Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 362 and 390

RIN 3064–AF37

Removal of Transferred OTS Regulations Regarding Certain Subordinate Organizations of State Savings Associations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking with request for public comment.

SUMMARY: In order to streamline Federal Deposit Insurance Corporation (FDIC) regulations, the FDIC proposes to rescind and remove from the Code of Federal Regulations (CFR) regulations entitled *Subordinate Organizations* that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The proposed rule would rescind and remove the transferred regulations because the FDIC has determined that the requirements for State savings association subordinate organizations included therein are substantially similar to the requirements for State savings associations and their subsidiaries set forth by certain sections of the Federal Deposit Insurance Act (FDI Act) and its implementing regulations. Therefore, the FDIC is proposing to remove the transferred regulations and proposes to use certain substantially similar FDIC regulations, as applicable, to achieve substantially similar supervisory results for State savings associations and their subsidiaries as could be obtained through the application of the transferred regulations.

DATES: Comments must be received on or before November 25, 2020.

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

• *Agency website: https://www.fdic.gov/regulations/laws/federal/.* Follow instructions for submitting comments on the agency website.

• *FDIC Email: Comments@fdic.gov.* Include RIN 3064–AF37 on the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/RIN 3064–AF37, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

• *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW 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.

Public Inspection: All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/,* including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002.

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.

FOR FURTHER INFORMATION CONTACT: Donald Hamm, Special Advisor, (202) 898–3528, *dhamm@fdic.gov;* or Shelli Coffey, Review Examiner, (312) 382–7539, *scoffey@fdic.gov,* Risk Management and Applications, Division of Risk Management Supervision; Suzanne Dawley, Counsel, *sudawley@fdic.gov; or* Karlyn J. Hunter, Counsel, *khunter@fdic.gov,* Legal Division.

SUPPLEMENTARY INFORMATION:

I. Policy Objective

The policy objective of the proposed rule is to simplify the FDIC's regulations by removing unnecessary regulations and realigning existing regulations in order to improve the public's understanding of the rules and to improve the ease of the public's reference to them. Thus, as further detailed in this section, the FDIC proposes to rescind and remove from the CFR part 390, subpart O.[1] Pursuant to subpart O, the FDIC may, at any time, limit a State savings association's investment in their subordinate organizations, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons.[2]

Subpart O includes definitions related to State savings association subsidiaries,[3] a requirement for the parent State savings association and its subsidiaries to maintain separate corporate identities,[4] a prior notice requirement for a State saving association seeking to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary,[5] requirements related to the issuance of securities by a subsidiary,[6] and requirements for the exercise of salvage power by a State savings association.[7]

The FDIC has determined that the requirements for State savings association subordinate organizations set forth in subpart O are substantially similar to requirements of section 28 and its implementing regulations, subpart C and subpart D of part 362 of the FDIC's Rules and Regulations, and section 37 of the FDI Act.[8] Therefore, the FDIC is proposing to remove subpart O and proposes to use part 362, subpart C and subpart D, as applicable, to achieve substantially similar supervisory results for State savings associations and subsidiaries as could be obtained through the application of subpart O.

II. Background

A. The Dodd-Frank Act

The Dodd-Frank Act, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding

[1] 12 CFR part 390, subpart O.

[2] 12 CFR part 390.250.

[3] 12 CFR 390.251.

[4] 12 CFR 390.252.

[5] 12 CFR 390.253.

[6] 12 CFR 390.254.

[7] 12 CFR 390.255.

[8] 12 U.S.C. 1831e(a); 12 CFR part 362, subparts C and D; 12 U.S.C. 1831n(a).

companies.[9] Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,[10] 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 [11] 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. The section provides that if such materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Pursuant to section 316(c) of the Dodd-Frank Act,[12] 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.[13]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act [14] granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act (FDI Act) [15] and other laws as the ''appropriate Federal banking agency'' or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act [16] revised the definition of ''appropriate Federal banking agency'' contained in section 3(q) of the FDI Act [17] 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 is designated as the ''appropriate Federal banking agency'' (or under similar terminology) for State savings associations, the FDIC is authorized to issue, modify, and rescind regulations involving such associations.

As noted, on July 14, 2011, operating pursuant to this authority, the FDIC's Board of Directors reissued and re-designated 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.[18] When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.[19]

B. 12 CFR Part 559

In 1996, the OTS adopted part 559, entitled *Subordinate Organizations,* which updated and substantially streamlined its regulations and statements of policy concerning subsidiaries and other subordinate organizations in which savings associations have ownership interests (including operating subsidiaries and service corporations) and equity investments (including pass-through investments).[20] Part 559 consolidated all OTS regulations affecting thrift subsidiaries in order to make it easier for savings associations to find and use these regulations.

