



6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 390

RIN 3064-AE08

Regulations Transferred from Office of Thrift Savings and Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) proposes to rescind and remove regulations transferred from the Office of Thrift Savings (“OTS”), and amend its rules of practice and procedure in ways that will ensure that all insured depository institutions, for which the FDIC is the appropriate Federal banking agency (“FBA”), are subject to the same substantive and procedural rules governing administrative hearings.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

• **FDIC Web Site:** <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the agency website.

• **FDIC E-mail:** *Comments@fdic.gov*. Include RIN 3064-AE08 on the subject line of the message.

• **FDIC 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.

Please include your name, affiliation, address, e-mail address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. 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 <http://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1-877-275-3342 or 1-703-562-2200.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation (“FDIC”) proposes to rescind and remove from

the Code of Federal Regulations 12 CFR part 390, subparts B, C, D, and E as redundant of existing uniform rules of practice and procedure applicable to administrative hearings. These subparts were included in the regulations that were transferred to the FDIC from the Office of Thrift Savings (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). With few exceptions addressed below, the requirements for State savings associations in Part 390, subparts B through E are substantively similar to those in FDIC’s 12 CFR part 308, subparts A, B, C, K, and N. The FDIC further proposes to amend 12 CFR part 308, subparts A, B, C, K, and N, to modify the scope of the rules to include State savings associations and to conform to and reflect the scope of the FDIC’s current supervisory responsibilities as the appropriate Federal banking agency for those institutions. Additionally, the FDIC proposes to modify these regulations in minor ways that will ensure that all insured depository institutions, for which the FDIC is the appropriate Federal banking agency (“FBA”), are subject to the same substantive and procedural rules governing administrative hearings.

I. Part 308 Amendments

A. Background

The Dodd-Frank Act 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, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were

divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (“OCC”), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (“FRB”), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), 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. The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC’s Board of Directors approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the *Federal Register* on July 6, 2011.¹

Although Section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC’s

¹ 76 FR 39247 (July 6, 2011).

existing authority to issue regulations under the FDI Act and other laws as the “appropriate Federal banking agency” or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in Section 3(q) of the FDI Act, 12 U.S.C. 1813(q), 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, as well as for State nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, pursuant to this authority, the FDIC’s Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.² When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating the transferred OTS regulations into other FDIC regulations, amending them, or rescinding them, as appropriate.

B. Summary of the Amendments

Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) required the FDIC, the FRB, the OCC, the OTS, and the National

² 76 FR 47652 (Aug. 5, 2011).

Credit Union Association (“NCUA”) to adopt joint uniform rules of practice and procedures and “local rules” that govern administrative hearings. Since August 1991, the FDIC has been operating under uniform rules set forth at 12 CFR part 308, subpart A, 12 CFR 308.1 -308.41, as well as its own set of “local rules” set forth at 12 CFR part 308, subpart B, 12 CFR 308.101- 308.107. The FDIC proposes to amend part 308, subparts A, B, C, K, and N to make several technical and conforming changes to expand the scope of the rules and procedures to include enforcement actions brought against State savings associations under additional statutory authority transferred from the OTS.

FDIC’s Existing 12 CFR Part 308, Subpart A -- Uniform Rules of Practice and Procedure

Part 308, subpart A contains the uniform rules of procedure agreed to and followed by all of the Federal banking agencies. The FDIC presented these proposed changes to the OCC, the FRB, and the NCUA and none of the agencies objected to the proposed revisions to subpart A.

Section 308.1: As presently written, section 308.1 sets the broad parameters of what types of enforcement actions are covered by the Uniform Rules. We propose minor conforming amendments to provide the FDIC with the authority to seek civil money penalties against State savings associations for violations of various laws such as the Federal Reserve Board Act, 12 U.S.C. 1468, and certain sections of the Home Owners’ Loan Act, 12 U.S.C. 1464 (“HOLA”).

Section 308.3: As presently written, section 308.3 defines the terms used in the Uniform Rules. The proposed amendments include a new definition of “Investigation” to provide the FDIC with authority to investigate State savings associations under HOLA that was

previously under OTS authority. Certain amendments will also clarify and update terms such as “Designee”, remove references to the OTS, and also correct a few technical errors in statutory and regulatory citation.

