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(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;

(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;

(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and

(10) Whether the proposal provides the counterparty with additional default rights or other rights.

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§ 382.7 Exclusion of certain QFCs.

(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform to the requirements of this part a covered QFC to which:

(1) A CCP is party; or

(2) Each party (other than the covered FSI) is an FMU.

(b) *Exclusion of certain covered entity and covered bank QFCs.* If a covered QFC is also a covered QFC under part 252 or part 47 of this title that an affiliate of the covered FSI is also required to conform pursuant to part 252 or part 47 and the covered FSI is:

(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered FSI is required to conform the credit enhancement to the requirements of this part but is not required to conform the direct QFC to the requirements of this part; or

(2) The direct party to which the covered entity or covered bank is the affiliate credit enhancement provider, then the covered FSI is required to conform

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the direct QFC to the requirements of this part but is not required to conform the credit enhancement to the requirements of this part.

(c) *Exclusion of certain contracts.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform the following types of contracts or agreements to the requirements of this part:

(1) An investment advisory contract that:

(i) Is with a retail customer or counterparty;

(ii) Does not explicitly restrict the transfer of the contract (or any QFC entered into pursuant thereto or governed thereby, or any interest or obligation in or under, or any property securing, any such QFC or the contract) from the covered FSI except as necessary to comply with section 205(a)(2) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5(a)(2)); and

(iii) Does not explicitly provide a default right with respect to the contract or any QFC entered pursuant thereto or governed thereby.

(2) A warrant that:

(i) Evidences a right to subscribe to or otherwise acquire a security of the covered FSI or an affiliate of the covered FSI; and

(ii) Was issued prior to January 1, 2018.

(d) *Exemption by order.* The FDIC may exempt by order one or more covered FSI(s) from conforming one or more contracts or types of contracts to one or more of the requirements of this part after considering:

(1) The potential impact of the exemption on the ability of the covered FSI(s), or affiliates of the covered FSI(s), to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(2) The burden the exemption would relieve; and

(3) Any other factor the FDIC deems relevant.

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

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 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.

SOURCE: 76 FR 47655, Aug. 5, 2011, unless otherwise noted.

Subparts A—E [Reserved]

Subpart F—Application Processing Procedures

§ 390.100 What does this subpart do?

(a) This subpart explains the FDIC's procedures for processing applications, notices, or filings (applications) under parts 390 and 391 for State savings associations. Except as provided in paragraph (b) of this section, §§ 390.103 through 390.110 and §§ 390.126 through 390.135 apply whenever an FDIC regulation requires any person (you) to file an application with the FDIC. Sections

390.111 through 390.125, however, only apply when a FDIC regulation incorporates the procedures in those sections or where otherwise required by the FDIC.

(b) This subpart does not apply to any of the following:

(1) An application related to a transaction under section 13(c) or (k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(c) or (k).

(2) A request for reconsideration, modification, or appeal of a final FDIC action.

(3) A request related to litigation, an enforcement proceeding, a supervisory directive or supervisory agreement. Such requests include a request seeking approval under, modification of, or termination of an order issued under subparts C or D, a supervisory agreement, a supervisory directive, a consent merger agreement or a document negotiated in settlement of an enforcement matter or other litigation, unless an applicable FDIC regulation specifically requires an application under this subpart.

(4) An application filed under a FDIC regulation that prescribes other application processing procedures and time frames for the approval of applications.

(c) If a FDIC regulation for a specific type of application prescribes some application processing procedures, or time frames, the FDIC will apply this subpart to the extent necessary to process the application. For example, if a FDIC regulation for a specific type of application does not identify time periods for the processing of an application, the time periods in this subpart apply.

§ 390.101 Do the same procedures apply to all applications under this subpart?

The FDIC processes applications for State savings associations under this subpart using two procedures, expedited treatment and standard treatment. To determine which treatment applies, you may use the following chart:

If . . .	Then the FDIC will process your application under . . .
(a) The applicable regulation does not specifically state that expedited treatment is available	Standard treatment.
(b) You are not a State savings association	Standard treatment.
(c) Your composite rating is 3, 4, or 5. The composite rating is the composite numeric rating that the FDIC or the other federal banking regulator assigned to you under the Uniform Financial Institutions Rating System or under a comparable rating system. The composite rating refers to the rating assigned and provided to you, in writing, as a result of the most recent examination.	Standard treatment.
(d) Your Community Reinvestment Act (CRA) rating is Needs to Improve or Substantial Non-compliance. The CRA rating is the Community Reinvestment Act performance rating that the FDIC or the other federal banking regulator assigned and provided to you, in writing, as a result of the most recent compliance examination. See, for example, 12 CFR 195.28.	Standard treatment.
(e) Your compliance rating is 3, 4, or 5. The compliance rating is the numeric rating that the FDIC or the other federal banking regulator assigned to you under the FDIC compliance rating system, or a comparable rating system used by the other federal banking regulator. The compliance rating refers to the rating assigned and provided to you, in writing, as a result of the most recent compliance examination.	Standard treatment.
(f) You fail any one of your capital requirements under 12 CFR part 324	Standard treatment.
(g) The FDIC has notified you that you are an association in troubled condition	Standard treatment.
(h) Neither the FDIC nor any other federal banking regulator has assigned you a composite rating, a CRA rating or a compliance rating.	Standard treatment.
(i) You do not meet any of the criteria listed in paragraphs (a) through (h) of this section	Expedited treatment.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.102 How does the FDIC compute time periods under this subpart?