The definitions in part 559 were derived in large part from existing OTS regulatory or statutory definitions.[21] Subpart B of part 559 was applicable to all savings associations. Section 559.10 prescribed requirements for a savings association and its subordinate organizations to establish and maintain separate identities in order to reduce the potential for customer confusion and to allow a court to hold the parent savings association liable for the subordinate organization's conduct or obligations. In order to establish or acquire a new subsidiary or engage in new activities, savings associations were required to follow the notice procedures set forth in § 559.11.

Part 559 addressed securities and investments issues related to savings associations as well. Section 559.12 included a replacement for an existing OTS regulation that required a savings association to notify the OTS before a subsidiary issues securities, regardless of the purpose for which the proceeds will be used, and incorporated requirements providing that securities issued by all subsidiaries state that they are not covered by federal deposit insurance and may not be called or accelerated in the event of the savings association's insolvency.[22] Section 559.13 replaced the application procedure for salvage investments, with a 30-day notice requirement.[23] In the notice, a savings association must fully document its additional investment in a service corporation or a lower-tier entity in a manner that demonstrates how its action is consistent with safety and soundness and document the other salvage alternatives that it considered.[24] The OTS added language to emphasize that investments made using salvage power authority continue to be considered investments for purposes of the capital regulation.[25]

C. Part 390, Subpart O

12 CFR part 559, as discussed above, was transferred to the FDIC with nominal changes. It is now found in the FDIC's rules at subpart O, entitled *Subordinate Organizations.*[26] Subpart O governs a range of requirements for subordinate organization of State savings associations, as further discussed below.

III. 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.[27] Consistent with the FDIC's stated intention to evaluate transferred OTS regulations before taking action on them, the FDIC conducted a careful review of subpart O and related Federal statutes, regulation, and statements of policy relevant to subordinate organizations of State savings associations. As discussed in Part III of this Supplementary Information section, the FDIC proposes to rescind and remove subpart O in its entirety, because the provisions contained there are duplicative of substantially similar FDIC statutory or regulatory provisions, or guidance that produce the same supervisory result.

Section 28 of the FDI Act prohibits a State savings association from engaging

[9] Public Law 111–203, 124 Stat. 1376 (2010).

[10] 12 U.S.C. 5411.

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

[12] 12 U.S.C. 5414(c).

[13] 76 FR 39246 (July 6, 2011).

[14] 12 U.S.C. 5412(b)(2)(B)(i)(II).

[15] 12 U.S.C. 1811 *et seq.*

[16] 12 U.S.C. 5412(c)(1).

[17] 12 U.S.C. 1813(q).

[18] 76 FR 47652 (Aug. 5, 2011).

[19] *Id.*

[20] 61 FR 66561, 66562 (Dec. 18, 1996).

[21] *Id* at 66563.

[22] *Id.* at 66567.

[23] *Id.*

[24] *Id.*

[25] *Id.* For example, a salvage investment in a nonincludable subsidiary would be deducted in calculating the State savings association's capital.

[26] 12 CFR part 390, subpart O.

[27] 12 U.S.C. 5414(b)(3).

as principal in any type of activity, or in any activity in an amount, that is not permissible for a Federal savings association unless the FDIC has determined the activity would pose no significant risk to the Deposit Insurance Fund (DIF); and the savings association is and continues to be in compliance with the capital standards set forth in section 5(t) of HOLA.[28] The FDIC proposes to use 12 CFR part 362, *Activities of Insured State Banks and Insured Savings Associations,* as applicable, which provides a substantially similar process for an insured State savings association, or its subsidiary, to apply for prior consent from the FDIC to engage in certain activities, that are not otherwise prohibited by federal or state law, while reaching substantially the same result as provided in subpart O without the burden of referring to a duplicative set of regulations.

Subpart C of part 362 governs the activities of insured State savings associations and implements section 28(a) of the FDI Act, which restricts and prohibits insured 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 their service corporations.

Subpart D of part 362 governs acquiring, establishing, or conducting new activities through a subsidiary by an insured State savings association, and implements section 18(m) of the FDI Act, which requires that prior notice be given to the FDIC when an insured savings association establishes or acquires a subsidiary or engages in any new activity in a subsidiary. In doing so it applies the definitions of § 362.2 unless otherwise indicated. The phrase ''activity permissible for a Federal savings association'' means any activity authorized for a Federal savings association under any statute including the Home Owners' Loan Act (HOLA),[29] as well as activities recognized as permissible for a Federal savings association in regulations issued by the OCC or in bulletins, orders or written interpretations issued by the OCC, or by the former OTS until modified, terminated, set aside, or superseded by the OCC.[30]

[28] 12 U.S.C. 1831e(a).

[29] 12 U.S.C. 1464 *et seq.*

[30] 12 CFR 362.9(a).

