB rules 12 CFR 571.3 and 563.17–6, respectively, were intended to support responsible risk management within the industry, to facilitate the examination process, and to assess and reduce the impact of interest rate risk on the former Savings Association Insurance Fund (SAIF).[113] The OTS redesignated § 563.17–6 as 12 CFR 563.176.[114] When the rule was transferred from the former OTS to the FDIC, the FDIC redesignated it as 12 CFR 390.353.

Section 390.353 requires the board of directors or a board committee of a State savings association to develop, implement, and review policies and procedures for the management of a State savings association's interest-rate-risk; requires the association's management to report periodically to the board regarding implementation of the policy; and requires the association's board of directors to adjust the policy as necessary, including adjustments to the authorized acceptable level of interest rate risk. For the reasons below, the FDIC proposes to rescind and remove § 390.353.

As mentioned above, the Interagency Safety and Soundness Guidelines, promulgated pursuant to section 39 of the FDI Act, describe examples of safe and sound practices for State nonmember banks and State savings associations. The guidelines suggest that an institution ''should manage interest rate risk in a manner that is appropriate to its size and the complexity of its assets and liabilities''.[115] Management and the board of directors should be provided reports regarding interest rate risk that are adequate to assess the level of risk. There is no reason to have an additional set of similar standards applicable only to State savings associations.[116]

R. 12 CFR 390.354—Procedures for Monitoring BSA Compliance

Section 390.354 requires State savings associations to establish and maintain a Bank Secrecy Act (BSA) compliance program and a customer identification program. Section 390.354 also enumerates the four pillars required for a BSA compliance program. Similarly, § 326.8 of the FDIC's regulations[117] requires insured depository institutions for which the FDIC is the appropriate Federal banking agency to establish a BSA compliance program to include the same four pillars and a customer identification program. The proposed rule would rescind § 390.354 and make technical changes to § 326.8, which is currently only applicable to insured depository institutions for which the

[107] *See* 12 U.S.C. 1831p–1(e); 12 CFR 308.300, *et seq.;* 12 CFR part 364, App. A.

[108] 12 U.S.C. 1867.

[109] 12 U.S.C. 1831e(a).

[110] *See* 12 CFR 362.9–.15.

[111] *See* 12 CFR 362.9(a).

[112] *See* 12 CFR 163.172.

[113] The SAIF provided deposit insurance to depositors of federally insured savings associations until it was merged into the Bank Insurance Fund (BIF), which similarly insured depositors of federally insured banks. The merged fund, the Deposit Insurance Fund (DIF) became effective on March 31, 2006, consistent with § 2102(a) of the Federal Deposit Insurance Reform Act of 2005. As a result of this action, both the SAIF and BIF were abolished. *See* 49 FR 19307 (May 7, 1984) (proposed rule); 49 FR 27295 (July 3, 1984) (final rule).

[114] 54 FR 49411 (Nov. 30, 1989).

[115] 12 CFR part 364, App. A, § II.E.

[116] Section 305 of FDICIA required the Federal banking agencies to revise their risk-based capital standards to take into account interest rate risk. *See* 12 U.S.C. 1828 nt.; *see also* 12 CFR 324.63, Table 10; 12 CFR 324.173, Table 12.

[117] 12 CFR 326.8, 326.1(a).

FDIC is the appropriate Federal Banking agency.[118]

Section 390.354(a) states that the purpose of the regulation is to require State savings associations to establish and maintain procedures reasonably designed to assure and monitor compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the U.S. Department of the Treasury, 31 CFR part 103 (now superseded by 31 CFR chapter X), commonly referred to as the Bank Secrecy Act. Similarly, § 326.8(a) requires that all insured depository institutions for which the FDIC is the appropriate Federal banking agency establish and maintain procedures reasonably designed to assure and monitor their compliance with the same laws and regulations.

Section 390.354(b) discusses the establishment of a BSA compliance program. Subparagraph (b)(1) states that State savings association shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements of the BSA. The compliance program must be written, approved by the State savings association's board of directors, and reflected in the minutes of the State savings association. Subparagraph (b)(2) states that each State savings association is subject to the requirements of 31 U.S.C. 5318(l) and its implementing regulations, which require the implementation of a customer identification program. Similarly, § 326.8(b)(1) requires that all insured depository institutions for which the FDIC is the appropriate Federal banking agency have a written BSA compliance program, approved by the board of directors, and reflected in the board minutes. Section 326.8(b)(2) also requires all insured depository institutions for which the FDIC is the appropriate Federal banking agency to have a customer identification program.

Section 390.354(c) states that a BSA compliance program shall: Provide for a system of internal controls; provide for independent testing; designate individual(s) responsible for BSA compliance; and provide training. Like § 390.354, § 326.8(c) requires that all insured depository institutions for which the FDIC is the appropriate Federal banking agency have these same BSA compliance program components.

Effective May 2, 2018, the FDIC amended §§ 326.0–326.4 [119] and rescinded the corresponding OTS regulations.[120] As of this date, the recently amended § 326.1 [121] defines both ''FDIC-supervised insured depository institution'' and ''institution'' as any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to 12 U.S.C. 1813(q)(2).

The proposed rule would amend § 326.8 to include both insured State savings associations and State nonmember banks for all of § 326.8 by replacing the terms ''insured nonmember bank'' and ''bank'' currently in § 326.8 with the term ''FDIC supervised institution'' or ''institution.'' Having made the technical amendment to § 326.8, § 390.354 will be duplicative and the FDIC proposes to rescind and remove § 390.354.[122]

S. 12 CFR 390.355—Suspicious Activity Reports and Other Reports and Statements

In order to streamline FDIC regulations and reduce regulatory burden, the FDIC proposes to rescind and remove § 390.355 because it is unnecessary, redundant, and duplicative. In addition, the FDIC proposes to make conforming changes to §§ 353.1 and 353.3 to make part 353 of the FDIC's regulations applicable to all FDIC-supervised institutions.

Section 390.355 requires State savings associations and service corporations to make certain reports. Specifically, subsection 390.355 (a) requires State savings associations to make periodic reports to the FDIC in such a manner and on such forms as the FDIC may prescribe. Subsection 390.355(b) prohibits State savings associations from making false or misleading statements or omissions. Subsection 390.355(c) requires a State Savings association maintaining bond insurance coverage to promptly notify its carrier and file a proof of loss concerning any covered losses more than twice the deductible amount. Subsection 390.355(d) requires State savings associations to file a Suspicious Activity Report (''SAR'') when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of law or regulation. Subsection 390.355(e) requires State savings associations within the jurisdiction of a Federal Home Loan Bank (FHLB) to provide data from the Consolidated Reports of Condition or Income (Call Report) upon the request of the FHLB.

1. § 390.355(a) Periodic Reports

Section 390.355(a) requires State savings associations to make such periodic or other reports to the FDIC in the manner and on the forms the FDIC requires. The FDIC may provide that reports filed for other purposes may also satisfy requirements imposed under § 390.355.

There are a number of Federal statutes that require reporting by State savings associations. For example, section 5 of HOLA requires ''each association to make reports of conditions to the appropriate Federal banking agency which shall be in a form prescribed by the appropriate Federal banking agency . . . .'' and sets forth the type of information such reports shall contain.[123] Section 7(a)(3) of the FDI Act requires all insured depository institutions to make four annual reports of condition to their appropriate Federal banking agency.[124] In addition, section 36 of the FDI Act [125] and the FDIC's implementing regulations at part 363 [126] require insured depository institutions above a specified asset threshold to have annual independent audits and to submit annual reports and audited financial statements to the FDIC. Section 37 of the FDI Act requires financial statements, capital standards, and other reports provided to the FDIC to be prepared in a manner consistent with generally accepted accounting procedures.[127] Finally, The Interagency Policy Statement on External Audit Programs of Banks and Savings

[118] 12 CFR 326.8 is applicable to ''all insured nonmember banks as defined in 12 CFR 326.1.'' Section 326.1 was revised to remove the definition of ''insured nonmember bank'' and replace it with the term ''FDIC-supervised institution'' or ''institution'', defined to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act (12 U.S.C. 1813(q). 83 FR 13839, 13842 (April 2, 2018).

[119] 12 CFR 326.0–326.4

[120] 83 FR at 13842–3.

[121] 12 CFR 326.1 (2019).

[122] The FDIC also proposes to amend the definition in 12 CFR 326.1 to apply to all entities for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act. This revision would clarify that foreign banks having a State-chartered insured branch are also subject to part 326 of the FDIC's regulations. This change is not substantive because the term ''insured depository institution'' already includes insured branches. *See* 12 U.S.C. 1813(a)(1), (c)(2), and (s)(3).

[123] 12 U.S.C. 1464(v)(1). Although 12 U.S.C. 1464 is titled ''Federal savings associations'', section 1464(v) describes the reporting obligations of ''[e]ach association'' and refers to the requirements of the ''appropriate Federal banking agency'' rather than only the OCC. The FDIC is the appropriate Federal banking agency for State savings associations. 12 U.S.C. 1813(q).

[124] 12 U.S.C. 1817(a)(3).

[125] 12 U.S.C. 1831m.

[126] 12 CFR part 363.

[127] 12 U.S.C. 1831n.