Section 308.25: As presently written, section 308.25 addresses document discovery in enforcement actions covered by the Administrative Procedure Act. We propose to correct a technical citation error.

Former OTS’s 12 CFR Part 509, Subparts A and B (transferred to FDIC’s Part 390, Subpart C)

The OTS’s rules of practice and procedure for adjudicatory proceedings, formerly found at 12 CFR part 509, subparts A and B, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart C. Subpart C contains both the OTS’s uniform rules and local rules. After careful review and comparison of the OTS rules that were transferred to 12 CFR part 390, subpart C to the FDIC’s uniform and local rules, this proposed revision rescinds part 390, subpart C, because it essentially duplicates the uniform rules. To the extent that the OTS local rules contained in subpart C differed from the FDIC’s local rules, those changes are discussed below in part 308, subpart B.

Moreover, it is important that all insured depository institutions for which the FDIC is the appropriate Federal banking agency are subject to the same substantive and procedural rules governing administrative hearings. Rescinding part 390, subpart C will streamline the FDIC’s rules and eliminate unnecessary regulations. Therefore, this proposed revision rescinds 12 CFR part 390, subpart C in its entirety.

FDIC’s Existing 12 CFR Part 308, Subpart B —General Rules of Procedure.

Section 308.101: As presently written, section 308.101(a) sets the scope of the Local Rules and makes clear that the rules contained in subpart A, “Uniform Rules,” and subpart B “Local Rules” do not apply to subparts D through P of part 308 unless specifically provided. We propose to correct a technical citation error. We also propose a new subsection 308.101(d) to provide the FDIC with the authority to seek civil money penalties against State savings associations for violations of the Exchange Act, 15 U.S.C. 78o(c).

Section 308.107: As presently written, section 308.107 restricts discovery in administrative enforcement proceedings to document discovery only. We propose to correct an internal technical citation error.

Former OTS’s 12 CFR Part 509, Subparts A and B (transferred to FDIC’s Part 390, Subpart C)

The OTS’s rules of practice and procedure for adjudicatory proceedings, formerly found at 12 CFR part 509, subparts A and B, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart C. Subpart C contains both the OTS’s uniform rules and local rules. In contrast to the FDIC local rules, the OTS local rules permitted additional discovery procedures such as depositions and had formal provisions pertaining to certain post-hearing motions and extensions of time. FDIC staff found that additional discovery procedures permitted by the OTS local rules were not necessary or appropriate. The OTS local rules also contained two provisions that formalized post-hearing procedures. The FDIC generally follows these practices when needed, but relies on the informal broad discretion of the Board and/or the Administrative Law Judge to make the appropriate rulings. After careful review and comparison of transferred OTS

local rules at 12 CF part 390, subpart C to the FDIC's local rules, this proposed revision rescinds part 390, subpart C in its entirety. Rescinding part 390, subpart C will streamline the FDIC's rules and eliminate unnecessary regulations.

FDIC's Existing 12 CFR Part 308, Subpart C —Rules of Practice Before the FDIC and Standards of Conduct.

Section 308.109: As presently written, section 308.109(b) sets forth the requirements for mandatory suspension and debarment. Subsection 308.109(b)(2) proposes adding language requiring attorneys who wish to appear before the FDIC as legal counsel to disclose any professional disciplinary actions so that the Board can determine whether counsel is fit to represent individuals in an administrative proceeding.

Former OTS's 12 CFR Part 513 (transferred to FDIC's Part 390, Subpart E)

The OTS rules for practice before the FDIC, formerly found at 12 CFR part 513, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart E. Subpart E is repetitive of the FDIC's rules of practice before the FDIC and standards of conduct found at 12 CFR part 308, subpart C, and certain of the FDIC's uniform rules found at 12 CFR part 308, subpart A. After a careful review and comparison, this proposed revision rescinds part 390, subpart E in its entirety because it is repetitive of part 308, subparts A and C.

FDIC's Existing 12 CFR Part 308, Subpart K —Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA.

This subpart K covers rules applicable to the FDIC's formal investigations. We proposed changing the title of this Subpart to reflect additional authority under HOLA transferred from the OTS.

Section 308.144: As presently written, section 308.144 sets the scope of investigations covered by the subpart. We propose revisions to this subsection to include additional statutory authority applicable to State savings associations.