IV. Section-by-Section Analysis

A. Section 390.250—What does this subpart cover?

Section 390.250 sets forth the FDIC's general rulemaking and supervisory authority under the FDI Act, its specific authority under section 18(m) of the Federal Deposit Insurance Act[31] and subpart O's application to subordinate organizations of State savings associations. Pursuant to this section, the FDIC may, at any time, limit a State savings association's investment in any of its subordinate organizations, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons. For the purposes of subpart O, notices are applications for purposes of statutory and regulatory references to the term ''applications.'' Further, any conditions that the FDIC imposes in approving any application are enforceable as a condition imposed in writing by the FDIC in connection with the granting of a request by a State savings association within the meaning of section 8(b) or 8(i) of the FDI Act.[32]

Part 362, which includes subparts C and D, is issued pursuant to several FDIC authorities, including the FDIC's general rulemaking authority pursuant to section 9(a)(Tenth) and section 28 of the FDI Act, the FDIC's statutory authority over the activities of State savings associations and subsidiaries, that are substantially similar to the authorizing statutes pursuant to which subpart O and § 390.250 were issued. Therefore, the FDIC is proposing to remove subpart O and proposes to use part 362, subparts C and D, as applicable, to achieve substantially similar supervisory results for State savings associations and subsidiaries as could be obtained through subpart O.

B. Section 390.251—Definitions

Section 390.251 is a definition section related to subordinate organizations. Included in the definitions section are: *Control, GAAP-consolidated subsidiary, lower-tier entity, ownership interest, subordinate organization,* and, *subsidiary.*

The *control* definition is a cross-reference to the former OTS § 391.41 definition,[33] which provided that a controlling shareholder is any person who, directly or indirectly, or acting in concert with one or more persons or companies, or together with members of his or her immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company, or controls in any manner the election or appointment of a majority of the company's board of directors.[34] For the purposes of State savings associations and their services companies, the FDIC proposes to apply the § 362.2(e) *control* definition. Pursuant to § 362.2(e), control means ''the power to vote, directly or indirectly, 25 percent or more of any class of the voting securities of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.''[35] This definition is consistent with the control definition applicable to service companies of Federal savings associations which references the FRB's part 225, Regulation Y.[36]

[31] 12 U.S.C. 1828(m).

[32] 12 U.S.C. 1818(b); 1818(i).

[33] The FDIC rescinded control definition at § 391.41 as part of its 2015 *Filing Requirements and Processing Procedures for Changes in Control with respect to State Nonmember Banks and State Savings Associations* rulemaking. 80 FR 65889 (Oct. 28, 2015).

The definition of *equity investment* in § 362.2(g) is broader than the definition of *ownership interest* in 390.251, which ''means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.'' *Equity investment* ''means an ownership interest in any company; any membership interest that includes a voting right in any company; any interest in real estate; any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction; and includes an equity security.''[37] Similarly, the definition of *subsidiary* pursuant to § 362.2(r) is substantially similar to the subsidiary definition in § 390.251. The distinction is that § 362.2(r) defines a *subsidiary* as ''any company that is owned or controlled directly or indirectly by one or more insured depository institutions, rather than only by a State savings association.''

In the 1996 preamble to part 559, the OTS stated that the *subordinate organization* definition encompassed all business organizations in which a savings association has a direct or indirect ownership interest except where that ownership interest has been acquired through the use of the savings association's pass-through investment authority.[38] The OTS further explained

[34] 12 CFR 391.41 (2015).

[35] 12 CFR 362.2(e).

[36] 12 CFR 5.59(d); 12 CFR part 225.

[37] 12 CFR 362.2(g).

[38] 61 FR at 66563.

the term was adopted primarily in order to avoid potential confusion arising from the use of the term *subsidiary* both as a generic term for a business organization in which a savings association has an ownership interest and as a more specific term used to describe a narrower category of companies in which the savings association's ownership interest is significant enough to give it direct or indirect control.[39] The OTS also added to part 559 *lower-tier entity,* which includes all business organizations in which an operating subsidiary, service corporation, or other subordinate organization has an ownership interest, such as *second-tier service corporations* or *service corporation subsidiaries.* The distinctions in these two definitions do not appear to enhance the quality of State savings association supervision from the perspective of the State savings association or the FDIC, as supervisor; therefore, the FDIC proposes to rescind and remove these definitions. Likewise, the OCC rescinded and removed these definitions in the 2015 rule integrating licensing rules of national banks and Federal savings associations.[40]

Lastly, the FDIC believes that a separate definition for *GAAP-consolidated subsidiary* is unnecessary as State savings association reports and financial statements are required to be uniform and consistent with U.S. generally accepted accounting principles (GAAP) pursuant to section 37 of the FDI Act and section 4(b) of the Homeowners Owners Loan Act (HOLA).[41] Further, the instructions to the Consolidated Reports of Condition and Income (Call Report) state that the regulatory reporting requirements applicable to the Call Report shall conform to GAAP as set forth in the Financial Accounting Standards Board's Accounting Standards Codification.[42] Because State savings associations have existing statutory directives to use GAAP in reporting and financial statements, eliminating a substantially similar regulation regarding GAAP-consolidated subsidiaries likely would not affect the quality of State savings association reporting and financial statements.