Associations[128] provides unified interagency guidance regarding independent external auditing programs of insured depository institutions that community banks and savings associations that do not have to comply with part 363 (because they do not meet the size threshold) or that are not otherwise subject to audit requirements by order, agreement, statute, or FDIC regulations.

For these reasons, § 390.355(a) is not necessary and the FDIC proposes that it be rescinded and removed.

2. § 390.355(b) False or Misleading Statements or Omissions

Section 390.355(b) prohibits State savings associations from making false or misleading statements or omissions to the FDIC and to auditors of State savings associations.

By statute, whoever makes any materially false, fictitious, or fraudulent statement or representation in a matter involving the executive branch of the U.S. government, is subject to imprisonment for up to five years.[129]

In addition, the OCC has promulgated a rule on this topic applicable to all savings associations, Federal or State. The Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.[130] On August 9, 2011, the OCC published in the **Federal Register** a final rule that contained a provision, 12 CFR 163.180(b), that is substantially similar to § 390.355(b) and that applies to both State and Federal savings associations.[131] It prohibits all savings associations from knowingly making false or misleading statements to their ''appropriate Federal banking agency'' and to those auditing the institution.[132] The OCC's prohibition at § 163.180(b) effectively prohibits a State savings association from making false or misleading statements to the FDIC or to any party auditing or preparing or reviewing its financial statements. Because the prohibition contained in the OCC's regulation is applicable to all savings associations and is substantially similar to the rule found at § 390.355(b), and enforceable by the FDIC pursuant to section 8 of the FDI Act,[133] the FDIC has concluded that § 390.355(b) is duplicative and unnecessary, and the FDIC proposes to rescind and remove this section.

3. § 390.355(c) Notifications of Loss and Reports of Increase in Deductible Amount of Bond

Subsection 390.355(c) requires a State Savings association maintaining bond insurance coverage to promptly notify its carrier and file a proof of loss concerning any covered losses more than twice the deductible amount. The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management of a *de novo* financial institution applying for deposit insurance.[134] However, the FDIC does not otherwise impose a reporting requirement such as the one contained in § 390.355(c).[135] Staff was unable to find a provision of State law or in the regulations of any Federal banking agency containing a prescriptive filing requirement such as that contained in § 390.355(c).

Therefore, on the basis of parity and reduction of the regulatory burden for State savings associations, the FDIC proposes to rescind and remove § 390.355(c).

4. § 390.355(d) Suspicious Activity Reports

Subsection 563.180(d) was transferred to the FDIC and redesignated as subsection 390.355(d). The section, which regulates SARs, was enacted in concert with the other Federal banking agencies, including the OCC,[136] the FRB,[137] and the FDIC,[138] as well as the Financial Crimes Enforcement Network (FinCEN).[139] These entities issued substantially similar proposals, which became effective on April 1, 1996. The purpose of the OTS's regulation was to revise its rule on the reporting of known or suspected criminal conduct and suspicious activities by the savings associations under its supervision. The final rule developed a single form, the SAR, for reporting known or suspected Federal criminal law violations and transactions that an institution suspects involve money laundering or violates the BSA.

Paragraph (1) of § 390.355(d) states that the purpose and scope of the subsection is to ensure that State savings associations and service corporations file a SAR when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA. Similarly, § 353.1 of the FDIC regulations states that its purpose is to ensure that all insured State nonmember banks file a SAR pursuant to the same laws and regulations.

Paragraph (2) of subsection 390.355(d) is a definition section similar to the definitional section contained in § 353.2 of the FDIC's regulations.

Paragraph (3) of subsection 390.355(d) enumerates the four instances when a State savings association must file a SAR with FinCEN: (1) Insider abuse involving any amount; (2) violations aggregating $5,000 or more where a suspect can be identified; (3) violations aggregating $25,000 or more regardless of potential suspects; and (4) transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act. Similarly, § 353.3 of the FDIC's regulations requires State nonmember banks to file SARs with FinCEN in the same four instances.

Paragraph (4) of subsection 390.355(d) is reserved.

Paragraph (5) of subsection 390.355(d) states the time by which a State savings association is required to file a SAR in various circumstances after the date of initial detection of facts that may constitute a basis for filing a SAR. Similarly, § 353.3(b) requires State nonmember banks to file SARs with FinCEN within the same time limits.

Paragraph (6) of subsection 390.355(d) encourages State savings associations to file a copy of the SAR with state and local law enforcement agencies where appropriate. Similarly, § 353.3(c) encourages State nonmember banks to file a copy of the SAR with state and local law enforcement agencies where appropriate.

Paragraph (7) of subsection 390.355(d) indicates that a State savings association

[128] *See* FIL–96–99 (Oct. 25, 1999); 64 FR 57094 (Oct. 22, 1999).

[129] 18 U.S.C. 1001(a)(2) (up to 8 years if the offense involves terrorism).

[130] *See* 12 U.S.C. 5412(b)(2)(B)(i)(II).

[131] 76 FR 49047 (Aug. 9, 2011).

[132] The FDIC is the ''appropriate Federal banking agency'' for any State savings association. *See* 12 U.S.C. 1813(q).

[133] 12 U.S.C. 1818.

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

[135] *See* Statement of Policy on Applications for Deposit Insurance, *supra* note 134 (''An insured depository institution should maintain sufficient fidelity bond coverage on its active officers and employees to conform with generally accepted industry practices. Primary coverage of no less than $1 million is ordinarily expected. Approval of the application may be conditioned upon acquisition of adequate fidelity coverage prior to opening for business.'').

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

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

[138] Suspicious Activity Reports, 61 FR 6095 (Feb. 16, 1996).

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

need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities. Similarly, § 353.3(d) directs that State nonmember banks need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

Paragraph (8) of subsection 390.355(d) states that a State savings association shall maintain a copy of any SAR filed along with supporting documentation for five years and shall make the supporting documentation available to appropriate law enforcement agencies upon request. Similarly, § 353.3(e) directs a State nonmember banks to maintain a copy of any SAR filed and supporting documentation for five years and to make supporting documentation available to appropriate law enforcement agencies upon request.

Paragraph (9) of subsection 390.355(d) states that the management of a State savings association shall promptly notify its board of directors, or a committee of directors or executive officers designated by the board of directors to receive notice of a SAR filing. Similarly, § 353.3(f) directs that State nonmember banks shall promptly notify its board of directors, or a committee thereof, to receive notice of a SAR filing.

Paragraph (9) of subsection 390.355(d) also states that if the subject of the SAR is a director or executive officer, the State savings association may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but shall notify all directors who are not suspects. In this circumstance, § 353.3 does not have analogous language; however, the FDIC relies on 31 U.S.C. 5813(g)(2) to achieve the same purpose. That section states:

> Reporting of suspicious transactions . . . (2) Notification prohibited (A) In general. If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency (i) neither the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported. . . .

Paragraph (10) of subsection 390.355(d) states that a State savings association's failure to file a SAR in accordance with this section may subject the State savings association, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action. In this circumstance, § 353.3 does not have analogous language. Although § 353.3 does not explicitly provide a remedy for failure to file a SAR, the FDIC has enforcement authority for violations of law or regulation.[140] Therefore, the FDIC is proposing to remove subsection 390.355(d)(10) in its entirety because it is unnecessary.

Paragraph (11) of subsection 390.355(d) states that a State savings association may obtain SARs and the instructions from the appropriate FDIC region as defined in § 303.2 of the FDIC's regulations. In this circumstance, § 353.3 does not have analogous language. However, FDIC-supervised institutions can obtain SAR forms electronically. Specifically, 31 CFR 1010.306(e) states:

> Forms to be used in making the reports required by § 1010.311, § 1010.313, § 1010.350, § 1020.315, § 1021.311, or § 1021.313 of this chapter may be obtained from BSA E-Filing System. Forms to be used in making the reports required by § 1010.340 may be obtained from the U.S. Customs and Boarder Protection or FinCEN.

Since the OTS's rule went into effect, FinCEN converted to the BSA E-Filing System for filing SARs for all financial institutions.[141] This provision of the transferred OTS rule is now obsolete as forms are no longer available from FDIC regions.

Paragraph (12) of subsection 390.355(d) states that SARs are confidential and any institution or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, citing this paragraph (d), applicable law (*e.g.,* 31 U.S.C. 5318(g)), or both, and shall notify the FDIC. Similarly, § 353.3(g) directs that State nonmember banks maintain the confidentiality of SARs, decline to disclose a SAR or the information contained in a SAR or information concerning the existence of a SAR, and notify the FDIC.

Paragraph (13) of subsection 390.355(d) states that the safe harbor provision of 31 U.S.C. 5318(g), which exempts any financial institution that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, covers all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this paragraph (d), or are filed on a voluntary basis. Similarly, § 353.3(h) contains similar safe harbor language.

For the above-stated reasons, the FDIC proposes to rescind and remove § 390.355(d).