In computing time periods under this subpart, the FDIC does not include the day of the act or event that commences the time period. When the last day of a time period is a Saturday, Sunday, or Federal holiday, the time period runs

until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

§ 390.103 Must I meet with the FDIC before I file my application?

(a) *Chart.* To determine whether you must attend a pre-filing meeting before you file an application, please consult the following chart:

If you file . . .	Then . . .
An application to acquire control of a State savings association.	The FDIC may require you to meet with the FDIC before filing your application and may require you to submit a draft business plan or other relevant information before this meeting.

(b) *Contacting the appropriate FDIC region.* (1) You must contact the appropriate FDIC region a reasonable time before you file an application described in paragraph (a) of this section. Unless paragraph (a) already requires a pre-filing meeting or a draft business plan, the appropriate FDIC region will determine whether it will require a pre-filing meeting, and whether you must submit a business plan or other relevant information before the meeting. The appropriate FDIC region will also establish a schedule for any meeting and the submission of any information.

(2) All other applicants are encouraged to contact the appropriate FDIC region to determine whether a pre-filing meeting or the submission of a draft business plan or other relevant

information would expedite the application review process.

§ 390.104 What information must I include in my draft business plan?

If you are required to submit a draft business plan under § 309.103, your plan must:

(a) Clearly and completely describe the State savings association’s projected operations and activities;

(b) Describe the risks associated with the transaction and the impact of this transaction on any existing activities and operations of the State savings association, including financial projections for a minimum of three years;

(c) Identify the majority of the proposed board of directors and the key senior executive officers (as defined in

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§ 390.361) of the State savings association and demonstrate that these individuals have the expertise to prudently manage the activities and operations described in the savings association's draft business plan; and

(d) Demonstrate how applicable requirements regarding serving the credit and lending needs in the market areas served by the State savings association will be met.

§ 390.105 What type of application must I file?

(a) *Expedited treatment.* If you are eligible for expedited treatment under § 390.101, you may file your application in the form of a notice that includes all information required by the applicable substantive regulation. If the FDIC has designated a form for your notice, you must file that form. Your notice is an application for the purposes of all statutory and regulatory references to "applications."

(b) *Standard treatment.* If you are subject to standard treatment under § 390.101, you must file your application following all applicable substantive regulations and guidelines governing the filing of applications. If the FDIC has a designated form for your application, you must file that form.

(c) *Waiver requests.* If you want the FDIC to waive a requirement that you provide certain information with the notice or application, you must include a written waiver request:

(1) Describing the requirement to be waived and

(2) Explaining why the information is not needed to enable the FDIC to evaluate your notice or application under applicable standards.

§ 390.106 What information must I provide with my application?

(a) *Required information.* You may obtain information about required certifications, other regulations and guidelines affecting particular notices and applications, appropriate forms, and instructions from the appropriate FDIC region.

(b) *Captions and exhibits.* You must caption the original application and required copies with the type of filing, and must include all exhibits and other pertinent documents with the original

application and all required copies. You are not required to include original signatures on copies if you include a copy of the signed signature page or the copy otherwise indicates that the original was signed.

§ 390.107 May I keep portions of my application confidential?

(a) *Confidentiality.* The FDIC makes submissions under this subpart available to the public, but may keep portions of your application confidential based on the rules in this section.

(b) *Confidentiality request.* (1) You may request the FDIC to keep portions of your application confidential. You must submit your request in writing with your application and must explain in detail how your request is consistent with the standards under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. For example, you should explain how you will be substantially harmed by public disclosure of the information. You must separately bind and mark the portions of the application you consider confidential and the portions you consider non-confidential.

(2) The FDIC will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The FDIC will make information in your CRA plan, including any information incorporated by reference from other parts of your application, available to the public upon request.

(c) *FDIC determination on confidentiality.* The FDIC will determine whether information that you designate as confidential may be withheld from the public under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. The FDIC will advise you before it makes information you designate as confidential available to the public.

§ 390.108 Where do I file my application?

(a) *Appropriate FDIC region.* (1) You must file the original application and the number of copies indicated on the applicable form with the appropriate FDIC region. The appropriate FDIC region addresses are listed in paragraph

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(a)(2) of this section. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must

file the original application and two copies.

