



6714-01-P

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Parts 365 and 390**

**RIN 3064-AE22**

**Removal of Transferred OTS Regulations Regarding Lending and Investment; and Conforming Amendments to Other Regulation**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) is adopting a final rule (final rule) to rescind and remove the “Lending and Investment” regulations because they are unnecessary, redundant, or duplicative of existing FDIC regulations; to amend certain sections of existing FDIC regulations governing real estate lending standards to make them applicable to all insured depository institutions for which the FDIC is the appropriate Federal banking agency; and to rescind and remove “Registration of Residential Mortgage Loan Originators” regulations because supervision and rulemaking authority in this area was transferred to the Consumer Financial Protection Bureau (Bureau) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

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

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,<sup>1</sup> the powers, duties and functions of the former Office of Thrift Supervision (OTS) were divided among the FDIC for State savings associations and the Office of the Comptroller of the Currency (OCC) for Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB) for savings and loan holding companies. Section 316(b) of the Dodd-Frank Act provides the manner of treatment of all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS.<sup>2</sup> The section provides that if such regulatory 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and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.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 continued OTS regulations to be enforced by each respective

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<sup>1</sup> 12 U.S.C. 5411.

<sup>2</sup> 12 U.S.C. 5414(b).

agency that would continue to remain in effect until the appropriate Federal banking agency modified or removed the regulations in accordance with the applicable laws. The list was published by the FDIC and OCC as a Joint Rule in the *Federal Register* on July 6, 2011,<sup>3</sup> and shortly thereafter, the FDIC published its transferred OTS regulations as new FDIC regulations in 12 CFR parts 390 and 391.<sup>4</sup> 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.

Further, section 312(c) of the Dodd-Frank Act amended the definition of “appropriate Federal banking agency” contained in section 3(q) of the Federal Deposit Insurance Act (FDI Act)<sup>5</sup> to add State savings associations to the list of entities for which the FDIC is designated the “appropriate Federal banking agency.” As a result, when the FDIC acts as the “appropriate Federal banking agency” for State savings associations, as it does today, it has the authority to issue, modify, and rescind regulations involving such associations as well as for State nonmember banks and insured U.S. branches of foreign banks.<sup>6</sup>

Finally, the Dodd-Frank Act amended the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act),<sup>7</sup> transferring the mortgage loan originator registration authority of the FDIC and certain other Federal agencies (the

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<sup>3</sup> 76 FR 39246 (Jul. 6, 2011).

<sup>4</sup> 76 FR 47652 (Aug. 5, 2011).

<sup>5</sup> 12 U.S.C. 1813(q).

<sup>6</sup> *See also* 12 U.S.C. 5412(b)(2)(C)(ii) (“the Corporation shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision on the day before the transfer date relating to the functions transferred under clause (i).” [relating to State savings associations]).

<sup>7</sup> 12 U.S.C. 5101, *et seq.*

S.A.F.E. Act Agencies) to the Bureau.<sup>8</sup> On December 10, 2011, the Bureau published its Regulation G<sup>9</sup> which substantially duplicated the FDIC's S.A.F.E. Act regulation at part 365, subpart B of the FDIC's regulations.

## **II. Proposed Rule**

### *A. Removal of Part 390, Subpart P, Lending and Investment*

On February 5, 2019, the FDIC published an NPR regarding the removal of part 390, subpart P (formerly OTS part 560), which addressed lending and investments by State savings associations.<sup>10</sup> The former OTS rule was transferred to the FDIC with only nominal changes. The NPR proposed removing part 390, subpart P from the Code of Federal Regulations (CFR) because, after careful review and consideration, the FDIC believed it was largely unnecessary, redundant, or duplicative of existing FDIC regulations.<sup>11</sup>

### *B. Amendments to Part 365, Subpart A, Real Estate Lending Standards*

In the NPR, the FDIC also proposed to further effectuate the transfer of supervisory authority for State savings associations from the former OTS to the FDIC by amending certain parts of part 365 of the FDIC's regulations to clarify that part 365, subpart A applies to all insured depository institutions, including State savings associations, for which the FDIC is the appropriate Federal banking agency.<sup>12</sup>

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<sup>8</sup> See section 1100 of the Dodd-Frank Act.

<sup>9</sup> See 12 CFR part 1007.

<sup>10</sup> 84 FR 1653 (Feb. 5, 2019).

<sup>11</sup> See 84 FR 1655-58.