5. § 390.355(e) Adjustable-Rate Mortgage Indices

Section 390.355(e) requires State savings associations within the jurisdiction of a FHLB to provide data from the Call Report upon the request of the FHLB. The FDIC is required under section 402(e)(3) of FIRREA ''to take such action as may be required as may be necessary to assure that the indexes prepared by the . . . Federal home loan banks immediately prior to the enactment of this subsection and used to calculate the interest rate on adjustable rate mortgage instruments continue to be available.''[142] As noted above, the Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.[143] On August 9, 2011, the OCC published in the **Federal Register** a final rule that contained a provision, 12 CFR 163.180(e), which is substantially similar to § 390.355(e) and that applies to both State and Federal savings associations.[144] It requires all savings associations within the jurisdiction of that FHLB to report specified data items for the FHLB to use in calculating and publishing an adjustable-rate mortgage index.[145]

Because the provision contained in the OCC's regulation is applicable to all savings associations and is substantially similar to the rule found at § 390.355(e), the FDIC has concluded that 3§ 90.355(e) is duplicative and unnecessary, and the FDIC proposes to rescind and remove this section.

6. Amendments to Other Rules

The proposed rule would amend FDIC §§ 353.1 and 353.3 to include both insured State savings associations and State nonmember banks by replacing the terms ''insured nonmember banks'' and ''bank'' currently in the regulation with the term ''FDIC-supervised institution.'' With these amendments, § 390.355 is unnecessary and, for the reasons stated

[140] *See* 12 U.S.C. 1818.

[141] *See https://bsaefiling.fincen.treas.gov/main.html.*

[142] *See* 12 U.S.C. 1437 nt.

[143] *See* 12 U.S.C. 5412(b)(2)(B)(i)(II).

[144] 76 FR 49047 (Aug. 9, 2011).

[145] 12 CFR 163.180(e).

above, the FDIC proposes to rescind and remove § 390.355 in its entirety.

T. 12 CFR 390.356—Bonds for Directors, Officers, Employees and Agents; Form of and Amount of Bonds

Section 390.356 requires fidelity bond coverage for directors, officers, employees, and agents of State savings associations. The FDIC proposes to rescind and remove § 390.356, to conform requirements for State savings associations with requirements for State nonmember banks, and to reduce regulatory burden. State savings associations may, however, consult FDIC guidance concerning best practices regarding fidelity bond coverage.[146]

Section 390.356(a) requires each State savings association to maintain fidelity bond coverage for those directors, officers, employees, and agents who have control over or access to cash, securities, or other property of the State savings association. Section 390.356(b) requires the management of each State savings association to determine the amount of fidelity bond coverage that would be considered safe and sound, commensurate with its assessment of the association's potential risk exposure. Additionally, paragraph (b) requires the State savings association's board of directors to approve the management's determination. Section 390.356(c) provides that the State savings association may maintain bond coverage through riders, endorsements, or supplements, beyond that provided by the insurance underwriting industry's standard forms if the State savings association's board determines that additional coverage is warranted. Section 390.356(d) provides that the State savings association's board of directors must approve the State savings association's fidelity bond coverage, review such coverage annually, and document its review and approval in board meeting minutes.

Neither the FDI Act nor the FDIC's regulations for State nonmember banks contain similar prescriptive language concerning fidelity bonds that would be applicable to State savings associations. Section 18(e) of the FDI Act authorizes, but does not mandate, that the FDIC require an insured depository institution to ''provide protection and indemnity against burglary, defalcation, and other similar insurable losses.'' [147] The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management of a *de novo* financial institution applying for deposit insurance.[148] However, other than expressing general guidelines regarding the appropriate level of insurance coverage, the FDIC does not otherwise impose requirements such as the ones contained in § 390.356.[149] There are no other relevant provisions concerning fidelity bond coverage or the use of fidelity bond proceeds. And, there is no analogous statutory or regulatory language for State nonmember banks that mirrors § 390.356. Therefore, for supervisory consistency between State nonmember banks and State savings associations, and to reduce regulatory burden, the FDIC proposes that § 390.356 be rescinded and removed.

U. 12 CFR 390.357—Bonds for Agents

Section 390.357,[150] provides that, in lieu of a bond for directors, officers, employees, and agents of State savings associations referenced in § 390.356, the State savings association's board may approve a bond for its agents. This bond must be twice the average monthly collections of such agent, and the agent is required to settle its account with the State savings association at least monthly.

Similar to § 390.356, there are not analogous statutory or regulatory requirements for State nonmember banks that resemble § 390.357. Neither sections 18(e) or 18(k) of the FDI Act nor §§ 326.2 or 326.3 of FDIC's regulations require or provide for bond coverage. State savings associations may, however, consult FDIC guidance concerning best practices regarding fidelity bond coverage.[151] Therefore, in the interest of consistency between State nonmember banks and State savings associations, and to reduce regulatory burden, the FDIC proposes that § 390.357 be rescinded and removed.[152]

V. 390.358 Conflicts of Interest

12 CFR 390.358 is the re-designation of the transferred OTS regulation prohibiting persons including directors, officers, or employees of State savings associations, or others who have power to direct its management or policies or who otherwise owe a fiduciary duty to a State savings association from advancing personal or business interests, or those of others, at the expense of the State savings association. The section also prescribes how these individuals should interact with the board of directors of a State savings association if they have an interest in a matter or transaction requiring board consideration.

While section 8(e) of the FDI Act [153] authorizes enforcement actions against directors and officers who breach their fiduciary duties to the depository institution, the existence and scope of a fiduciary duty generally is a matter of state law. The FDIC proposes to rescind and remove § 390.358 because such conduct is governed by either statutory or common law.[154]

W. 390.359 Corporate Opportunity

Section 390.359 is the re-designation of the OTS regulation prohibiting persons, including directors and officers or others who have power to direct its management or policies or who otherwise owe a fiduciary duty to a State savings association from taking advantage of corporate opportunities belonging to the State savings association. Such conduct is governed by either statutory or common law.[155] While section 8(e) of the FDI Act [156] authorizes enforcement actions against directors and officers who breach their fiduciary duties to the depository institution, the existence and scope of a fiduciary duty generally is a matter of state law. The FDIC proposes to rescind and remove § 390.358 because such conduct is governed by either statutory or common law.

[146] *See, e.g.,* Risk Management Manual of Examination Policies § 4.4 (Fidelity and Other Indemnity Protection), available at *https://www.fdic.gov/regulations/safety/manual/section4-4.pdf.*.

[147] *See* 12 U.S.C. 1828(e).

[148] *See* 12 U.S.C. 1816; Statement of Policy on Applications for Deposit Insurance, *supra* note 134.

[149] *See* Statement of Policy on Applications for Deposit Insurance, *supra* note 134. Generally, an order granting Federal deposit insurance would include fidelity coverage as a condition, but would not specify an amount. See also Resolution Seal No. 071098, B(2)(a)(iii) and (d) (Dec. 3, 2002); Memorandum to the Board regarding Delegations of Authority, Ex. 1, Delegations of Authority: Notices and Filings, subpart B, n. B–1 6(11) (Nov. 25, 2002), available at *https://www.fdic.gov/regulations/laws/matrix/exhibit1.html.*

[150] 12 CFR 390.357.

[151] *See, e.g.,* Risk Management Manual of Examination Policies § 4.4, *supra* note 146.

[152] State savings associations may, however, consult FDIC guidance concerning best practices regarding fidelity bond coverage. *See* Risk Management Manual of Examination Policies § 4.4, *supra* note 146.

[153] 12 U.S.C. 1818(e).

[154] *See, e.g.,* 12 U.S.C. 1821(k); *Atherton* v. *FDIC,* 519 U.S. 213 (1997); CO Rev Stat § 7–108–401 and § 11–41–134 (2017); IN Code § 23–1–35–1; § 28–10–1–3; § 28–13–11–1 (2018); LA Rev Stat § 6:291; § 12:1–830 (2018); MO Rev. Stat Title XXIV § 369.109; NH Rev Stat § 293–A:8.30 (2018); NJ 17:9A–250; NY Banking Law § 398–B (2018); Ohio Rev. Code 1701.59, .641, 1105.11; PA Consol. Stat, Title 15, § 512; SC Code § 34–28–440 (2018); WI Stat § 180.0828; § 215.525 (2018).

[155] *See supra* note 154.

[156] 12 U.S.C. 1818(e).

X. 12 CFR 390.360–.368—Change of Director or Senior Executive Officer

Section 914 of FIRREA added section 32 of the FDI Act.[157] Section 32 requires certain insured depository institutions and insured depository institution holding companies to furnish the appropriate Federal banking agency with at least 30 days' notice prior to adding any individual to the board of directors or employing any individual as a senior executive officer. Section 32 was amended on September 30, 1996, by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).[158] Section 209 of the EGRPRA changed the circumstances under which a notice must be filed and also permitted the appropriate Federal banking agency no more than 90 days to issue a notice of disapproval of the proposed addition of a director or employment of a senior executive officer. On September 25, 1998, the OTS, then the appropriate Federal banking agency for all savings associations, issued a final rule relating to the changes made to section 32 by EGRPRA and added implementing regulations which replaced 12 CFR 574.9 with §§ 563.550 through 563.590. These regulations were transferred then to the FDIC, as the appropriate Federal banking agency for State savings associations. The implementing regulations are now found at §§ 390.360 through 390.368.[159]

Subpart F of part 303 of the FDIC's regulations imposes similar notice filing requirements on insured State nonmember banks. After careful review, for the reasons described below, the FDIC proposes to amend subpart F of part 303 so that it applies to State savings associations as well as State nonmember banks and to rescind and remove §§ 390.360 through 390.368 as unnecessary and duplicative. The FDIC believes that the section 32 of the FDI Act and the proposed amendments to subpart F of part 303 sufficiently address the circumstances and requirements for both State nonmember banks and State savings associations to provide advance notification to the FDIC before appointing or employing directors and senior executive officers.