For these reasons, the FDIC proposes to rescind § 390.251 in its entirety.

C. Section 390.252—How must separate corporate entities be maintained?

Section 390.252 requires State savings associations and their subordinate organizations to operate in a manner that demonstrates to the public that they are separate corporate entities because of concerns that a failure to maintain separate corporate existences could potentially result in a court, for equitable reasons, holding the savings association liable for the obligations of the subordinate organization.[43] This requires that State savings associations and their subordinate organizations must independently meet in order to meet this requirement. The requirements provide that each State savings association and subordinate organization: (1) Avoid intermingling their business transactions, accounts and records; (2) observe separate corporate procedures; (3) be adequately financed as separate entities based on the character and size of their respective businesses; (4) each independently hold out itself to the public as separate enterprise; and that (5) indicate that the State savings association is not liable for any borrowings by the subordinate organization, unless the parent State savings association has guaranteed a loan to the subordinate organization.[44]

The core eligibility requirements in § 362.4(c) describe corporate separateness in the context of the state-chartered depository institution-subsidiary. The eligible subsidiary requirements in 362.4(c)(2)—which are more detailed than eligible subsidiary requirements of 390.252—are designed specifically for the bank/subsidiary relationship, and provide for separation between the state-chartered depository institution and its subsidiary to lessen the possibility of piercing the corporate veil; deduction of the state-chartered depository institution investment in the subsidiary to segregate the capital supporting the state-chartered depository institution from the capital supporting the subsidiary; and limitations on the state-chartered depository institution's investment in the subsidiary and on transactions with the subsidiary to ensure transactions are arms-length.[45] The eligible subsidiary requirements are also incorporated into § 362.13. Section 362.13 permits a State savings association that previously filed an application, and obtained the FDIC's consent to engage in an activity or to acquire or retain an investment in a service corporation engaging as principal in an activity, to continue the activity or retain the investment without seeking the FDIC's consent, provided the State savings association and the service corporation, if applicable, continue to meet the conditions and restrictions of approval if the insured state savings association and any applicable service corporation meet the requirements of § 362.4(c)(2).[46]

The provisions of § 362.4(c)(2) that are duplicative of § 390.251 require that an eligible subsidiary: (1) Meet applicable statutory or regulatory capital requirements and have sufficient operating capital for normal obligations that are reasonably foreseeable for a business of its size and character; (2) be physically separate and distinct in its operations from the operations of the state-chartered depository institution; (3) maintain separate accounting and other business records; (4) observe separate business entity formalities; (5) conduct business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the state-chartered depository institution; and (6) that the state-chartered depository institution is not responsible for, and does not guarantee, the obligations of the subsidiary.[47]

State savings associations and service corporations that qualify as eligible depository institutions and eligible subsidiaries pursuant to § 362.4(c) maintain separate corporate identities, which should sufficiently insulate State savings associations from the liabilities of subsidiaries. For this reason, the FDIC proposes to remove and rescind § 390.252 as duplicative.[48]

D. Section 390.253—What notices are required to establish or acquire a new subsidiary or engage in new activities through a subsidiary?

Pursuant to § 390.253, a State savings association must file a notice with the FDIC prior to establishing, acquiring or engaging in new activities of a subsidiary as required under section 18(m) of the FDI Act.[49] This section provides that such a notice must contain all of the information required under § 362.15, is subject to FDIC objection, and must be filed at least 30 days prior

[39] *Id.*

[40] 80 FR 28414, May 18, 2015. Regulations pertaining to operating subsidiaries of Federal savings associations and service corporations are found at 12 CFR 5.38 and 5.59, respectively.

[41] 12 U.S.C. 1831n(a)(2); 12 U.S.C. 1463(b)(2).

[42] Instructions for Preparation of Consolidated Reports of Condition and Income, Form FFIEC 031 and 041 *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201906_i.pdf.*

[43] 61 FR at 66567.

[44] 12 CFR 390.252(a).

[45] 12 CFR 362.4(c). *See* FIL–97–97. September 23, 1997.

[46] 12 CFR 362.13.

[47] Section 362.4(c)(2)(vii) corresponds to §§ 390.252(a)(4) and (5).