<sup>12</sup> See *id.* at 1658.

*C. Removal of Part 365, Subpart B, Registration of Residential Mortgage Loan Originators*

Finally, the FDIC proposed to rescind subpart B of part 365, which relates to registration requirements for residential mortgage loan originators, due to the Bureau's issuance of its<sup>13</sup> regulation, Regulation G, pursuant to the Bureau's authority under the Dodd-Frank Act. In light of the Bureau's action, the FDIC considered the provisions contained in part 365, subpart B to be unnecessary, redundant, or otherwise duplicative of the Bureau regulation governing this area.<sup>14</sup>

**III. Comments**

The FDIC issued the NPR with a 60-day comment period, which closed on April 8, 2019. The FDIC received no comments on the NPR, and consequently the final rule is adopted without change.

**IV. Explanation of the Final Rule**

As discussed in the NPR, 12 CFR part 390, subpart P is being rescinded in its entirety because other existing FDIC regulations concerning permissible activities, safety and soundness standards, and real estate lending standards replicate the current requirements of part 390, subpart P.

To clarify that part 365 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC is amending sections 365.1 and 365.2 of

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<sup>13</sup> The S.A.F.E. Act was enacted as part of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654, sections 1501-17 (codified at 12 U.S.C. 5101-16) as amended by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. 111-203, 124 Stat. 1376). The S.A.F.E. Act requires residential mortgage loan originators employed by depository institutions, subsidiaries that are owned and controlled by a depository institution and regulated by a Federal banking agency, institutions regulated by the National Credit Union Administration, and institutions regulated by the Farm Credit Administration to register with the Nationwide Mortgage Licensing System and Registry, obtain a unique identifier, and maintain such registration.

<sup>14</sup> See 84 FR 1658-59.

part 365 to replace the phrases “insured state nonmember banks (including state-licensed insured branches of foreign banks)” and “state nonmember bank” throughout subpart A with the phrase “FDIC-supervised institution.” In addition, section 365.1 is being revised to add the definition of the term “FDIC-supervised institution” to mean any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act.<sup>15</sup>

Finally, because the Dodd-Frank Act amended the S.A.F.E. Act, transferring Federal registration requirements for mortgage loan originators from the S.A.F.E. Act Agencies (including the FDIC) to the Bureau, and the Bureau has finalized its Regulation G, the FDIC is rescinding part 365, subpart B, in its entirety, because it is outdated and no longer necessary.

## **V. Administrative Law Matters**

### *A. Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),<sup>16</sup> the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The final rule rescinds and removes from FDIC regulations part 390, subpart P. With regard to part 365, subpart A, the final rule amends sections 365.1 and 365.2 to clarify that State savings associations as well as State nonmember banks and foreign banks having insured branches are all subject to part 365. It also rescinds and removes from the FDIC’s regulations part 365, subpart B. The final rule will not create any new

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<sup>15</sup> 12 U.S.C. 1813(q).

<sup>16</sup> 44 U.S.C. 3501-3521.

or revise any existing collections of information under the PRA. Therefore, no information collection request has been submitted to the OMB for review.

*B. The Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), requires that, in connection with a final rule, an agency prepare a final regulatory flexibility analysis that describes the impact of the proposed rule on small entities.<sup>17</sup> 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 \$550 million.<sup>18</sup> For the reasons provided below, the FDIC certifies that the rule 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 December 31, 2018, the FDIC supervised 3,489 insured financial institutions, of which 2,674 are considered small banking organizations for the purposes of the RFA. The rule primarily affects regulations that govern State savings associations.

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<sup>17</sup> 5 U.S.C. 601, *et seq.*

<sup>18</sup> The SBA defines a small banking organization as having \$550 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, effective December 2, 2014). “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 the RFA.

There are 36 State savings associations considered to be small banking organizations for the purposes of the RFA.<sup>19</sup>

As explained previously, the rule would remove sections 390.260, 390.261, 390.262, 390.263, 390.264, 390.265, 390.266, 390.267, 390.268, 390.269, 390.270, 390.271, and 390.272 of part 390, subpart P because these sections are unnecessary, redundant of, or otherwise duplicative of other FDIC regulations for safety and soundness standards. Because these regulations are redundant to existing regulations, rescinding them would not have any substantive effects on small FDIC-supervised institutions.

As explained previously, part 364 covers State savings associations in section 364.101 and in appendix A. Because the lending documentation practices and standards in part 364, appendix A are substantively similar to existing regulations for State savings associations found in section 390.271, rescinding section 390.271 and the rest of part 390, subpart P would not have any substantive effects on small FDIC-supervised institutions.