1. 12 CFR 390.360—Change of Director or Senior Executive Officer

Section 390.360 is an introductory section. It describes the statutory basis for and the content and purpose of the remaining §§ 390.361 through 390.368. The content of this section is substantively identical to § 303.100. Therefore, the FDIC proposes that § 390.360 be rescinded and removed.

2. 12 CFR 390.361—Applicable Definitions

Section 390.361 provides definitions of certain terms that apply to §§ 390.360 through 390.368. This section defines the terms director, senior executive officer and troubled condition. Section 303.101 provides substantively similar definitions for the same three terms. The FDIC does not believe § 390.361 is necessary in light of § 303.101, and for this reason, the FDIC proposes to rescind and remove § 390.361.

3. 12 CFR 390.362—Who must give prior notice?

Section 390.362 outlines the conditions under which prior notification must be given to the FDIC. Paragraph (a) requires a State savings association to provide notice prior to adding or replacing board members or senior executive officers if it: (1) Does not comply with all minimum capital requirements; (2) is in troubled condition; or (3) if it has been notified by the FDIC that a notice is required. These three conditions are substantively identical to those contained in § 303.102, which pertains to State nonmember banks. When part 303, subpart F is amended to apply to State savings associations, paragraph (a) will become unnecessary and duplicative.

Paragraph (b) allows an individual seeking election to the board of directors of a State savings association, without a nomination by the institution's management, to submit an after-the-fact notice to the FDIC within seven days of being elected. Section 303.102(c)(2) contains a similar regulation with the requirement that a notice must be submitted within two business days after election. Thus paragraph (b) is duplicative and unnecessary. For foregoing reasons, the FDIC proposes to rescind and remove § 390.362.

4. 12 CFR 390.363—What procedures govern the filing of my notice?

Section 390.363 references the procedures found in §§ 390.103 through 390.110 as governing the filing of a notice to the FDIC. Again, these sections are substantively similar to the procedural rules found in subpart A of part 303. Because subpart A of part 303 governs general procedures for submitting filings, including notices, to the FDIC, § 390.363 is unnecessary and duplicative. For this reason and because maintaining alternative procedures for State savings associations and State nonmember banks would be confusing and burdensome, the FDIC proposes to rescind and remove § 390.363.

5. 12 CFR 390.364—What information must I include in my notice?

Section 390.364 establishes the required content for prior notices filed pursuant to section 32 of the FDI Act. Paragraph (a) requires the submission of certain biographical information, a set of fingerprints and any other information that the FDIC requires. Paragraph (d)(1) of § 303.102 requires substantively similar information.[160]

Paragraph (b) of § 390.364 allows the FDIC to modify the requirements listed in paragraph (a), similar to paragraph (d)(2) of § 303.102. Amending § 303.102 to also apply to State savings associations will make § 390.364 unnecessary and duplicative. For this reason, the FDIC proposes to rescind and remove § 390.364.

6. 12 CFR 390.365—What procedures govern the FDIC's review of my notice for completeness?

Section 390.365 outlines the procedures and timelines the FDIC will follow in reviewing a notice of change of director or senior officer. Paragraph (a) states that the FDIC will notify the applicant in writing of the date on which the FDIC received a complete notice. This provision is substantively similar to paragraph (a) of § 303.103. Paragraph (b) of § 390.365 states that an applicant may be asked to provide additional information before an application is deemed complete, and failure to provide such information may cause the notice filing to be deemed withdrawn. This provision is substantively similar to § 303.11. If subpart F of part 303 is amended to apply to State savings associations, § 390.365 will become duplicative and unnecessary. For this reason, the FDIC proposes to rescind and remove § 390.365.

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[157] 12 U.S.C. 1831i.

[158] Public Law 104–208, 110 Stat. 3009, Sept. 30, 1996.

[159] 63 FR 51272 (Sept. 25, 1998).

[160] Section 303.102(d)(1) does not specifically contain a fingerprinting requirement, but does provide that ''[t]he FDIC may require additional information.'' In practice, the FDIC obtains fingerprints to facilitate background checks performed in connection with applications and notices submitted to the FDIC, including: Applications for Federal deposit insurance, notices of acquisition of control, requests for participation in the banking industry by individuals with certain criminal convictions, and notices to replace board members or senior management in certain institutions *See* FIL–21–2018, Electronic Fingerprinting for Background Checks Related to Applications (Apr. 17, 2018). Thus, the FDIC is clarifying that fingerprints may be required in connection with the filings noted above.

7. 12 CFR 390.366—What standards and procedures will govern the FDIC review of the substance of my notice?

Section 390.366 outlines the standards and procedures under which a notice of change of director or senior officer will be reviewed by the FDIC. This section is substantively identical to paragraph (c) of § 303.103. If subpart F of part 303 is amended to apply to State savings associations, § 390.366 will become duplicative and unnecessary. For this reason, the FDIC proposes to rescind and remove § 390.366.

8. 12 CFR 390.367—When may a proposed director or senior executive officer begin service?

Section 390.367 establishes the conditions and timelines for a proposed director or senior executive officer to begin service. Paragraph (a) establishes that a director or senior executive officer may begin service 30 days after the FDIC receives all required information, unless the FDIC has disapproved the notice or the FDIC has extended its review period. Paragraph (b) establishes that a director or senior executive officer may begin service any time after the FDIC provides notice that it will not disapprove the notice. Both of these paragraphs are substantively similar to the conditions and timelines established under paragraphs (a) and (b) of § 303.103. If subpart F of part 303 is amended to apply to State savings associations, § 390.367 will become duplicative and unnecessary. For this reason, the FDIC proposes to rescind and remove § 390.367.

9. 12 CFR 390.368—When will the FDIC waive the prior notice requirement?

Section 390.398 outlines the conditions under which the FDIC may waive the prior notification requirement. Paragraph (a) establishes that the FDIC may provide a waiver of prior notice if it issues a written finding that a delay would (1) threaten the safety or soundness of the institution, (2) not be in the public interest, or (3) that extraordinary circumstances exist to justify a waiver. Paragraph (b) allows for an automatic waiver under certain circumstances for directors elected without the nomination of management. Paragraph (c) allows for the FDIC to subsequently deny a notice filed after a waiver within 30 days. Paragraph (c) of § 303.102 provides for substantively identical criteria for the waiver of prior notice for State nonmember banks. If subpart F of part 303 is amended to apply to State savings associations, § 390.368 will become duplicative and unnecessary. For this reason, the FDIC proposes to rescind and remove § 390.368.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking, and specifically requests comments on the following:

Question 3: What impact, positive or negative, can you foresee in the FDIC's proposal to rescind certain provisions of Subpart S? Please substantiate your response.

Written comments must be received by the FDIC no later than December 2, 2019.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA),[161] 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 proposed rule would rescind and remove from the FDIC's regulations part 390, subpart S. The proposed rule will not create any new or revise any existing information collections pursuant to 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 proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.[162] 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.[163] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As of June 30, 2019, the FDIC supervised 3,424 insured depository institutions, of which 2,665 are considered small banking organizations for the purposes of RFA. The proposed rule primarily affects regulations that govern State savings associations. There are 36 State savings associations considered to be small banking organizations for the purposes of the RFA.[164]

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.330 requires a de novo State savings association, prior to commencing operations, to file its charter and bylaws with the FDIC for certification. The FDIC does not charter depository institutions, therefore the certification authority outlined in § 390.330 does not conform with the FDIC's general authority. The OCC or State banking supervisors do charter depository institutions and therefore, may have similar charter and bylaw certification requirements for de novo savings associations. If the OCC or a State banking supervisor does not have similar charter and bylaw certification requirements for de novo savings associations, this aspect of the proposed rule could reduce recordkeeping and reporting requirements for future de novo savings associations. However, an analysis of de novo activity for savings associations shows that there has been only one in the last eleven years. The proposed rule would also eliminate the federal requirement for a state savings association to make available to its accountholders, on request, a copy of its bylaws. The nature of the requirements contained in § 390.330 are typically addressed by state law. Depending on the state, elimination of this section could result in a small reduction in expenses. Therefore, this aspect of the

[161] 44 U.S.C. 3501, *et seq.*

[162] 5 U.S.C. 601, *et seq.*

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

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

proposed rule is unlikely to pose significant effects on a substantial number of small, FDIC-supervised state savings associations.