(2) The addresses of appropriate FDIC region and the states covered by each office are:

Region	Office address	States served
New York	350 Fifth Avenue, Suite 1200, New York, NY 10118.	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands.
Atlanta	10 Tenth Street, NE., Suite 800, Atlanta, GA 30309-3906.	Alabama, Florida, Georgia, North Carolina, South Carolina, Virginia, West Virginia.
Chicago	300 South Riverside Plaza, Suite 1700, Chicago, Illinois 60606.	Illinois, Indiana, Kentucky, Ohio, Michigan, Wisconsin.
Kansas	1100 Walnut St., Suite 2100, Kansas City, MO 64106.	Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
Dallas	1601 Bryan Street, Dallas, TX 75201	Arkansas, Colorado, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, Texas.
San Francisco	25 Jessie Street at Ecker Square, Suite 2300, San Francisco, CA 94105-2780.	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Utah, Washington, Wyoming.

(b) *Additional filings with FDIC headquarters.* (1) In addition to filing in the appropriate FDIC region, if your application involves a significant issue of law or policy or if an applicable regulation or form directs you to file with FDIC Headquarters, you must also file copies of your application with the Risk Management and Applications Section at FDIC headquarters, 550 17th Street, NW., Washington, DC 20429. You must file the number of copies indicated on the applicable form. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must file three copies.

(2) You file your application and all required copies with the FDIC, as described under § 390.108.

(2)(i) You may request a list of applications involving significant issues of law or policy by contacting appropriate FDIC region.

(i) If you are required to file with an appropriate FDIC region and with the FDIC headquarters, you have not filed with the FDIC until you file with both offices.

(ii) The FDIC reserves the right to identify significant issues of law or policy in a particular application. The FDIC will advise you, in writing, if it makes this determination.

(ii) You have not filed with the appropriate FDIC region or the FDIC headquarters until you file the application and the required number of copies with that office.

(iii) If you file after the close of business established by appropriate FDIC region or the FDIC headquarters, you have filed with that office on the next business day.

(3) [Reserved]

§ 390.109 What is the filing date of my application?

(b) The FDIC may notify you that it has adjusted your application filing date if you fail to meet any applicable publication requirements.

(a) Your application's filing date is the date that you complete all of the following requirements.

(c) If, after you properly file your application with the appropriate FDIC region, the FDIC determines that a significant issue of law or policy exists under § 390.108(b)(2)(ii), the filing date of your application is the day you filed with the appropriate FDIC region. The 30-day review period under § 390.126 or § 390.127 will restart in its entirety when the appropriate FDIC region forwards the appropriate number of copies of your application to the FDIC headquarters.

(1) You attend a pre-filing meeting and submit a draft business plan or relevant information, if the FDIC requires you to do so under § 390.103.

§ 390.110 How do I amend or supplement my application?

To amend or supplement your application, you must file the amendment or supplemental information at the appropriate FDIC region along with the number of copies required under § 390.108. Your amendment or supplemental information also must meet the caption and exhibit requirements at § 390.106(b).

§ 390.111 Who must publish a public notice of an application?

Sections 390.111 through 390.115 apply whenever a FDIC regulation requires an applicant (“you”) to follow the public notice procedures in this subpart.

§ 390.112 What information must I include in my public notice?

Your public notice must include the following:

- (a) Your name and address.
- (b) The type of application.
- (c) The name of the depository institution(s) that is the subject matter of the application.
- (d) A statement indicating that the public may submit comments to the appropriate FDIC region.

(e) The address of the appropriate FDIC region where the public may submit comments.

(f) The date that the comment period closes.

(g) A statement indicating that the nonconfidential portions of the application are on file in the appropriate FDIC region, and are available for public inspection during regular business hours.

(h) Any other information that the FDIC requires you to publish. You may find the format for various publication notices in the appendix to the FDIC application processing handbook.

§ 390.113 When must I publish the public notice?

You must publish a public notice of the application no earlier than seven days before and no later than the date of filing of the application.

§ 390.114 Where must I publish the public notice?

You must publish the notice in a newspaper having a general circulation in the communities indicated in the following chart:

If you file . . .	You must publish in the following communities . . .
(a) Bank Merger Act application under 390.332(a), or an application for a mutual to stock conversion under 12 CFR part 192.	The community in which your home office is located.
(b) A change of control notice under part 391, subpart E.	The community in which the home office of the State savings association whose stock is to be acquired is located and, if applicable, the community in which the home office of the acquiror’s largest subsidiary State savings association is located.

§ 390.115 What language must I use in my publication?

(a) *English.* You must publish the notice in a newspaper printed in the English language.

(b) *Other than English.* If the FDIC determines that the primary language of a significant number of adult residents of the community is a language other than English, the FDIC may require that you simultaneously publish additional notice(s) in the community in the appropriate language(s).

mission of public comments on certain types of applications or notices (“applications”) pending before the FDIC. It applies whenever a regulation incorporates the procedures in §§ 390.116 through 390.120, or where otherwise required by the FDIC.

§ 390.117 Who may submit a written comment?