Section 308.145: As presently written, section 308.145 covers the conduct and approval of formal investigations. We propose technical changes to cover investigations under HOLA and to reflect the FDIC's current internal organization.

Section 308.146: As presently written, section 308.146 sets forth the powers of the person conducting the investigation. We propose a technical change to cover investigations under HOLA and to clarify conduct standards for counsel participating in the investigation.

Section 308.147: As presently written, section 308.147 protects the confidentiality of investigations. We propose a technical change to ensure the confidentiality of investigations under HOLA.

Section 308.148: As presently written, section 308.148 covers the rights of witnesses participating in a formal investigation. We propose a technical change to include witnesses in a HOLA investigation. Additionally, we propose language clarifying that counsel does not have the right to attend formal testimony if they are not personally representing the witness. This is also to ensure the confidentiality of the investigation.

Section 308.150: As presently written, section 308.150 covers transcripts of sworn testimony. We propose a technical change to clarify that a witness must submit a written request to obtain a transcript of his or her testimony.

Former OTS's 12 CFR Part 512 (transferred to FDIC's Part 390, Subpart D)

The OTS rules for investigative proceedings and formal examination proceedings, formerly found at 12 CFR part 512, were transferred to the FDIC and relocated with nominal changes to 12 CFR part 390, subpart D. Part 390, subpart D governed the OTS's procedures for conducting its formal investigations under section 10(c) of the FDI Act, 12 U.S.C. 1820(c). After a careful review and comparison of 12 CFR part 390, subpart D, and the FDIC's analogous regulation, 12 CFR part 308, subpart K, this proposed revision rescinds part 390, subpart D in full because it is substantially duplicative of part 308, subpart K. To the extent that there were minor differences in the OTS versions those minor changes are reflected in the amendments to part 308, subpart K described above.

FDIC's Existing 12 CFR Part 308, Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Section 308.161: As presently written, section 308.161 covers the scope of the rules applicable when a felony is charged. We propose a technical change to subsection 308.161(a) to include institution-affiliated parties ("IAPs") of State savings institutions.

Section 308.163: As presently written, section 308.163 relates to the notice of suspension, removal, or prohibition. We propose changes to paragraph 308.163(a)(2) to clarify that the suspension or prohibition under this subpart N is effective immediately. We propose further changes to paragraph 308.163(c) to clarify the effect of service of the notice and the content of the notice. We also propose a new paragraph 308.163(d) and to clarify certain rights and obligations of IAPs in regards to requesting a hearing and the content of any response to the notice.

Section 308.164: As presently written, section 308.164 covers hearing procedures under this subpart N. We propose changes to paragraph 308.164(b)(3) to clarify the right to an

oral argument and to paragraph 308.164(b)(5) to provide a transcript of the hearing to the presiding officer. We also propose a new paragraph 308.164(10) to clarify that the IAP has the burden of demonstrating that the IAP's continued participation in the banking industry does not pose a threat to depository institutions.

Former OTS's 12 CFR Part 508 (transferred to FDIC's Part 390, Subpart B)

Former part 508 of the OTS regulations, 12 CFR part 508, addressed removals, suspensions, and prohibitions where a crime is charged or proven. The regulation was transferred to the FDIC with only nominal changes and republished as subpart B of 12 CFR part 390. After a careful review and comparison of 12 CFR part 390, subpart B, and the FDIC's analogous regulation, 12 CFR part 308, and the proposed changes to part 308, subpart N described above, this proposed revision rescinds part 390, subpart B in full because it is substantially duplicative of part 308, subpart N.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(b)(3), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 390, subparts B through E, the FDIC, as the appropriate federal banking agency for State savings associations, proposes to rescind part 390, subparts B through E in their entirety. The FDIC also proposes to amend part 308, subparts A, B, C, K, and N to make several technical and conforming changes as described below.

A. Changes to Subpart A -- Uniform Rules of Practice and Procedure

Section 308.1 Scope: In section 308.1(e)(1) the phrase “or 12 U.S.C. 1468” is added at the end of the sentence to add authority to seek civil money penalties against State savings associations for violations of Sections 23A and 23B of the Federal Reserve Board Act, 12 U.S.C. 1468. Additionally, in section 308.1(e)(9) after “FDIC” the phrase “or the former Office of Thrift Supervision (OTS)” is inserted. Finally, three new paragraphs are proposed to include additional authority for State savings associations at 308.1(e) by inserting new sections to cover Sections 5, 9, and 10 of the Home Owners’ Loan Act (HOLA), pursuant to 12 U.S.C. 1464(d), 1467(d), and 1467a.