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

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.332 addresses the application requirements for mergers, consolidations, purchases or sales of assets, and assumptions of liabilities that apply to State savings associations. The FDIC proposes to rescind § 390.332 and to amend 12 CFR part 303, subpart D, the section of the FDIC's regulations governing merger transactions. The proposed amendments to subpart D would make that section applicable to any FDIC-supervised institution, including State savings associations, and would make other conforming changes. Because the proposed changes would not affect the application requirements and application content this aspect of the proposed rule is unlikely to pose any effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.333 prohibits State savings associations from making inaccurate representations about services, contracts, investments, or financial condition in their advertising. The prohibition of misrepresentations in advertising contained in § 390.333 is substantially similar to the more general prohibition of unfair or deceptive acts or practices under section 5(a) of the Federal Trade Commission Act (section 5). The FDIC enforces this provision pursuant to its authority under section 8 of the FDI Act.[165] The prohibition contained in section 5 is broader than § 390.333 because it prohibits all ''unfair or deceptive acts or practices in or affecting commerce,'' and it applies to all FDIC-supervised institutions, not only State savings associations.[166] Because the narrower prohibitions of § 390.333 appear subsumed within the broader prohibitions of Section 5, the FDIC believes that this aspect of the proposed rule will not have any substantive effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.334 limits who may serve on the board of directors of a State savings association by providing that: A majority of the directors must not be employees of the State savings association or its affiliates; no more than two directors may come from the same family; and no more than one director may be an attorney with a particular law firm. This aspect of the proposed rule could reduce compliance requirements on small, FDIC-supervised state savings associations by enabling them to make changes to the composition of their board of directors if they so choose. Such a reduction of compliance requirements could benefit covered entities by enabling them to choose a board that best executes the fiduciary powers of the board of directors, and more effectively supports the financial health of the institution. However, rescinding § 390.334 also potentially reduces the independence of boards of directors for small State savings associations thereby increasing risks to safety and soundness. The FDIC believes that the potential risks to safety and soundness for small FDIC-insured state savings associations that might result from rescinding § 390.334 is ameliorated by periodic examinations of safety and soundness risk in management for covered institutions. Therefore, the FDIC believes that this aspect of the proposed rule will not have any significant effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.335 is entitled ''Tying restriction exception'' and refers solely to the regulations issued by the FRB. Section 312(b)(2) of the Dodd-Frank Act transferred the authority to grant exceptions from the anti-tying regulations of HOLA to the FRB, rather than to the FDIC, upon the dissolution of the OTS.[167] Therefore, rescinding § 390.335 would align the FDIC's regulations with the FDIC's general authority. Additionally, because the FRB maintains the authority to grant exceptions from the anti-tying regulations for Federal and State savings associations, this aspect of the proposed rule will have no substantive effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.336 sets forth requirements with which a State savings association must comply when entering into an employment contract with its officers and other employees. Although there are no similar regulations for FDIC-supervised institutions, existing statutes, guidelines, and regulations have a similar effect on FDIC-supervised institutions, including State savings associations. Therefore, removal of § 390.336 is unlikely to have any substantive effect on small, FDIC-supervised State savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.337 states only that State savings associations should ''see the regulations issued by Board of Governors of the Federal Reserve System'' for the applicable rules for transactions with affiliates. Because HOLA applies sections 23A and 23B of the Federal Reserve Act to State savings associations [168] and because the FRB's Regulation W[169] addresses the additional restrictions of HOLA applicable to State and Federal savings associations' transactions with their affiliates, the FDIC believes that this aspect of the proposed rule will not have any substantive effects on small, FDIC-supervised institutions.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.338 cross-referenced the FRB's Regulation O,[170] with some additional modifications. Section 337.3 of the FDIC's regulations reference Regulation O to impose similar direct regulatory requirements on State nonmember banks. The FDIC proposes to rescind and remove § 390.338, to make minor conforming changes to § 337.3 to clarify its applicability to State savings associations, and to make technical amendments to § 337.3. Therefore, this aspect of the proposed rule is unlikely

[165] 12 U.S.C. 1818.

[166] 15 U.S.C. 45(a)(1).

[167] 12 U.S.C. 5412(b)(2)(A).

[168] 12 U.S.C. 1468(a).

[169] The FDIC has interpreted the language ''in the same manner and to the same extent'' to include the application of Regulation W.

[170] 12 CFR part 215.

to have any effect on small, FDIC-supervised institutions.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.339 prohibits State savings associations from sponsoring an employee pension plan which, because of unreasonable costs or for any other reason, could lead to material financial loss or damage to the sponsor. The section further requires a State savings association that serves as a pension plan sponsor to retain detailed pension plan records and actuarial funding reports and to provide advance notice of a pension plan termination. The Interagency Safety and Soundness Guidelines explicitly identify compensation that could lead to material financial loss as an unsafe and unsound practice. Additionally, regulations on recordkeeping by the Pension Benefit Guaranty Corporation would apply to any pension plan offered by an FDIC-supervised institution.[171] Because FDIC-supervised institutions, including State savings associations, will continue to be subject to the Interagency Safety and Soundness Guidelines, as well as PBCG regulations, rescinding § 390.339 is unlikely to substantively effect small, FDIC-supervised institutions.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.340 generally prohibits the offer or sale of debt or equity securities issued by a State savings association or an affiliate of the State savings association at an office of the State savings association with the exception of equity securities issued in connection with the State savings association's conversion from mutual to stock form in a transaction that has been approved by the FDIC or if the sale is conducted in accordance with the conditions set forth in § 390.340. The NDIP Statement of Policy [172] provides guidelines for all sales of nondeposit products (such as annuities, mutual funds, and other securities) by depository institutions, including State savings associations. Additionally, the Offering Circular Statement of Policy provides guidelines for sales and distribution of bank securities. Therefore, the FDIC believes that rescission of § 390.340 will not substantively change the offer or sale of debt or equity securities issued by a State savings associations or their subsidiaries. Therefore, this aspect of the proposed rule is unlikely to pose significant effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.341 provides application and notice procedures and form and content requirements for subordinate debt securities and mandatorily redeemable preferred stock that a State savings association seeks to include in its tier 2 capital. There is no corresponding requirement applicable to State nonmember banks. Many of the form and content requirements in § 390.341 that are designed to prevent consumer confusion are included in the FDIC's Offering Circular Statement of Policy which covers FDIC-supervised institutions, including State savings associations. Small FDIC-supervised institutions, including State savings associations, are governed by the criteria for inclusion in tier 2 capital are included in the FDIC's capital rules in 12 CFR part 324.[173] Therefore, this aspect of the proposed rule is unlikely to pose significant effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.342 states that §§ 390.342 through 390.348 apply to capital distributions by a State savings association.[174] Because the proposed rule would rescind §§ 390.342 through 390.348, and would amend other FDIC regulations to make them applicable to State savings associations, the removal of § 390.342 will not have any substantive effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.343 defines a ''capital distribution'' for the purposes of §§ 390.342–348. Section 38 of the FDI Act [175] applies to all insured depository institutions, and, among other things, generally prohibits an insured depository institution from making a capital distribution if, after making the distribution, the institution would be undercapitalized. Section also 38 defines a ''capital distribution'' to include certain dividends; repurchases, redemptions, retirements, or other acquisitions of shares or other ownership interests, including extensions of credit to finance an affiliated company's acquisition of such shares; and any other transaction that the Federal banking agencies find to be in substance a distribution of capital.[176] Part 303 of the FDIC's regulations implements the PCA provisions of section 38 for insured State nonmember banks and insured branches of foreign banks. The proposed rule would amend § 303.203 so that it expressly applies to State savings associations. The requirements of §§ 390.343(a) and (b) are substantively similar to requirements in section 38 and the current, analogous FDIC regulations at § 303.203. Section 390.343(e) incorporates FDI Act section 38(b)(2)(B)(iii), which authorizes the Federal banking agencies to, by order or regulation, deem as a ''capital distribution'' any transaction that the FDIC determines to be in substance a distribution of capital.[177] Therefore, the proposed rule's rescission of these elements and amendments to § 303.203 will have no effects on small, FDIC-supervised state savings associations.

Section 390.343(c) further defines ''capital distribution'' to include any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring, including the payment of cash or property to shareholders of another savings association of its holding company to acquire ownership in that savings association, other than by a distribution of shares.[178] This prong of § 390.343's definition of ''capital distribution'' is not matched by an analogous prong in section 38. Additionally, § 390.343(d) captures as a ''capital distribution'' any capital distribution that is charged against a State savings association's capital accounts if the State savings association would not be well capitalized following the distribution.[179] As with payments made in connection with a corporate restructuring, this element of § 390.343's regulatory definition is not expressly addressed in section 38. The proposed rule would rescind these requirements for small, FDIC-supervised state savings associations. The FDIC believes that this aspect of the proposed rule is unlikely to substantively effect small, FDIC-supervised institutions. Additionally, the FDIC believes that small, FDIC-supervised savings association would benefit from the establishment of equal treatment of capital distributions for State nonmember banks and State savings associations. However, it is difficult to estimate these effects because it depends on the financial condition of, and future decisions of

[171] Public Law 109–280, 120 Stat. 780, 29 U.S.C. 1301 *et seq.*

[172] *See supra* note 12.

[173] *See* 12 CFR 324.20(d)(1).

[174] 12 CFR 390.342.

[175] 12 U.S.C. 1831o.

[176] 12 U.S.C. 1831*o*(b)(2)(B).

[177] 12 CFR 390.343(e), 12 U.S.C. 1831*o*(b)(2)(B)(iii).