[48] The OCC retained separate corporate identity provisions for service corporation in its 2015 final rule integrating licensing rules of national banks and Federal savings associations. 80 FR 28467, May 18, 2015. 12 CFR 5.59(e)(8).

[49] 12 CFR 390.253. *See* 12 U.S.C 1828(m)(1).

to the establishment or acquisition of a subsidiary or commencement of a new activity through a subsidiary. The notice requirements of § 362.15 are substantially similar to the transferred OTS notice requirement in § 390.253. For this reason, the FDIC proposes to rescind and remove § 390.253 because it is duplicative.

Federal Savings Association Notice Requirement in § 362.15

Section 363(7) of the Dodd-Frank Act amended section 18(m) of the FDI Act to change notification requirements for insured savings associations as a result of the transfer of the powers, duties, and functions formerly performed by the OTS that were divided among the FDIC, as to State savings associations, and the Office of the Comptroller of the Currency (OCC), as to Federal savings associations.[50] After the Dodd-Frank Act amendment of section 18(m) of the FDI Act, Federal savings associations are no longer required to provide notice to the FDIC prior to the establishment, or acquisition, of a subsidiary, or prior to commencement of a new activity in a subsidiary controlled by a federal savings association.[51] State savings banks must continue to notify the FDIC at least 30 days prior to establishing or acquiring a subsidiary or prior to commencement of a new activity through a State savings association-controlled subsidiary pursuant to section 18(m).[52] To reflect the amendment, the FDIC proposes to remove the references to Federal savings association notice requirements remaining in § 362.15 as part of the proposal.[53]

E. Section 390.254—How may a subsidiary of a State savings association issue securities?

Section 390.254 permits a State savings association subsidiary to issue, either directly or through a third party intermediary, any securities that its parent State savings association is permitted to issue. The subsidiary must not state or imply that the securities it issues are covered by federal deposit insurance, nor may it issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that State savings association is insolvent or is placed into receivership.[54] The State savings association, for as long as any securities are outstanding, must maintain all records generated through each securities issuance in the ordinary course of business, including a copy of any prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the FDIC.[55] Such records must include, but are not limited to: (1) The amount of assets or liabilities (including any guarantees made with respect to the securities issuance) that have been transferred or made available to the subsidiary; the percentage that such amount represents of the current book value of assets on an unconsolidated basis; and the current book value of all such assets of the subsidiary; (2) the terms of any guarantee(s) issued by the State savings association or any third party; (3) a description of the securities the subsidiary issued; (4) the net proceeds from the issuance of securities (or the pro rata portion of the net proceeds from securities issued through a jointly owned subsidiary); the gross proceeds of the securities issuance; and the market value of assets collateralizing the securities issuance (any assets of the subsidiary, including any guarantees of its securities issuance made); (5) the interest or dividend rates and yields, or the range thereof, and the frequency of payments on the subsidiary's securities; (6) the minimum denomination of the subsidiary's securities; and (7) where the subsidiary marketed or intends to market the securities.[56]

The OCC retained certain of these requirements for operating subsidiaries and service corporations of Federal savings associations in the 2015 final rule integrating licensing rules of national banks and Federal savings associations.[57] Pursuant to OCC regulations, neither an operating subsidiary nor a service corporation ''shall state or imply that the securities it issues are covered by Federal deposit insurance,'' or ''issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that the controlling Federal savings association is insolvent or has been placed into receivership, and for as long as any securities are outstanding, the controlling Federal savings association must maintain all records generated through each securities issuance in the ordinary course of business, including but not limited to a copy of the prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the OCC.''[58]

State savings association subsidiaries are permitted to issue securities pursuant to section 28 of the FDI Act because the operating subsidiaries and service corporations of Federal savings associations are permitted to issue securities, subject to regulatory limitations. State savings associations and subsidiaries are reminded that subsidiary issuances, like other permissible activities, are subject to the same restrictions or conditions imposed on the Federal savings association and must be conducted in the same manner in which an operating subsidiary or service corporation is authorized to issue such securities.

Accordingly, a State savings association subsidiary should not state or imply that the securities it issues are covered by Federal deposit insurance, or issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that the controlling State savings association is insolvent or has been placed into receivership, and for as long as any securities are outstanding, the controlling State savings association must maintain all records generated through each securities issuance in the ordinary course of business, including but not limited to a copy of the prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the FDIC. For these reasons, the FDIC proposes to remove and rescind § 390.254.

F. Section 390.255—How may a State savings association exercise its salvage power in connection with a service corporation or lower-tier entities?

Section 390.255 generally permits a State savings association to notify the FDIC at least 30 days before making a contribution or a loan (including a guarantee of a loan made by any other person) to a lower-tier entity (salvage investment) that exceeds the maximum amount otherwise permitted under law or regulation to exercise its power to salvage the underlying asset (typically, an outstanding loan). Without the salvage power provision, the maximum amount a State savings association would be permitted would be related the loans to one borrower limit (LTOB Limit), which is equivalent to the applicable state's legal lending limit.