Section 308.3 Definitions: In section 308.3(e) to simplify the term “Designee”, the phrase at the end of the subsection “as provided in 12 CFR part 303 of this chapter or by specific resolution of the Board of Directors” would be stricken. To correct a technical error in section 308.3(j) the term “Institution” should refer to the statutory citation at the end of the subsection “12 U.S.C. 1467a(a).” A new section 308.3(l) would be added to define “Investigation” stating “*Investigation* means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).” In section 308.3(m), we propose deleting the phrase “the Office of Thrift Supervision (“OTS”)”. In section 308.3(q), we propose a technical correction to the “Uniform Rules” term by deleting “§308.01” and inserting “§308.1”. Finally, the subsections 308.3(l) through 308.3(r) would be renumbered to accommodate the new section 308.3(l).

Section 308.25 Request for document discovery from parties: As presently written, § 308.25 “Request for document discovery from parties”, addressed document discovery in enforcement actions covered by the Administrative Procedure Act. In section 308.25(b),

“Production or copying” we propose to correct a technical citation error by deleting “part 310” and inserting “part 309”.

B. Changes to Subpart B – General Rules of Procedure

Section 308.101 Scope of Local Rules:

In section 308.101(a), we propose a technical correction to the internal citation by deleting “§308.01” and inserting “§308.1”. We also propose a new subsection with the following language “(d) Subparts A, B, and C prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).”

Section 308.107 Document discovery:

In subsection 308.107(a), we propose a technical correction to the internal citation that deletes “§308.01” and inserts “§308.1”.

C. Changes to Subpart C -- Rules of Practice Before the FDIC and Standards of Conduct

Section 308.109 Suspension and disbarment:

In subsection 308.109(b)(2), we propose adding the following language immediately before the last sentence “Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the FDIC, for that reason alone may be

disqualified from practicing before the FDIC until such time as the appropriate filing shall be made.”

D. Changes to Subpart K -- Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

We propose changing the title of this subpart K to add “and Section 5(d)(1)(B) of HOLA” at the end.

Section 308.144 Scope:

We propose adding “or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B))” immediately following the phrase “pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c))”.

Section 308.145 Conduct of investigation:

We propose striking the first sentence and inserting the following sentence, “An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees.”

Section 308.146 Powers of person conducting investigation:

In the first sentence, after “conduct” insert “the” and strike the phrase immediately following “a section 10(c)”. Additionally, in the second to last sentence in the paragraph, we propose replacing the phrase “been guilty of” with “engaged in” as well as inserting the phrase “dilatory, obstructionist, or contumacious” before “conduct”. Similarly, after

“conduct” we propose adding the phrase “or has otherwise violated any provision of this part during the course of an investigation.”

Section 308.147 Investigations confidential:

We propose striking the phrase “conducted pursuant to section 10(c)” from the first sentence.

Section 308.148 Rights of witnesses:

We propose striking the phrase “pursuant to section 10(c)” from the opening sentence. In paragraph 308.148(c), we suggest adding the following sentence at the end “Neither attorney(s) for the institution that is the subject of the investigation, nor attorney(s) for any other interested persons, shall have any right to be present during the testimony of any witness not personally represented by such attorney;”.

Section 308.150 Transcripts:

In subsection 308.150(a) *General rule*, we propose striking the phrase “in an investigation pursuant to section 10(c)” in the first sentence. We further propose inserting the phrase “that the witness submits a written request for the transcript and” after “provided” and before “the transcript” in the second to last sentence.

E. Changes to Subpart N -- Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Section 308.161 Scope:

In paragraph 308.161(a), in the first sentence after the phrase “of an insured state nonmember bank, or”, we propose to insert the phrase “an insured state savings association, or”.

Section 308.163 Notice of Suspension or prohibition, and orders of removal or prohibition:

In paragraph 308.163(a)(2), in the first sentence after the phrase “institution-affiliated party”, we propose to insert “who shall immediately comply with the requirements thereof,”. In paragraph 308.163(c)(1), we propose to strike the term “receipt” and replace it with “service”. In paragraph 308.163 (c)(2), we suggest striking the opening phrase “Summarize or cite to” and insert “Set forth the basis and facts in support of the notice or order and address”. Finally, we propose to add a new paragraph 308.163(d) adopting the OTS requirements for requesting a hearing under this section. The new paragraph provides guidance for the institution-affiliated party to identify the issues to be resolved and the requested relief.