Any person may submit a written comment supporting or opposing an application.

§ 390.116 Comment procedures.

Sections 390.116 through 390.120 contain the procedures governing the sub-

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§ 390.118 What information should a comment include?

(a) A comment should recite relevant facts, including any demographic, economic, or financial data, supporting the commenter's position. A comment opposing an application should also:

(1) Address at least one of the reasons why the FDIC may deny the application under the relevant statute or regulation;

(2) Recite any relevant facts and supporting data addressing these reasons; and

(3) Address how the approval of the application could harm the commenter or any community.

(b) A commenter must include any request for a meeting under § 390.122 in its comment. The commenter must describe the nature of the issues or facts to be discussed and the reasons why written submissions are insufficient to adequately address these facts or issues.

§ 390.119 Where are comments filed?

A commenter must file with the appropriate FDIC region (See table at § 390.108(a)(2)). The commenter must simultaneously send a copy of the comment to the applicant.

§ 390.120 How long is the comment period?

(a) *General.* Except as provided in paragraph (b) of this section, a commenter must file a written comment with the FDIC within 30 calendar days after the date of publication of the initial public notice.

(b) *Late-filed comments.* The FDIC may consider late-filed comments if the FDIC determines that the comment will assist in the disposition of the application.

§ 390.121 Meeting procedures.

Sections 390.121 through 390.125 contain meeting procedures. They apply whenever a regulation incorporates the procedures in §§ 390.121 through 390.125, or when otherwise required by the FDIC.

§ 390.122 When will the FDIC conduct a meeting on an application?

(a) The FDIC will grant a meeting request or conduct a meeting on its own

initiative, if it finds that written submissions are insufficient to address facts or issues raised in an application, or otherwise determines that a meeting will benefit the decision-making process. The FDIC may limit the issues considered at the meeting to issues that the FDIC decides are relevant or material.

(b) The FDIC will inform the applicant and all commenters requesting a meeting of its decision to grant or deny a meeting request, or of its decision to conduct a meeting on its own initiative.

(c) If the FDIC decides to conduct a meeting, the FDIC will invite the applicant and any commenters requesting a meeting and raising an issue that FDIC intends to consider at the meeting. The FDIC may also invite other interested persons to attend. The FDIC will inform the participants of the date, time, location, issues to be considered, and format for the meeting a reasonable time before the meeting.

§ 390.123 What procedures govern the conduct of the meeting?

(a) The FDIC may conduct meetings in any format including, but not limited to, a telephone conference, a face-to-face meeting, or a more formal meeting.

(b) The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*) and the FDIC Rules of Practice and Procedure in Adjudicatory Proceedings (subpart C) do not apply to meetings under this section.

§ 390.124 Will FDIC approve or disapprove an application at a meeting?

The FDIC will not approve or deny an application at a meeting under §§ 390.121 through 390.125.

§ 390.125 Will a meeting affect application processing time frames?

If the FDIC decides to conduct a meeting, it may suspend applicable application processing time frames, including the time frames for deeming an application complete and the applicable approval time frames in §§ 390.126

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through 390.135. If the FDIC suspends applicable application processing time frames, the time period will resume when the FDIC determines that a record has been developed that sufficiently supports a determination on the issues considered at the meeting.

§ 390.126 If I file a notice under expedited treatment, when may I engage in the proposed activities?

If you are eligible for expedited treatment and you have appropriately filed your notice with the FDIC, you may engage in the proposed activities upon the expiration of 30 days after the filing date of your notice, unless the FDIC takes one of the following actions before the expiration of that time period:

(a) The FDIC notifies you in writing that you must file additional information supplementing your notice. If you are required to file additional information, you may engage in the proposed activities upon the expiration of 30 cal-

endar days after the date you file the additional information, unless the FDIC takes one of the actions described in paragraphs (b) through (d) of this section before the expiration of that time period;

(b) The FDIC notifies you in writing that your notice is subject to standard treatment under §§ 390.126 through 390.135. The FDIC will subject your notice to standard treatment if it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information;

(c) The FDIC notifies you in writing that it is suspending the applicable time frames under § 390.125; or

(d) The FDIC notifies you that it disapproves your notice.

§ 390.127 What will the FDIC do after I file my application?

(a) *FDIC action.* Within 30 calendar days after the filing date of your application, the FDIC will take one of the following actions:

If the FDIC . . .	Then . . .
(1) Notifies you, in writing, that your application is complete * * *.	The applicable review period will begin on the date that the FDIC deems your application complete.
(2) Notifies you, in writing, that you must submit additional information to complete your application * * *.	You must submit the required additional information under § 390.128.
(3) Notifies you, in writing, that your application is materially deficient * * *.	The FDIC will not process your application.
(4) Takes no action * * *	Your application is deemed complete. The applicable review period will begin on the day the 30-day time period expires.

(b) *Waiver requests.* If your application includes a request for waiver of an information requirement under § 390.105(b), and the FDIC has not notified you that you must submit additional information under paragraph (a)(2) of this section, your request for waiver is granted.