The salvage power doctrine was a long-held position of the OTS and its

[50] Public Law 111–203, 124 Stat 1376 (2010).

[51] 12 U.S.C. 1828(m).

[52] *Id.*

[53] 12 CFR 362.15.

[54] 12 CFR 390.254(a).

[55] 12 CFR 390.254(c).

[56] *Id.*

[57] 80 FR 28414, May 18, 2015. Regulations pertaining to issuance of securities of operating subsidiaries and service corporations of Federal savings associations are found at 12 CFR 5.38(e)(7) and 5.59(e)(9), respectively.

[58] 12 CFR 5.38(e)(7); 12 CFR 5.59(e)(9).

predecessor, the Federal Home Loan Bank Board (FHLBB),[59] that a Federal savings association has inherent or implied authority to take whatever steps may be necessary to salvage an investment.[60] When integrating the OTS regulations for Federal savings associations, the OCC adopted the position that a Federal savings association has inherent or implied authority to use salvage power,[61] as well as the position that the LTOB Limit is not a specific legal prohibition with respect to the salvage powers doctrine.[62]

Because a State savings association derives its powers, including salvage power, from its respective State chartering banking agency, there may be lack of uniformity among State LTOB Limits (or legal lending limit).[63] For these reasons, staff proposes that State savings associations apply to the FDIC for prior approval pursuant to § 362.11 before making a contribution or a loan to a lower-tier entity (salvage investment) that exceeds the maximum amount otherwise permitted under law or regulation to exercise its power to salvage the underlying asset to be consistent with State law. The applicant would be required to provide evidence that the State approved any exception over the LTOB limit.[64]

For these reasons, the FDIC proposes to remove and rescind § 390.255.

IV. Expected Effects

As of June 30, 2020, the FDIC supervised 3,270 depository institutions, of which 35 (1.1 percent) are State savings associations.[65] The proposed rule primarily would affect regulations that govern State savings associations. As previously discussed, the proposed rule, if adopted, would rescind part 390, subpart O because most of its elements are duplicative of, or substantially similar to the requirements of section 28 of the Federal Deposit Insurance Act (FDI Act) and its implementing regulations, subparts C and D of part 362 of the FDIC's Rules and Regulations, and section 37 of the FDI Act.

Additionally, the proposed rule would amend certain sections of part 362 to remove the references to Federal savings association notice requirements because Federal savings associations are no longer required to provide notice to the FDIC prior to the establishment, or acquisition, of a subsidiary, or prior to commencement of a new activity in a subsidiary controlled by a Federal savings association.[66] The FDIC does not believe that the proposed rule will have substantive effects on State savings associations.

Section 390.250 sets forth the FDIC's general rulemaking and supervisory authority under the FDI Act, its specific authority under section 18(m) of the Federal Deposit Insurance Act[67] and subpart O's application to subordinate organizations of State savings associations. As previously discussed, State savings associations are subject to part 362, subparts C and D, which has the same statutory basis as § 390.350. Therefore, the FDIC believes that the practical application of part 362, subparts C and D, generally achieves the same outcomes for State savings associations as does subpart O. Therefore, the FDIC believes that the proposed rescission of § 390.250, if enacted, is unlikely to have any substantive effects for State savings associations or their subordinate organizations.

Section 390.251 is a definition section related to subordinate organizations. As previously discussed, the FDIC believes that the definitions of *subsidiary* and *GAAP-consolidated subsidiary* are substantially similar to and redundant to other statutory and regulatory requirements to which State savings associations are already subject. As previously discussed, State savings associations are already subject to a definition of *control* in part 362.2(e), a definition that is narrower, however, than the one in § 390.251. Therefore, rescission of § 390.251 could benefit State savings associations by narrowing the scope of investments in subordinate organizations that may be subject to limitation for supervisory, legal, or safety and soundness reasons asserted by the FDIC. Rescission of the definition of control in § 390.251 could further benefit State savings associations by creating parity with the control definition applicable to service companies of Federal savings associations which references the FRB's part 225, Regulation Y.[68] As previously discussed, State savings associations are already subject to a definition of *equity investment* in § 362.2(g), a definition that is broader, however, than the one in § 390.251. Therefore, rescission of § 390.251 is unlikely to pose additional costs for State savings associations because they are already subject to regulations with a substantively similar and broader defined scope of investments in subordinate organizations. Finally, the proposed rescission of § 390.251 would remove definitions of *lower-tier entity* and *second-tier service corporations* or *service corporation subsidiaries* for which there is no corollary in FDIC regulations. However, as previously discussed, the FDIC does not believe that the existence of these defined terms enhance the quality of State savings association supervision. Therefore, the FDIC believes that rescission of these definitions is unlikely to have any substantive effects on State savings associations.