[178] 12 CFR 390.343(c).

[179] 12 CFR 390.343(d).

senior management at, small FDIC-supervised savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.344 adopts additional definitions specifically for the capital distribution provisions of §§ 390.342 through 390.348.[180] Section 38 of the FDI Act[181] applies to all insured depository institutions, and, among other things, generally prohibits an insured depository institution from making a capital distribution if, after making the distribution, the institution would be undercapitalized. Section 38 also defines a ''capital distribution'' to include certain dividends; repurchases, redemptions, retirements, or other acquisitions of shares or other ownership interests, including extensions of credit to finance an affiliated company's acquisition of such shares; and any other transaction that the Federal banking agencies find to be in substance a distribution of capital.[182] Part 303 of the FDIC's regulations implements the PCA provisions of section 38 for insured state nonmember banks and insured branches of foreign banks, and definitions of terms for capital distribution provisions are contained in the FDIC's capital rules. The proposed rule would amend § 303.203 so that it expressly applies to State savings associations. Therefore, the rescinding § 390.344 is unlikely to have any substantive effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.345 establishes that a State savings association is required to file an application for a proposed capital distribution in certain circumstances, and in others is required to file a notice. The application requirements of § 303.203 are analogous to those imposed on State savings associations by § 390.345(a)(3), as both sections require applications to the FDIC in cases where an institution would be undercapitalized following a capital distribution, as mandated by section 38 of the FDI Act. Because section 38 prohibits capital distributions in cases where an insured depository institution would be undercapitalized, the substantive requirements of § 390.345(a)(3) would be preserved by making § 303.203 applicable to State savings associations. The application requirements of § 303.241 are analogous to the notice requirements imposed on State savings associations by § 390.345(b)(2), as both sections require regulatory consideration of transactions that would reduce or retire common or preferred stock or capital notes or debentures. Accordingly, the FDIC proposes to rescind §§ 390.345(a)(3) and 390.345(b)(2) and, as noted above, the FDIC also proposes to amend § 303.241 so that it applies to State savings associations.

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

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.346 provides filing instructions for capital distributions that are subject to application or notice requirements under § 390.345, including instructions concerning a filing's content, schedules, and timing.[183] Because the FDIC proposes rescinding § 390.345, these provisions would no longer be applicable. Therefore, the FDIC proposes to rescind § 390.346. As described above, the FDIC also proposes to make §§ 303.203 and 303.241 applicable to State savings associations, and both of these sections set forth requirements related to the content of filings. Furthermore, certain rules of general applicability, including those related to processing, are set forth in subpart A of part 303 of the FDIC's regulations and would apply to filings made by State savings associations under §§ 303.203 and 303.241. Based on this information, the FDIC believes that this aspect of the proposed rule is unlikely to have any effect on small, FDIC-supervised State savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.347 authorizes a State savings association to combine a notice or application required under § 390.345 with another related notice or application.[184] Because the FDIC proposes rescinding § 390.345, these provisions would no longer be applicable. Therefore, the FDIC proposes to rescind § 390.347. As noted above, by making State savings associations subject to §§ 303.203 and 303.241, as proposed, State savings associations would be permitted to file applications that are subject to both sections as a single filing or concurrently with other filings.[185] Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to have any effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.348 sets forth the bases on which the FDIC may deny, in whole or in part, a notice or application filed under § 390.345. Because the FDIC proposes to rescind § 390.345, these provisions would no longer be applicable. Furthermore, the statutory exception that applies to capital distributions subject to section 38 of the FDI Act would continue to apply to capital distributions by State savings associations that are subject to section 38. In addition, because the proposal would make reductions or retirements of capital by State savings associations subject to the application requirements of § 303.241, the FDIC would evaluate such applications in light of the

[180] 12 CFR 390.344.

[181] 12 U.S.C. 1831o.

[182] 12 U.S.C. 1831*o*(b)(2)(B).

[183] 12 CFR 390.346.

[184] 12 CFR 390.347.

[185] *See* 12 CFR 303.203(b) and 12 CFR 303.241(e).

statutory factors enumerated in section 18(i)(4) of the FDI Act, and the bases identified in §§ 390.348(b) and 390.348(c) would be preserved insofar as they would be inherent in how the FDIC would review applications in light of the statutory factors of section 18(i)(4).[186] Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to have any effect on small FDIC-supervised State savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.349 implements the statutory requirement of section 4 of the HOLA. That section requires each State savings association to be operated in a safe and sound manner and encourages State savings associations to provide credit for housing safely and soundly.[187] In particular, § 390.349 includes explicit safety and soundness requirements relating to liquidity and compensation to officers, directors, employees, and consultants. Section 39 of the FDI Act[188] requires the Federal banking agencies to prescribe safety and soundness standards for internal controls, information systems, and internal audit systems; loan documentation; credit underwriting; interest rate exposure; asset growth; compensation, fees, and benefits; and such other operational and managerial standards as the agency determines to be appropriate. To this end, the FDIC has adopted part 364 and the related appendices. Part 364 establishes compensation-related standards and provides for other safety- and soundness-related guidelines which apply to all insured State nonmember banks, to state-licensed insured branches of foreign banks, and to State savings associations.[189] As such, the safety and soundness standards in § 390.349 are generally duplicative of the standards implemented through part 364. Part 364, as amended, provides consistent safety and soundness standards for both State nonmember banks and State savings associations. Therefore, the FDIC believes that this aspect of the proposed rule will have no substantive effects on small, FDIC-supervised institutions.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.350 contains requirements regarding examinations, appraisals, establishing and maintaining books and records, and using data processing services for maintenance of records. The proposed rule would rescind paragraphs (a), pertaining to examinations and audits, and (b), pertaining to appraisals. Section 390.350(a) states that each State savings association and affiliate will be examined periodically and may be examined anytime by the FDIC and that appraisals may be required as part of the examination. Section 337.12 states that the FDIC examines State nonmember banks pursuant to section 10 of the FDI Act,[190] State savings associations pursuant to section 10 of the FDI Act and section 4 of HOLA,[191] and implements the frequency of examinations specified by section 10 for insured depository institutions, including State savings associations. Section 390.350(b) permits the FDIC to select appraisers in connection with an examination, requires State savings associations to pay for such an appraiser, and mandates that the FDIC furnish the appraisal report to the State savings association within 90 days following the filing of the report to the FDIC. Part 323 of the FDIC's regulations implements Title XI of FIRREA,[192] which requires written appraisals in connection with certain federally related transactions entered into by institutions regulated by the FDIC. Section 323.3(c), which applies to all FDIC-supervised institutions, including State savings associations, allows the FDIC to require an appraisal whenever the agency believes it is necessary to address safety and soundness concerns, which would include during an examination.

Section 390.350(c) requires each State savings association and its affiliates to establish and maintain such accounting and other records as will provide an accurate and complete record of all business it transacts to enable the examination of the State savings association and its affiliates by the FDIC. The documents, files, and other material or property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be.

State savings associations are already subject to other FDIC regulations that achieve the purposes of § 390.350(c). For example, as recognized by § 304.3 of the FDIC's regulations, all insured depository institutions, including State savings associations, are required to file quarterly Consolidated Reports of Condition and Income (Call Reports).

Section 390.350(d) prohibits State savings associations from transferring the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has authorized the transfer by resolution and notified the appropriate regional director. The FDIC has not promulgated a similar rule for State nonmember banks. The removal of § 390.350(d) will provide relief to State savings association by not having to notify the appropriate regional director of its intention to relocate records from its home office to a branch or service office and will provide parity with State nonmember banks which do not provide the FDIC with prior notification of transferring records from one location to another.

Section 390.350(e) requires that when a State savings association maintains any of its records by means of data processing services, it will notify the appropriate regional director for the region in which the principal office of such State savings association is located, in writing, at least 90 days prior to the date on which such maintenance of records will begin. Section 304.3(d), implementing section 7 of the Bank Service Company Act,[193] already requires FDIC-supervised institutions, including State savings associations, to notify the FDIC about the existence of a service relationship within thirty days after the making of the contract or the performance of the service and provides for the required information either through a letter or FDIC Form 6120/06 *Notification of Performance of Bank Services.* Therefore, the FDIC believes that rescinding § 390.350 is unlikely to have any substantive effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.352 addresses the permissibility of financial derivatives transactions, the responsibility of the board of directors

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

[187] 12 U.S.C. 1463(a).

[188] 12 U.S.C. 1831p–1.

[189] 12 CFR 364.101. In 2015, 12 CFR 364.101 was amended to apply to both state nonmember banks and state savings associations. *See Removal of Transferred OTS Regulations Regarding Safety and Soundness Guidelines and Compliance Procedures; Rules on Safety and Soundness,* 80 FR 65903 (Oct. 28, 2015).

[190] 12 U.S.C. 1820.

[191] 12 U.S.C. 1463.