§ 390.128 If the FDIC requests additional information to complete my application, how will it process my application?

(a) You may use the following chart to determine the procedure that applies to your submission of additional information under § 390.127(a)(1):

If, within 30 calendar days after the date of FDIC's request for additional information . . .	Then, FDIC may . . .	And . . .
(1) You file a response to all information requests * * *.	(i) Notify you in writing within 15 days after the filing date of your response that your application is complete * * * applicable to all response that your application is complete * * *. (ii) Notify you in writing within 15 calendar days after the filing date of your response that you must submit additional information regarding matters derived from or prompted by information already furnished or any additional information necessary to resolve the issues presented in your application * * *.	The applicable review period will begin on the date that the FDIC deems your application complete. You must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in this section.

If, within 30 calendar days after the date of FDIC's request for additional information . . .	Then, FDIC may . . .	And . . .
	(iii) Notify you in writing within 15 calendar days after the filing date of your response that your application is materially deficient * * * . (iv) Take no action within 15 calendar days after the filing date of your response * * * .	The FDIC will not process your application. Your application is deemed complete. The applicable review period will begin on the day that the 15-day time period expires.
(2) You request an extension of time to file additional information * * * .	(i) Grant an extension, in writing, specifying the number of days for the extension * * * . (ii) Notify you in writing that your extension request is disapproved * * * .	You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section. The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation.
(3) You fail to respond completely * * * .	(i) Notify you in writing that your application is deemed withdrawn * * * . (ii) Notify you, in writing, that your response is incomplete and extend the response period, specifying the number of days for the respond extension * * * .	The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation. You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section.

(b) The FDIC may extend the 15-day period referenced in paragraph (a)(1) of this section by up to 15 calendar days, if the FDIC requires the additional time to review your response. The FDIC will notify you that it has extended the period before the end of the initial 15-day period and will briefly explain why the extension is necessary.

(c) If your response filed under paragraph (a)(1) of this section includes a request for a waiver of an informational requirement, your request for a waiver is granted if the FDIC fails to act on it within 15 calendar days after the filing of your response, unless the FDIC extends the review period under paragraph (b) of this section. If the FDIC extends the review period under paragraph (b), your request is granted if the FDIC fails to act on it by the end of the extended review period.

§ 390.129 Will the FDIC conduct an eligibility examination?

(a) *Eligibility examination.* The FDIC may notify you at any time before it deems your application complete that it will conduct an eligibility examination. If the FDIC decides to conduct an eligibility examination, it will not deem your application complete until it concludes the examination.

(b) *Additional information.* The FDIC may, as a result of the eligibility examination, notify you that you must

submit additional information to complete your application. If so, you must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in § 390.128.

§ 390.130 What may the FDIC require me to do after my application is deemed complete?

After your application is deemed complete, but before the end of the applicable review period,

(a) The FDIC may require you to provide additional information if the information is necessary to resolve or clarify the issues presented by your application.

(b) The FDIC may determine that a major issue of law or a change in circumstances arose after you filed your application, and that the issue or changed circumstances will substantially effect your application. If the FDIC identifies such an issue or changed circumstances, it may:

(1) Notify you, in writing, that your application is now incomplete and require you to submit additional information to complete the application under the procedures described at § 390.128; and

(2) Require you to publish a new public notice of your application under § 390.131.

§ 390.131 Will the FDIC require me to publish a new public notice?

(a) If your application was subject to a publication requirement, the FDIC may require you to publish a new public notice of your application if:

(1) You submitted a revision to the application, you submitted new or additional information, or a major issue of law or a change in circumstances arose after the filing of your application; and

(2) The FDIC determines that additional comment on these matters is appropriate because of the significance of the new information or circumstances.

(b) The FDIC will notify you in writing if you must publish a new public notice of your revised application.

(c) If you are required to publish a new public notice of your revised application, you must notify the FDIC after you publish the new public notice.

§ 390.132 May the FDIC suspend processing of my application?

(a) *Suspension.* The FDIC may, at any time, indefinitely suspend processing of your application if:

(1) The FDIC, another governmental entity, or a self-regulatory trade or professional organization initiates an investigation, examination, or administrative proceeding that is relevant to the FDIC's evaluation of your application;

(2) You request the suspension or there are other extraordinary circumstances that have a significant impact on the processing of your application.

(b) *Notice.* The FDIC will promptly notify you, in writing, if it suspends your application.

§ 390.133 How long is the FDIC review period?

(a) *General.* The applicable FDIC review period is 60 calendar days after the date that your application is deemed complete, unless an applicable FDIC regulation specifies a different review period.

(b) *Multiple applications.* If you submit more than one application in connection with a proposed action or if two or more applicants submit related applications, the applicable review period for all applications is the review

period for the application with the longest review period, subject to statutory review periods.