As stated previously, the rule would amend part 365, subpart A so that it would expressly apply to State savings associations. Because the real estate lending requirements in sections 365.1 and 365.2 and part 364, appendix A are substantively identical to currently applicable regulations for State savings associations found in 390.264 and 390.265 (including the appendix to section 390.265), amending part 365, subpart A so that it would apply to all FDIC-supervised institutions would not have any substantive effects on small FDIC-supervised institutions.

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<sup>19</sup> FDIC Call Report, December 31, 2018.

As explained previously, the rule would rescind part 365, subpart B because the authority to implement Federal registration requirements for mortgage loan originators has been transferred by statute to the Bureau. Because rulemaking authority for the S.A.F.E. Act was transferred to the Bureau in December 2011, the removal of the FDIC's S.A.F.E. Act regulations would not have any substantive effects on small FDIC-supervised covered institutions.

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

*C. Small Business Regulatory Enforcement Fairness Act, Congressional Review Act*

The OMB has determined that the Final Rule is not a "major rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>20</sup> As required by SBREFA, the FDIC will submit the Final Rule and other appropriate reports to Congress and the Government Accountability Office for review.

*D. Plain Language*

Section 722 of the Gramm-Leach-Bliley Act<sup>21</sup> requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. In the NPR, the FDIC invited comments on whether the NPR was clearly stated and effectively organized, and how the FDIC might make it easier to understand. No comments on this issue were received. Although the FDIC did not receive any comments, the FDIC sought to present the Final Rule in a simple and straightforward manner.

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<sup>20</sup> 5 U.S.C. 801 *et seq.*

<sup>21</sup> Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (1999), codified at 12 U.S.C. 241 nt.

*E. The Economic Growth and Regulatory Paperwork Reduction Act*

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA),<sup>22</sup> 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.<sup>23</sup> 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 the agency will take 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 P, and modifying part 365, this rule complements other actions the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

*F. Riegle Community Development and Regulatory Improvement Act of 1994*

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

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<sup>22</sup> 12 U.S.C. 3311.

<sup>23</sup> Pub. L. 104–208, 110 Stat. 3900 (1996).

regulations that impose additional reporting, disclosures, 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 form.<sup>24</sup> The FDIC has determined that the final rule would not impose additional reporting, disclosure, or other requirements; therefore, the requirements of the RCDRIA do not apply.

### **List of Subjects**

#### **12 CFR Part 365**

Banks, banking, Mortgages, Savings associations.

#### **12 CFR Part 390**

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

### **Authority and Issuance**

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR parts 365 and 390 as follows:

#### **PART 365—REAL ESTATE LENDING STANDARDS**

##### **Subpart A—Real Estate Lending Standards [Amended]**

1. Revise the authority citation for part 365 to read as follows:

**Authority:** 12 U.S.C. 1828(o), 5412.

2. Revise § 365.1 to read as follows:

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<sup>24</sup> 12 U.S.C. 4802.

**§ 365.1 Purpose and scope.**

This subpart, issued pursuant to section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribes standards for real estate lending to be used by FDIC-supervised institutions in adopting internal real estate lending policies. For purposes of this subpart, the term “FDIC-supervised institution” means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

3. In § 365.2, revise paragraphs (a), (b)(1)(iii), (b)(2)(iii) and (iv), and (c) to read as follows:

**§ 365.2 Real estate lending standards.**

(a) Each FDIC-supervised institution shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) \* \* \*

(iii) Be reviewed and approved by the FDIC-supervised institution’s board of directors at least annually.

(2) \* \* \*

(iii) Loan administration procedures for the FDIC-supervised institution’s real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the FDIC-supervised institution's real estate lending policies.

(c) Each FDIC-supervised institution must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.

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**Subpart B— [Removed and Reserved]**

4. Remove and reserve subpart B, consisting of §§ 365.101 through 365.105, and appendix A to subpart B.

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

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

**Authority:** 12 U.S.C. 1819.

**Subpart P— [Removed and Reserved]**

6. Remove and reserve Subpart P, consisting of §§ 390.260 through 390.272.

Federal Deposit Insurance Corporation.  
By order of the Board of Directors.  
Dated at Washington, DC, on June 18, 2019.  
**Valerie Best,**  
*Assistant Executive Secretary.*

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