[192] Public Law 101–73, 103 Stat. 183; codified at 12 U.S.C. 3331 *et seq.*

[193] 12 U.S.C. 1867.

and management of a State savings association with respect to such transactions, and recordkeeping requirements related to such transactions. Section 28(a) of the FDI Act,[194] implemented by Part 362 of the FDIC's regulations,[195] restricts and prohibits State savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for a Federal savings association and its service corporations. The term ''activities permissible for a Federal savings association'' means, among other things, activities recognized as permissible in OCC regulations.[196] Section 163.172 of the OCC's regulations governs the financial derivatives activities of Federal savings associations, the responsibility of the board of directors and management of a Federal savings association with respect to such transactions, and recordkeeping requirements related to such transactions.[197] Because section 28(a) of the FDI Act and part 362 establish requirements that are duplicative of 390.352, the FDIC believes that rescinding § 390.352 is unlikely to have any effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.353 requires the board of directors or a board committee of a State savings association to develop, implement, and review policies and procedures for the management of a State savings association's interest-rate-risk; requires the association's management to report periodically to the board regarding implementation of the policy; and requires the association's board of directors to adjust the policy as necessary, including adjustments to the authorized acceptable level of interest rate risk. As mentioned above, the Interagency Safety and Soundness Guidelines, promulgated pursuant to section 39 of the FDI Act, describe examples of safe and sound practices for State nonmember banks and State savings associations. The Guidelines provide that an institution ''should manage interest rate risk in a manner that is appropriate to its size and the complexity of its assets and liabilities''.[198] Management and the board of directors should be provided reports regarding interest rate risk that are adequate to assess the level of risk. Because the requirements outlined in § 390.353 are similar to the safety and soundness practices outlined in established Guidelines that already apply to small, FDIC-supervised state savings associations, the FDIC believes that this aspect of the proposed rule is unlikely to have any substantive effects on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.354 requires State savings associations to establish and maintain a BSA compliance program and a customer identification program. Section 390.354 also enumerates the four pillars required for a BSA compliance program. Similarly, § 326.8 of the FDIC's regulations [199] requires insured depository institutions for which the FDIC is the appropriate Federal banking agency to establish a BSA compliance program to include the same four pillars and a customer identification program. The proposed rule would rescind § 390.354 and make technical changes to § 326.8, which is currently only applicable to insured depository institutions for which the FDIC is the appropriate Federal banking agency.[200] Because the amended § 326.8 would be duplicative of § 390.354 the FDIC believes that this aspect of the proposed rule is unlikely to have any effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.355 requires State savings associations and service corporations to make certain reports. Subsection 390.355 (a) requires State savings associations to make periodic reports to the FDIC in such a manner and on such forms as the FDIC may prescribe. Statutory authorities enable the FDIC to require reports be filed by small, FDIC-supervised state savings associations.

Subsection 390.355(b) prohibits State savings associations from making false or misleading statements or omissions to the FDIC and to auditors of State savings associations. The Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.[201] On August 9, 2011, the OCC published in the **Federal Register** a final rule that contained a provision, 12 CFR 163.180(b), that is substantially similar to § 390.355(b) and that applies to both State and Federal savings associations.[202] It prohibits all savings associations from knowingly making false or misleading statements to their ''appropriate Federal banking agency'' and to those auditing the institution.[203] The OCC's prohibition at § 163.180(b) effectively prohibits a State savings association from making false or misleading statements to the FDIC or to any party auditing or preparing or reviewing its financial statements. Therefore, the FDIC believes that rescinding this subsection will have no effect on small, FDIC-supervised state savings associations.

Subsection 390.355(c) requires a State Savings association maintaining bond insurance coverage to promptly notify its carrier and file a proof of loss concerning any covered losses more than twice the deductible amount. The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management of a *de novo* financial institution applying for deposit insurance.[204] However, the FDIC does not otherwise impose a reporting requirement such as the one contained in § 390.355(c).[205] This aspect of the proposed rule potentially reduces reporting requirements on small, FDIC-supervised state savings associations. The FDIC believes that these potential effects are likely to be relatively small. However, it is difficult to estimate these effects because it depends on the financial condition of, and future decisions of senior management at, small, FDIC-supervised savings associations.

Subsection § 390.355(d) regulates SARs for state savings associations, was enacted in concert with the other Federal banking agencies, including the

[194] 12 U.S.C. 1831e(a).

[195] *See* 12 CFR 362.9–.15.

[196] *See* 12 CFR 362.9(a).

[197] *See* 12 CFR 163.172.

[198] 12 CFR part 364, App. A, § II.E.

[199] 12 CFR 326.8, 326.1(a).

[200] 12 CFR 326.8 is applicable to ''all insured nonmember banks as defined in 12 CFR 326.1.'' Section 326.1 was revised to remove the definition of ''insured nonmember bank'' and replace it with the term ''FDIC-supervised institution'' or ''institution'', defined to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act (12 U.S.C. 1813(q). 83 FR 13839, 13842 (April 2, 2018).

[201] *See* 12 U.S.C. 5412(b)(2)(B)(i)(II).

[202] 76 FR 49047 (Aug. 9, 2011).

[203] The FDIC is the ''appropriate Federal banking agency'' for any State savings association. *See* 12 U.S.C. 1813(q).

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

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

OCC,[206] the FRB,[207] and the FDIC,[208] as well as the Financial Crimes Enforcement Network (FinCEN).[209] These entities issued substantially similar proposals, which became effective on April 1, 1996. As mentioned earlier, paragraphs (1)–(8), (12), and (13) of § 390.355(d) mirror § 353.3 for state nonmember banks. The notification requirements for board of directors, or a committee of directors or executive officers of state savings associations outlined paragraph (9) of subsection 390.355(d) also mirror notifications requirements in § 353.3. Paragraph (9) of subsection 390.355(d) also states that if the subject of the SAR is a director or executive officer, the State savings association may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but shall notify all directors who are not suspects. In this circumstance, § 353.3 does not have analogous language; however, the FDIC relies on 31 U.S.C. 5813(g)(2) to achieve the same purpose. Paragraph (10) of subsection 390.355(d) states that a State savings association's failure to file a SAR in accordance with this section may subject the State savings association, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action. In this circumstance, § 353.3 does not have analogous language. Although § 353.3 does not explicitly provide a remedy for failure to file a SAR, the FDIC has enforcement authority for violations of law or regulation.[210] Therefore, the FDIC proposes to rescind subsection 390.355(d)(10) in its entirety because it is unnecessary. Paragraph (11) of subsection 390.355(d) states that a State savings association may obtain SARs and the instructions from the appropriate FDIC region as defined in § 303.2 of the FDIC's regulations. In this circumstance, § 353.3 does not have analogous language. However, FDIC-supervised institutions can obtain SAR forms electronically. FinCEN converted to the BSA E-Filing System for filing SARs for all financial institutions;[211] therefore this provision is now obsolete as forms are no longer available from FDIC regions. With this proposed rule the FDIC proposes to make conforming changes to §§ 353.1 and 353.3 to make part 353 of the FDIC's regulations applicable to all FDIC-supervised institutions, including state savings associations. Therefore, the FDIC believes that rescinding this subsection of § 390.355 will have no effect on small, FDIC-supervised state savings associations.

Subsection 390.355(e) requires State savings associations within the jurisdiction of a FHLB to provide data from the Call Report upon the request of the FHLB. The FDIC is required under section 402(e)(3) of FIRREA ''to take such action as may be required as may be necessary to assure that the indexes prepared by the . . . Federal home loan banks immediately prior to the enactment of this subsection and used to calculate the interest rate on adjustable rate mortgage instruments continue to be available.''[212] As noted above, the Dodd-Frank Act provided the OCC with rulemaking authority relating to both State and Federal savings associations.[213] On August 9, 2011, the OCC published in the **Federal Register** a final rule that contained a provision, § 163.180(e), that is substantially similar to § 390.355(e) and that applies to both State and Federal savings associations.[214] It requires all savings associations within the jurisdiction of that FHLB to report specified data items for the FHLB to use in calculating and publishing an adjustable-rate mortgage index.[215] Because the provision contained in the OCC's regulation is applicable to all savings associations and is substantially similar to the rule found at § 390.355(e), the FDIC believes that rescinding this subsection will not have any effect on small, FDIC-supervised state savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.356 requires fidelity bond coverage for directors, officers, employees, and agents of State savings associations. Neither the FDI Act nor the FDIC's regulations for State nonmember banks contain similar prescriptive language concerning fidelity bonds that would be applicable to State savings associations. Section 18(e) of the FDI Act authorizes, but does not mandate, that the FDIC to require an insured depository institution to ''provide protection and indemnity against burglary, defalcation, and other similar insurable losses.''[216] The FDIC generally requires fidelity bond insurance for insured depository institutions and considers whether fidelity bond insurance is in place when analyzing the general character and fitness of the management of a *de novo* financial institution applying for deposit insurance.[217] However, other than expressing general guidelines regarding the appropriate level of insurance coverage, the FDIC does not otherwise impose requirements such as the ones contained in § 390.356.[218] There are no other relevant provisions concerning fidelity bond coverage or the use of fidelity bond proceeds. And, there is no analogous statutory or regulatory language for State nonmember banks that mirrors § 390.356. Therefore, rescinding § 390.356 could potentially reduce compliance costs for small, FDIC-supervised state savings associations if they choose to make changes to their fidelity bond coverage. The FDIC believes that this aspect of the proposed rule is likely to pose relatively small effects on small, FDIC-supervised state savings associations. However, it is difficult to estimate these effects because it depends on the decisions of senior management at small, FDIC-supervised savings associations.