(c) *Extensions.* (1) The FDIC may extend the review period for up to 30 calendar days beyond the period described in paragraph (a) or (b) of this section. The FDIC must notify you in writing of the extension and the duration of the extension. The FDIC must issue the written extension before the end of the review period.

(2) The FDIC may also extend the review period as needed until it acts on the application, if the application presents a significant issue of law or policy that requires additional time to resolve. The FDIC must notify you in writing of the extension and the general reasons for the extension. The FDIC must issue the written extension before the end of the review period, including any extension of that period under paragraph (c)(1) of this section.

§ 390.134 How will I know if my application has been approved?

(a) *FDIC approval or denial.* (1) The FDIC will approve or deny your application before the expiration of the applicable review period, including any extensions of the review period.

(2) The FDIC will promptly notify you in writing of its decision to approve or deny your application.

(b) *No FDIC action.* If the FDIC fails to act under paragraph (a)(1) of this section, your application is approved.

§ 390.135 What will happen if the FDIC does not approve or disapprove my application within two calendar years after the filing date?

(a) *Withdrawal.* If the FDIC has not approved or denied your pending application within two calendar years after the filing date under § 390.109, the FDIC will notify you, in writing, that your application is deemed withdrawn unless the FDIC determines that you are actively pursuing a final FDIC determination on your application. You are not actively pursuing a final FDIC determination if you have failed to timely take an action required under this part, including filing required additional information, or the FDIC has

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suspended processing of your application under §390.132 based on circumstances that are, in whole or in part, within your control and you have failed to take reasonable steps to resolve these circumstances.

(b) [Reserved]

Subpart G—Nondiscrimination Requirements

§ 390.140 Definitions.

As used in this subpart—

Application. For purposes of this part, an application for a loan or other service is as defined in Regulation C, 12 CFR 203.2(b).

Dwelling. The term “dwelling” means a residential structure (whether or not it is attached to real property) located in a state of the United States of America, the District of Columbia, or the Commonwealth of Puerto Rico. The term includes an individual condominium unit, cooperative unit, or mobile or manufactured home.

State savings association. The term “State savings association” means any State savings association as defined in 12 U.S.C. 1813(b).

§ 390.141 Supplementary guidelines.

The FDIC’s policy statement found at 12 CFR 390.150 supplements this subpart and should be read together with this subpart. Refer also to the HUD Fair Housing regulations at 24 CFR parts 100 *et seq.*, Federal Reserve Regulation B at 12 CFR part 202, and Federal Reserve Regulation C at 12 CFR part 203.

§ 390.142 Nondiscrimination in lending and other services.

(a) No State savings association may deny a loan or other service, or discriminate in the purchase of loans or securities or discriminate in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or other service on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has

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the capacity to contract) or national origin of:

(1) An applicant or joint applicant;

(2) Any person associated with an applicant or joint applicant regarding such loan or other service, or with the purposes of such loan or other service;

(3) The present or prospective owners, lessees, tenants, or occupants of the dwelling(s) for which such loan or other service is to be made or given;

(4) The present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity of the dwelling(s) for which such loan or other service is to be made or given.

(b) A State savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.

(c) No State savings association may discriminate against an applicant for a loan or other service on any prohibited basis (as defined in 12 CFR 202.2(z) and 24 CFR part 100).

§ 390.143 Nondiscriminatory appraisal and underwriting.

(a) *Appraisal.* No State savings association may use or rely upon an appraisal of a dwelling which the State savings association knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect under the Fair Housing Act of 1968 or the Equal Credit Opportunity Act.

(b) *Underwriting.* Each State savings association shall have clearly written, non-discriminatory loan underwriting standards, available to the public upon request, at each of its offices. Each association shall, at least annually, review its standards, and business practices implementing them, to ensure equal opportunity in lending.

§ 390.144 Nondiscrimination in applications.

(a) No State savings association may discourage, or refuse to allow, receive, or consider, any application, request, or inquiry regarding a loan or other service, or discriminate in imposing conditions upon, or in processing, any such application, request, or inquiry on the basis of the age or location of the dwelling, or on the basis of the race,

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color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), national origin, or other characteristics prohibited from consideration in §390.142(c), of the prospective borrower or other person, who:

(1) Makes application for any such loan or other service;

(2) Requests forms or papers to be used to make application for any such loan or other service; or

(3) Inquires about the availability of such loan or other service.

(b) A State savings association shall inform each inquirer of his or her right to file a written loan application, and

to receive a copy of the association's underwriting standards.

§ 390.145 Nondiscriminatory advertising.

No State savings association may directly or indirectly engage in any form of advertising that implies or suggests a policy of discrimination or exclusion in violation of title VIII of the Civil Rights Acts of 1968, the Equal Credit Opportunity Act, or this subpart. Advertisements for any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall include a facsimile of the following logotype and legend:



§ 390.146 Equal Housing Lender Poster.