Section 390.252 requires State savings associations and their subordinate organizations to operate in a manner that demonstrates to the public that they are separate corporate entities because of concerns that a failure to maintain separate corporate existences could potentially result in a court, for equitable reasons, holding the savings association liable for the obligations of

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[59] A July 1941 legal opinion provided that savings associations had ''an inherent power and a positive duty'' to salvage an investment to protect the FSLIC insurance fund. FHLBB Op. G.C. B–50, Salvage Operations, July 1, 1941.

[60] Salvage powers permit Federal savings association to take whatever steps necessary to salvage an investment, provided the steps taken are integral parts of a reasonable and bona fide salvage plan and do not contravene a specific legal prohibition. Comptrollers Handbook, Other Real Estate Owned, Version 1.1, August 2018 p. 18.

[61] *See* 12 CFR 5.59(i). (Federal savings association permitted to exercise its salvage powers to make a salvage investment to a service corporation investment); *see also,* Comptroller's Handbook, Other Real Estate Owned (Federal savings association's salvage powers are derived from 12 CFR 160.30, General Lending and Investment Powers, and permit the acquisition, holding, and operation of OREO and the expenditure of additional funds in regard to OREO), *https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/other-real-estate-owned/index-other-real-estate-owned.html,* last visited 7/9/2020.

[62] National banks and savings associations are subject to 12 CFR part 32, Lending Limits, but *see also* Comptroller's Handbook OREO (''(Note: The lending limit is not considered to be a specific legal prohibition within the meaning of the salvage powers doctrine.)'').

[63] *See 2007 WL 7112410, OTS RB 37–21, Examination Handbook, Asset Quality, Section 211, LOANS TO ONE BORROWER, December 13, 2007. Rescinded by OCC Bulletin 2012–19, dated June 29, 2012.* (''[s]tate-chartered savings associations have similar authority under state law.'') *See also,* 1975 WL 171273, Office of Thrift Supervision, August 7, 1975 (''[i]n the case of a state-chartered institution, the application must be accompanied by an opinion of counsel that the action proposed is within the institution's power.'') and 1975 WL 171331, Office of Thrift Supervision, December 19, 1975 (''[w]hether a state chartered association possesses similar salvage powers, [to a Federal savings association is] . . . governed by the laws of the chartering jurisdiction.'').

[64] LTOB Limits are established by state law of each chartering authority, and LTOB Limits are not consistent from state to state. Some states allow waivers or modifications, while others do not. Part 362 does not authorize any insured State savings association to make investments or conduct activities that are not authorized or that are prohibited by either Federal or State law. 12 CFR 362.9(c).

[65] Call Report data, June 30, 2020.

[66] 12 U.S.C. 1828(m).

[67] 12 U.S.C. 1828(m).

[68] 12 CFR 5.59(d); 12 CFR part 225.

the subordinate organization.[69] As discussed previously, FDIC-supervised depository institutions, including State savings associations and their subsidiaries, are covered by §§ 362.4(c) and 362.13, which are substantively similar to or broader than the obligations in § 390.252. Therefore, the FDIC believes that the proposed rescission of § 390.252, if adopted, is unlikely to have any substantive effect on State savings associations or their subsidiaries.

Section 390.253 establishes notification requirements for State savings associations prior to their establishing, acquiring or engaging in new activities of a subsidiary as required under section 18(m) of the FDI Act.[70] As discussed previously, State savings associations are already subject to substantively similar requirements in § 362.15. Therefore, the FDIC believes that the proposed rescission of § 390.253, if adopted, is unlikely to pose any substantive effects on State savings associations.

Section 362.15 established notification requirements for State and Federal savings associations prior to their establishing or acquiring a subsidiary, or conducting any new activity through a subsidiary. As discussed previously, after the Dodd-Frank Act amendment of section 18(m) of the FDI Act, Federal savings associations are no longer required to provide notice to the FDIC prior to the establishment, or acquisition, of a subsidiary, or prior to the commencement of a new activity in a subsidiary controlled by a federal savings association.[71] Therefore, the FDIC believes that the proposed rescission of references to Federal savings associations from § 362.15 is unlikely to have any substantive effect on insured depository institutions in that it is simply consistent with existing law.

Section 390.254 permits a State savings association subsidiary to issue, either directly or through a third party intermediary, any securities that its parent State savings association is permitted to issue. As discussed previously, although there is no corollary regulation for FDIC-supervised depository institutions, State savings association subsidiaries are permitted to issue securities pursuant to section 28 of the FDI Act because the operating subsidiaries and service corporations of Federal savings associations are permitted to issue securities, subject to regulatory limitations. Therefore, the FDIC believes that the proposed rescission of § 390.254, if adopted, is unlikely to have any substantive effect on State savings associations or their subsidiaries.