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, § 390.357 provides that, in lieu of a bond for directors, officers, employees, and agents of State savings associations referenced in § 390.356, the State savings association's board may approve a bond for its agents. This bond must be twice the average monthly collections of such agent, and the agent is required to settle its account with the State savings association at least monthly. Similar to § 390.356, there are not analogous statutory or regulatory requirements for State nonmember banks that resemble § 390.357. Therefore, rescinding § 390.357 could potentially reduce compliance costs for small, FDIC-supervised state savings associations to the extent that they were engaging in such bond coverage practices and choose to make changes. The FDIC believes that this aspect of the proposed rule is likely to pose relatively small

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

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

[208] Suspicious Activity Reports, 61 FR 6095 (Feb. 16, 1996).

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

[210] *See* 12 U.S.C. 1818.

[211] *See https://bsaefiling.fincen.treas.gov/main.html.*

[212] *See* 12 U.S.C. 1437 nt.

[213] *See* 12 U.S.C. 5412(b)(2)(B)(i)(II).

[214] 76 FR 49047 (Aug. 9, 2011).

[215] 12 CFR 163.180(e).

[216] *See* 12 U.S.C. 1828(e).

[217] *See* 12 U.S.C. 1816; Statement of Policy on Applications for Deposit Insurance.

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

effects on small, FDIC-supervised state savings associations. However, it is difficult to estimate these effects because it depends on the decisions of senior management at small, FDIC-supervised savings associations.

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

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

As discussed previously in the **SUPPLEMENTARY INFORMATION** section, §§ 390.360 through 390.368 require certain insured depository institutions and insured depository institution holding companies to furnish the appropriate Federal banking agency with at least 30 days' notice prior to adding any individual to the board of directors or employing any individual as a senior executive officer. It also permits the appropriate Federal banking agency no more than 90 days to issue a notice of disapproval of the proposed addition of a director or employment of a senior executive officer. Subpart F of Part 303 of the FDIC's regulations imposes similar notice filing requirements on insured State nonmember banks. After careful review, for the reasons described above in Section X. of the **SUPPLEMENTARY INFORMATION** section, the FDIC proposes to amend subpart F of Part 303 so that it applies to State savings associations as well as State nonmember banks and to rescind and remove §§ 390.360 through 390.368. Therefore, the FDIC believes that rescinding §§ 390.360 through 390.368 is unlikely to have any effect on small, FDIC-supervised state savings associations.

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects that the FDIC has not identified on small entities?

C. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA),[219] 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.[220] The FDIC, along with the other Federal banking agencies, submitted a Joint Report to Congress on March 21, 2017, (''EGRPRA Report'') discussing how the review was conducted, what has been done to date to address regulatory burden, and further measures that will be taken to address issues that were identified. 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 S, this Proposed Rule complements other actions the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [221] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the Proposed Rule in a simple and straightforward manner. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

E. Riegle Community Development and Regulatory Improvement Act of 1994

The Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, 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, new regulations and amendments to regulations that impose additional reporting, disclosure, or other new requirements on insured depository institutions generally must 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

[219] Public Law 104–208, 110 Stat. 3009 (1996).

[220] Public Law 104–208, 110 Stat. 3009 (1996).

[221] Public Law 106–102, 113 Stat. 1338, 1471 (codified at 12 U.S.C. 4809).

form.[222] The FDIC invites comments that further will inform its consideration of RCDRIA.

List of Subjects

12 CFR Part 303

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

12 CFR Part 326

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

12 CFR Part 337

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

12 CFR Part 353

Banks, banking, Crime, Reporting and recordkeeping requirements.

12 CFR Part 390

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

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

PART 303—FILING PROCEDURES

■ 1. The authority citation for 12 CFR Part 303 is revised to read as follows:

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

■ 2. Amend § 303.2 by redesignating paragraphs (s) through (ff) as paragraphs (t) through (gg) and adding a new paragraph (s) to read as follows:

* * * * *

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

* * * * *

■ 3. Revise § 303.62 to read as follows:

§ 303.62 Transactions requiring prior approval.

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

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

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

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

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

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

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

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

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

■ 4. Revise § 303.64 to read as follows:

§ 303.64 Processing

(a) *Expedited processing for eligible depository institutions*—(1) *General.* An application filed under this subpart by an eligible depository institution as defined in § 303.2(r) and which meets the additional criteria in paragraph (a)(4) of this section will be acknowledged by the FDIC in writing and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

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

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

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

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

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

(3) Notwithstanding paragraphs (a)(1) or (2) of this section, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

[222] 12 U.S.C. 4802.

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

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

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

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

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

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

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

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

■ 5. Revise § 303.100 to read as follows:

§ 303.100 Scope

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

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

§ 303.101 Definitions

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

* * * * *

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

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

* * * * *

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

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

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

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

§ 303.102 Filing procedures and waiver of prior notice

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

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

(2) Is in troubled condition; or

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

* * * * *

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

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

* * * * *

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

* * * * *

■ 8. Revise § 303.103 to read as follows:

§ 303.103 Processing

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

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

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

(c) *Notice of disapproval.* The FDIC may disapprove a notice filed under § 303.102 if the FDIC finds that the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted indicates that it would not be in the best interests of depositors of the FDIC-supervised institution or in the best interests of the public to permit the individual to be employed by, or associated with the FDIC-supervised institution. Subpart L of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

■ 9. Revise § 303.200(b) to read as follows:

§ 303.200 Scope

* * * * *

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

■ 10. Revise § 303.203 to read as follows:

§ 303.203 Applications for capital distributions.

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

(b) *Content of filing.* An application to repurchase, redeem, retire, or otherwise acquire shares or ownership interests of the FDIC-supervised institution shall describe the proposal, the shares or obligations that are the subject thereof, and the additional shares or obligations of the institution that will be issued in at least an amount equivalent to the distribution. The application also shall explain how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition. If the proposed action also requires an application under § 303.241 of this part regarding prior consent to retire capital, such application should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*).

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

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

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

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

* * * * *

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

* * * * *

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

■ 12. Revise the authority citation for 12 CFR part 326 to read as follows:

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

■ 13. Revise § 326.1(a) to read as follows:

§ 326.8 Definitions

* * * * *

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

* * * * *

■ 14. Revise § 326.8 to read as follows:

§ 326.8 Bank Secrecy Act Compliance

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

(b) *Compliance procedures*—(1) *Program requirement.* Each institution shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the institution's board of directors, and noted in the minutes.

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

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

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by institution personnel or by an outside party;

(3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

■ 15. Revise the authority citation for 12 CFR 337 to read as follows:

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

■ 16. Revise § 337.3 to read as follows:

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

(a) With the exception of 12 CFR 215.5(b), 215.5(c)(3), and 215.5(c)(4), FDIC-supervised institutions are subject to the restrictions contained in Federal Reserve Board Regulation O (12 CFR part 215) to the same extent and to the same manner as though they were member banks.

(b) For the purposes of compliance with § 215.4(b) of Federal Reserve Board Regulation O, no FDIC-supervised institution may extend credit or grant a line of credit to any of its executive officers, directors, or principal shareholders or to any related interest of any such person in an amount that, when aggregated with the amount of all other extensions of credit and lines of credit by the FDIC-supervised institution to that person and to all related interests of that person, exceeds the greater of $25,000 or five percent of the FDIC-supervised institution's unimpaired capital and unimpaired surplus,[3] or $500,000 unless:

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

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

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

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

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

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

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

(3) For the purposes of paragraph (c) of this section, the definitions of the terms used in Federal Reserve Board Regulation O shall apply including the exclusion of executive officers of an FDIC-supervised institution's parent bank or savings and loan holding company and executive officers of any other subsidiary of that bank or savings and loan holding company from the definition of executive officer for the purposes of complying with the loan restrictions contained in section 22(g) of the Federal Reserve Act. For the purposes of complying with § 215.5(d) of Federal Reserve Board Regulation O, the reference to ''the amount specified for a category of credit in paragraph (c) of this section'' shall be understood to refer to the amount specified in paragraph (c)(2) of this § 337.3.

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

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

■ 17. Revise § 337.11 to read as follows:

§ 337.11 Effect on other banking practices.

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

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

PART 353—SUSPICIOUS ACTIVITY REPORTS

■ 18. Revise the authority citation for 12 CFR part 353 to read as follows:

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

§ 353.1 [Amended]

■ 19. Amend § 353.1 by removing the term ''insured nonmember bank'' and adding in its place the term ''FDIC-supervised institution''.

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

§ 353.2 Definitions

* * * * *

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

§ 353.3 [Amended]

■ 21. Amend § 353.3 by:

■ a. Removing the term ''insured nonmember bank'' and adding in its place the term ''FDIC-supervised institution'';

■ b. Removing the term ''bank'' and adding in its place the term ''institution''.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

■ 22. The authority citation for part 390 continues to read as follows:

Authority: 12 U.S.C. 1819.

Subpart S—[Removed]

■ 23. Remove subpart S consisting of §§ 390.330 through 390.368

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 15, 2019.

Annmarie H. Boyd,

Assistant Executive Secretary.

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