Section 308.164 Hearings:

In paragraph 308.164(b)(3), we propose adding the following sentence at the end of the paragraph, “Following the introduction of all evidence, the applicant and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.” In paragraph 308.164(b)(5), we propose adding the following sentence at the end of the paragraph, “A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record sua sponte or upon the motion of any party.” Finally, we propose to add a new paragraph 308.164(b)(10) clarifying that the institution-affiliated party has the burden of proof to show that his or her continued participation in the industry does not pose a threat to, or public confidence in, insured institutions.

III. Request for Comments

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

Do the amended provisions of 12 CFR part 308, subparts A, B, C, K, and N consistently apply the same regulation to both State savings associations and State nonmember banks?

What negative impacts, if any, can you foresee in the FDIC's proposed revisions of 12 CFR part 308, subparts A, B, C, K, and N?

Written comments must be received by the FDIC no later than [insert date 60 days after publication in the FEDERAL REGISTER].

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

The Proposed Rule would rescind and remove from FDIC regulations part 390, subparts B, C, D, and E, and makes minor amendments to part 308, subparts A, B, C, K, and N to expressly make those provisions applicable to State savings associations and to modify FDIC regulations in minor ways that will improve enforcement practices and procedures. These regulations will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.* requires that each federal agency either (1) certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities, or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for

comment. This rule has a limited scope: it removes redundant regulations that affect State savings associations, and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Notwithstanding this certification, the FDIC invites comments on the impact of this rule on small entities.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, codified at 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. 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?

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.³ The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. The Federal Register document would request that EGRPRA related comments be specific and provide alternatives whenever appropriate.

List of Subjects

12 CFR Part 390

Administrative practice and procedure, Banks, Banking, Claims, Investigations Lawyers, Penalties, Standards of Conduct, State nonmember banks, and State savings associations.

12 CFR Part 308

Administrative practice and procedure, Banks, Banking, Claims, Investigations Lawyers, Penalties, Standards of Conduct, State nonmember banks, and State savings associations.

³ Pub. L.104-208 (Sept. 30, 1996).

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend parts 308 and 390 of Title 12 of the Code of Federal Regulations as set forth below:

PART 308 – RULES OF PRACTICE AND PROCEDURE

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

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), and 5414(b)(3); 15 U.S.C. 78 (h) and (i), 78o(c)(4), 78o-4(c), 78o-5, 78q-1, 78s 78u, 78u-2, 78u-3 and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; sec. 31001(s), Pub. L. 104-134, 110 Stat. 1321-358, Pub. L. 109-351, and Pub. L. 111-203, 124 Stat. 1376.

Subpart A—Uniform Rules of Practice and Procedure

2. In § 308.1, revise paragraphs (e) introductory text, (e)(1), and (e)(9), and add paragraphs (e)(12) through (14) to read as follows:

§ 308.1 Scope.

* * * * *

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (“FRA”), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

* * *

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

* * *

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d)(1), (5)-(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(14) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)-(4) and (r).

* * * * *

3. In § 308.3, revise paragraphs (e), (j)(3), and (l) through (r), and add paragraph (s) to read as follows:

§ 308.3 Definitions.

* * * * *

(e) *Designee* of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors.

* * * * *

(j) ***

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

* * * * *

(l) *Investigation* means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).

(m) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

(n) *Office of Financial Institution Adjudication* (“OFIA”) means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve Board (“FRB”), the FDIC, and the National Credit Union Administration (“NCUA”).

(o) *Party* means the FDIC and any person named as a party in any notice.

(p) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (j) of this section.

(q) *Respondent* means any party other than the FDIC.

(r) *Uniform Rules* means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.1 and as specified in subparts B through P of this part.

(s) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

4. In § 308.25, revise paragraph (b) to read as follows:

§ 308.25 Request for document discovery from parties.

* * * * *

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per page copying rate imposed by 12 CFR part 309 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

* * * * *

Subpart B – General Rules of Procedure

5. In § 308.101, revise paragraph (a) and add paragraph (d) to read as follows:

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1 of the Uniform Rules.