Section 390.255 generally permits a State savings association to notify the FDIC at least 30 days before making a contribution or a loan (including a guarantee of a loan made by any other person) to a lower-tier entity (salvage investment) that exceeds the maximum amount otherwise permitted under law or regulation to exercise its power to salvage the underlying asset (typically, an outstanding loan).[72] As discussed previously, State savings associations are currently subject to § 362.11 which requires State savings associations to seek prior approval from the FDIC before making a contribution or a loan to a lower-tier entity (salvage investment) that exceeds the maximum amount otherwise permitted under law or regulation to exercise its power to salvage the underlying asset to be consistent with State law. Therefore, the FDIC believes that the proposed rescission of § 390.255, if adopted, is unlikely to substantively affect State savings associations.

By removing duplicative or unnecessary regulations the FDIC believes that the proposed rule will benefit State savings associations by clarifying regulations and improving the ease of references.

V. Alternatives

The FDIC has considered alternatives to the rule but believes that the amendments represent the most appropriate option for covered institutions. As discussed previously, the Dodd-Frank Act transferred certain powers, duties, and functions formerly performed by the OTS to the FDIC. The FDIC's Board reissued and redesignated certain transferred regulations from the OTS, but noted that it would evaluate them and might later incorporate them into other FDIC regulations, amend them, or rescind them, as appropriate. The FDIC has evaluated the existing regulations relating to certain subordinate organizations of State savings associations. The FDIC considered the status quo alternative of retaining the current regulations, but did not choose to do so. The FDIC believes it would be unnecessary for FDIC-supervised institutions to continue to refer to these separate sets of regulations, and is therefore proposing to amend and rescind them.

VI. Request for Comments

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

1. What impact, if any, do you foresee in the FDIC's proposal to rescind Subpart O? Please substantiate your response.

Written comments must be received by the FDIC no later than November 25, 2020.

VII. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 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 FDIC regulations subpart O. The proposed rule will not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), requires that, in connection with a notice of 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.[73] 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.[74] Generally, the FDIC considers

[69] 61 FR 66567.

[70] 12 CFR 390.253. *See* 12 U.S.C 1828(m)(1).

[71] 12 U.S.C. 1828(m).

[72] Without the salvage power provision, the maximum amount a State savings association would be permitted would be related the loans to one borrower limit (LTOB Limit), which is equivalent to the applicable state's legal lending limit.

[73] 5 U.S.C. 601, *et seq.*

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

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 non-interest 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, 2020, the FDIC supervised 3,270 insured depository institutions, of which 2,548 are considered small banking organizations for the purposes of RFA. The proposed rule primarily affects regulations that govern State savings associations.[75] There are 33 State savings associations considered to be small banking organizations for the purposes of the RFA.[76]

As explained previously, the proposed rule would remove §§ 390.250 through 390.255 of subpart O because these sections are unnecessary or redundant of existing federal banking laws or regulations that prescribe requirements subsidiaries of State savings associations. Because these regulations are redundant to existing regulations, rescinding them would not have any substantive effects on small FDIC-supervised institutions.

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.

2. 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 on small entities that the FDIC has not identified?

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[77] 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 to rescind subpart O in a simple and straightforward manner.

3. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal 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.[78] 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 subpart O, this proposal complements other actions the FDIC has taken, separately and with the other federal banking agencies, to further the EGRPRA mandate.

List of Subjects

12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Investments, 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.

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation proposes to amend 12 CFR parts 362 and 390 as follows:

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

■ 1. The authority citation for part 362 continues to read as follows:

Authority: 12 U.S.C. 1816, 1818, 1819(a)(Tenth), 1828(j), 1828(m), 1828a, 1831a, 1831e, 1831w, 1843(l).

■ 2. Revise § 362.15 to read as follows:

§ 362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

No State insured savings association may establish or acquire a subsidiary, or conduct any new activity through a subsidiary, unless it files a notice in compliance with § 303.142(c) of this chapter at least 30 days prior to establishment of the subsidiary or commencement of the activity and the FDIC does not object to the notice. This requirement does not apply to any State savings association that acquired its principal assets from a Federal savings bank that was chartered prior to October 15, 1982, as a savings bank under State law.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

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

Authority: 12 U.S.C. 1819.

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

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

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

Subpart O—[Removed and Reserved]

■ 4. Remove and reserve subpart O, consisting of §§ 390.250 through 390.255.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 20, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–23525 Filed 10–21–20; 4:15 pm]

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[75] FDIC Call Report, June 30, 2020.

[76] *Id.*

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

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