(a) Each State savings association shall post and maintain one or more Equal Housing Lender Posters, the text of which is prescribed in paragraph (b) of this section, in the lobby of each of its offices in a prominent place or places readily apparent to all persons

seeking loans. The poster shall be at least 11 by 14 inches in size, and the text shall be easily legible. It is recommended that savings associations post a Spanish language version of the poster in offices serving areas with a substantial Spanish-speaking population.

(b) The text of the Equal Housing Lender Poster shall be as follows:



We Do Business In Accordance With Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF

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RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or

Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD:

SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

For processing under FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

On the basis of race, color, national origin, religion, sex, marital status, or age;

Because income is from public assistance; or

Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

§ 390.147 Loan application register.

State savings associations and other lenders required to file Home Mortgage Disclosure Act Loan Application Registers with the FDIC in accordance with 12 CFR part 203 must enter the reason for denial, using the codes provided in 12 CFR part 203, with respect to all loan denials.

§ 390.148 Nondiscrimination in employment.

(a) No State savings association shall, because of an individual's race, color, religion, sex, or national origin:

(1) Fail or refuse to hire such individual;

(2) Discharge such individual;

(3) Otherwise discriminate against such individual with respect to such individual's compensation, promotion, or

the terms, conditions, or privileges of such individual's employment; or

(4) Discriminate in admission to, or employment in, any program of apprenticeship, training, or retraining, including on-the-job training.

(b) No State savings association shall limit, segregate, or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of such individual's race, color, religion, sex, or national origin.

(c) No State savings association shall discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State, or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing of such practice by any lawfully constituted authority.

(d) No State savings association shall print or publish or cause to be printed or published any notice or advertisement relating to employment by such savings association indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin.

(e) This regulation shall not apply in any case in which the Federal Equal Employment Opportunities law is made inapplicable by the provisions of section 2000e-1 or sections 2000e-2 (e) through (j) of title 42, United States Code.

(f) Any violation of the following laws or regulations by a State savings association shall be deemed to be a violation of this subpart:

(1) The Equal Employment Opportunity Act, as amended, 42 U.S.C. 2000e-2000h-2, and Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR part 1600;

(2) The Age Discrimination in Employment Act, 29 U.S.C. 621-633, and EEOC and Department of Labor regulations;

(3) Department of the Treasury regulations at 31 CFR part 12 and Office of

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Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60;

(4) The Veterans Employment and Readjustment Act of 1972, 38 U.S.C. 2011–2012, and the Vietnam Era Veterans Readjustment Adjustment Assistance Act of 1974, 38 U.S.C. 2021–2026;

(5) The Rehabilitation Act of 1973, 29 U.S.C. 701 *et al.*; and

(6) The Immigration and Nationality Act, 8 U.S.C. 1324b, and INS regulations at 8 CFR part 274a.

§ 390.149 Complaints.

Complaints regarding discrimination in lending by a State savings association shall be referred to the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Washington, DC 20410 for processing under the Fair Housing Act, and to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249 for processing under FDIC regulations. Complaints regarding discrimination in employment by a State savings association should be referred to the Equal Employment Opportunity Commission, Washington, DC 20506 and a copy, for information only, sent to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249.

§ 390.150 Guidelines relating to nondiscrimination in lending.

(a) *General.* Fair housing and equal opportunity in home financing is a policy of the United States established by Federal statutes and Presidential orders and proclamations. In furtherance of the Federal civil rights laws and the economical home financing purposes of the statutes administered by the FDIC, the FDIC has adopted, in this subpart, nondiscrimination regulations that, among other things, prohibit arbitrary refusals to consider loan applications on the basis of the age or location of a dwelling, and prohibit discrimination based on race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the per-

son has the capacity to contract), or national origin in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing related loans. Such discrimination is also prohibited in the purchase of loans and securities. This section provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies. Each State savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity.

(b) *Loan underwriting standards.* The basic purpose of the FDIC's nondiscrimination regulations is to require that every applicant be given an equal opportunity to obtain a loan. Each loan applicant's creditworthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

(c) *Discriminatory practices—* (1) *Discrimination on the basis of sex or marital status.* The Civil Rights Act of 1968 and the National Housing Act prohibit discrimination in lending on the basis of sex. The Equal Credit Opportunity Act, in addition to this prohibition, forbids discrimination on the basis of marital status. Refusing to lend to, requiring higher standards of creditworthiness of, or imposing different requirements on, members of one sex or individuals of one marital status, is discrimination based on sex or marital status. Loan underwriting decisions must be based on an applicant's credit history and present and reasonably foreseeable economic prospects, rather than on the basis of assumptions regarding comparative differences in creditworthiness between married and unmarried individuals, or between men and women.

(2) *Discrimination on the basis of language.* Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.

(3) *Income of husbands and wives.* A practice of discounting all or part of either spouse's income where spouses apply jointly is a violation of section 527 of the National Housing Act. As with other income, when spouses apply jointly for a loan, the determination as to whether a spouse's income qualifies for credit purposes should depend upon a reasonable evaluation of his or her past, present, and reasonably foreseeable economic circumstances. Information relating to child-bearing intentions of a couple or an individual may not be requested.