* * * * *

(d) Subparts A, B, and C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).

6. In § 308.107, revise paragraph (a) to read as follows:

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.1 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

* * * * *

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

7. In § 308.109, revise paragraphs (b)(1) and (2) to read as follows:

§ 308.109 Suspension and disbarment.

* * * * *

(b) * * *

(1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any state, territory, district, commonwealth, or possession; or any person who has been and remains suspended or barred from practice before the OCC, Board of Governors, the OTS, the NCUA, the Securities and Exchange Commission, or the Commodity Futures Trading Commission; or any person who has been, within the last ten years, convicted of a felony, or of a misdemeanor involving moral turpitude, shall

be suspended automatically from appearing or practicing before the FDIC. A disbarment, suspension, or conviction within the meaning of this paragraph (b) shall be deemed to have occurred when the disbaring, suspending, or convicting agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment or an order on a plea of nolo contendere or on consent, regardless of whether a violation is admitted in the consent.

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Executive Secretary a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made. Failure to file any such paper shall not impair the operation of any other provision of this section.

* * * * *

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA and Section 5(d)(1)(B) of HOLA

8. Section 308.144 is revised to read as follows:

§ 308.144 Scope.

The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any

institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)) or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)). The Uniform Rules and subpart B of the Local Rules shall not apply to investigations under this subpart.

9. Section 308.145 is revised to read as follows:

§ 308.145 Conduct of investigation.

An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.

10. Section 308.146 is revised to read as follows:

§ 308.146 Powers of person conducting investigation.

The person designated to conduct the investigation shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the main office of the bank, institution, or affiliate is located or in

which the witness resides or conducts business. The person conducting the investigation may obtain the assistance of counsel or others from both within and outside the FDIC. The persons who issue the order of investigation may limit, quash, or modify any subpoena or subpoena duces tecum, upon application and for good cause shown. The person conducting an investigation may report to the Board of Directors any instance where any attorney has engaged in contemptuous dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigation. The Board of Directors, upon motion of the person conducting the investigation, or on its own motion, may make a finding of contempt and may then summarily suspend, without a hearing, any attorney representing a witness from further participation in the investigation.

11. Section 308.147 is revised to read as follows:

§ 308.147 Investigations confidential.

Investigations shall be confidential. Information and documents obtained by the FDIC in the course of such investigations shall not be disclosed, except as provided in part 309 of this chapter and as otherwise required by law.

12. In § 308.148, revise the introductory text and paragraph (c) to read as follows:

§ 308.148 Rights of witnesses.

In an investigation:

* * * * *

(c) All persons testifying shall be sequestered. Such persons and their counsel shall not be present during the testimony of any other person, unless permitted in the discretion of the person conducting the investigation. Neither attorney(s) for the institution that is the

subject of the investigation, nor attorney(s) for any other interested persons, shall have any right to be present during the testimony of any witness not personally represented by such attorney;

* * * * *

13. In § 308.150, revise paragraph (a) to read as follows:

§ 308.150 Transcripts.

(a) *General rule.* Transcripts of testimony, if any, shall be recorded by an official reporter, or by any other person or means designated by the person conducting the investigation. A witness may, solely for the use and benefit of the witness, obtain a copy of the transcript of his or her testimony at the conclusion of the investigation or, at the discretion of the person conducting the investigation, at an earlier time, provided that the witness submits a written request for the transcript and the transcript is available. The witness requesting a copy of his or her testimony shall bear the cost thereof.

* * * * *

**Subpart N—Rules and Procedures Applicable to Proceedings Relating to
Suspension, Removal, and Prohibition Where a Felony Is Charged**

14. In § 308.161, revise the introductory text and paragraph (a) introductory text to read as follows:

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following:

(a) Proceedings to suspend an institution-affiliated party of an insured state nonmember bank, or an insured state savings association, or to prohibit such party from further participation in the conduct of the affairs of any depository institution, if continued

service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

* * * * *

15. In § 308.163, revise paragraph (a)(2) and (c)(1) and (2), and add paragraph (d) to read as follows:

§ 308.163 Notice of suspension or prohibition, and orders of removal or prohibition.

(a) ***

* * * * *

- (2) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, who shall immediately comply with the requirements thereof, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

* * * * *

(c) ***

- (1) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after service of the written notice or order; and

(2) Set forth the basis and facts in support of the notice or order and address the relevant considerations specified in § 308.162 of this subpart.

(d) To obtain a hearing, the institution-affiliated party shall file with the Executive Secretary a written request for a hearing within 30 days after service of the notice of suspension or prohibition or the order of removal or prohibition, which shall:

(1) Admit or deny specifically each allegation in the notice or order, or state that the institution-affiliated party is without knowledge or information, which statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When an institution-affiliated party intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder; and

(2) Shall state whether the institution-affiliated party is requesting termination or modification of the notice or order, and shall state with particularity how he intends to show that his continued service to or participation in the conduct of the affairs of the depository institution would not, or is not likely to, pose a threat to the interests of its depositors or to impair public confidence in the depository institution.

16. In § 308.164, revise paragraphs (b)(3) and (5), and add paragraph (b)(10) to read as follows:

§ 308.164 Hearings.

* * * * *

(b) * * *

(3) The institution-affiliated party may appear at the hearing and shall have the right to introduce relevant and material documents. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff. Following the introduction of all evidence, the applicant and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

* * * * *

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the institution-affiliated party afforded the hearing. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record sua sponte or upon the motion of any party.

* * * * *

(10) The institution-affiliated party has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of a depository institution does not, or is not likely to,

pose a threat to the interests of the depository institution's depositors or
threaten to impair public confidence in the depository institution.

PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

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

Authority: 12 U.S.C. 1819.

Subpart A also issued under 12 U.S.C. 1820.

Subpart B also issued under 12 U.S.C. 1818.

Subpart C also issued under 5 U.S.C. 504; 554-557; 12 U.S.C. 1464; 1467; 1468;
1817; 1818; 1820; 1829; 3349, 4717; 15 U.S.C. 78l; 78o-5; 78u-2; 28 U.S.C.
2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart D also issued under 12 U.S.C. 1817; 1818; 1820; 15 U.S.C. 78l.

Subpart E also issued under 12 U.S.C. 1813; 1831m; 15 U.S.C. 78.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 *et seq.*

Subpart G also issued under 12 U.S.C. 2810 *et seq.*, 2901 *et seq.*; 15 U.S.C. 1691; 42
U.S.C. 1981, 1982, 3601-3619.

Subpart H also issued under 12 U.S.C. 1464; 1831y.

Subpart I also issued under 12 U.S.C. 1831x.

Subpart J also issued under 12 U.S.C. 1831p-1.

Subpart L also issued under 12 U.S.C. 1831p-1.

Subpart M also issued under 12 U.S.C. 1818.

Subpart N also issued under 12 U.S.C. 1821.

Subpart O also issued under 12 U.S.C. 1828.

Subpart P also issued under 12 U.S.C. 1470; 1831e; 1831n; 1831p-1; 3339.

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

Subpart R also issued under 12 U.S.C. 1463; 1464; 1831m; 1831n; 1831p-1.

Subpart S also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1468a; 1817; 1820;
1828; 1831e; 1831o; 1831p-1; 1881-1884; 3207; 3339; 15 U.S.C. 78b; 78l; 78m;
78n; 78p; 78q; 78w; 31 U.S.C. 5318; 42 U.S.C. 4106.

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

Subpart U also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78l; 78m;
78n; 78p; 78w; 78d-1; 7241; 7242; 7243; 7244; 7261; 7264; 7265.

Subpart V also issued under 12 U.S.C. 3201-3208.

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

Subpart X also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828; 3331 *et seq.*

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

Subpart Z also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828 (note).

Subpart B — [Removed and reserved]

18. Remove and reserve part 390, subpart B consisting of §§ 390.10 through 390.23.

Subpart C — [Removed and reserved]

19. Remove and reserve part 390, subpart C consisting of §§ 390.30 through 390.75.

Subpart D — [Removed and reserved]

20. Remove and reserve part 390, subpart D consisting of §§ 390.80 through 390.86.

Subpart E — [Removed and reserved]

21. Remove and reserve part 390, subpart E consisting of §§ 390.90 through 390.97.

Dated at Washington, D.C., this 8th day of April, 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman

Executive Secretary

[FR Doc. 2014-08260 Filed 04/18/2014 at 8:45 am; Publication Date: 04/21/2014]