(4) *Supplementary income.* Lending standards which consider as effective only the non-overtime income of the primary wage-earner may result in discrimination because they do not take account of variations in employment patterns among individuals and families. The FDIC favors loan underwriting which reasonably evaluates the credit worthiness of each applicant based on a realistic appraisal of his or her own past, present, and foreseeable economic circumstances. The determination as to whether primary income or additional income qualifies as effective for credit purposes should depend upon whether such income may reasonably be expected to continue through the early period of the mortgage risk. Automatically discounting other income from bonuses, overtime, or part-time employment, will cause some applicants to be denied financing without a realistic analysis of their credit worthiness. Since statistics show that minority group members and low- and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing.

(5) *Applicant's prior history.* Loan decisions should be based upon a realistic evaluation of all pertinent factors respecting an individual's creditworthiness, without giving undue weight to any one factor. The State savings asso-

ciation should, among other things, take into consideration that:

(i) In some instances, past credit difficulties may have resulted from discriminatory practices;

(ii) A policy favoring applicants who previously owned homes may perpetuate prior discrimination;

(iii) A current, stable earnings record may be the most reliable indicator of credit-worthiness, and entitled to more weight than factors such as educational level attained;

(iv) Job or residential changes may indicate upward mobility; and

(v) Preferring applicants who have done business with the lender can perpetuate previous discriminatory policies.

(6) *Income level or racial composition of area.* Refusing to lend or lending on less favorable terms in particular areas because of their racial composition is unlawful. Refusing to lend, or offering less favorable terms (such as interest rate, downpayment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons.

(7) *Age and location factors.* Sections 390.142-390.144 prohibit loan denials based upon the age or location of a dwelling. These restrictions are intended to prohibit use of unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of a dwelling or the physical or economic characteristics of an area. Loan decisions should be based on the present market value of the property offered as security (including consideration of specific improvements to be made by the borrower) and the likelihood that the property will retain an adequate value over the term of the loan. Specific factors which may negatively affect its short-range future value (up to 3-5 years) should be clearly documented. Factors which in some cases may cause the market value of a property to decline are recent zoning changes or a significant number of abandoned homes in the immediate vicinity of the property. However, not all zoning changes will cause a decline in property values, and proximity to abandoned buildings may not affect the market value of a property because of rehabilitation programs or affirmative

lending programs, or because the cause of abandonment is unrelated to high risk. Proper underwriting considerations include the condition and utility of the improvements, and various physical factors such as street conditions, amenities such as parks and recreation areas, availability of public utilities and municipal services, and exposure to flooding and land faults. However, arbitrary decisions based on age or location are prohibited, since many older, soundly constructed homes provide housing opportunities which may be precluded by an arbitrary lending policy.

(8) *Fair Housing Act (title VIII, Civil Rights Act of 1968, as amended)*. State savings associations, must comply with all regulations promulgated by the Department of Housing and Urban Development to implement the Fair Housing Act, found at 24 CFR part 100 *et seq.*, except that they shall use the Equal Housing Lender logo and poster prescribed by FDIC regulations at §§ 390.145 and 390.146 rather than the Equal Housing Opportunity logo and poster required by 24 CFR parts 109 and 110.

(d) *Marketing practices*. State savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a State savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The FDIC will systematically review marketing practices where evidence of discrimination in lending is discovered.

Subparts H–N [Reserved]

Subpart O—Subordinate Organizations

§ 390.250 What does this subpart cover?

(a) The FDIC is issuing this subpart O pursuant to its general rulemaking and supervisory authority under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, and its specific authority under section 18(m) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(m). This subpart applies to subordinate organizations of State savings associations. The FDIC may, at any time, limit a State savings association's investment in any of these entities, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons.

(b) Notices under this subpart are applications for purposes of statutory and regulatory references to "applications." 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 12 U.S.C. 1818(b) or 1818(i).

§ 390.251 Definitions.

For purposes of this subpart:

Control has the same meaning as in part 391, subpart E.

GAAP-consolidated subsidiary means an entity in which a State savings association has a direct or indirect ownership interest and whose assets are consolidated with those of the savings association for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, these are entities in which a State savings association has a majority ownership interest.

Lower-tier entity includes any company in which a subsidiary has a direct or indirect ownership interest.

Ownership interest means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.

Subordinate organization means any corporation, partnership, business trust, association, joint venture, pool,

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syndicate, or other similar business organization in which a State savings association has a direct or indirect ownership interest, unless that ownership interest qualifies as a pass-through investment and is so designated by the investing State savings association.

Subsidiary means any subordinate organization directly or indirectly controlled by a State savings association.

§ 390.252 How must separate corporate identities be maintained?

(a) Each State savings association and subordinate organization thereof must be operated in a manner that demonstrates to the public that each maintains a separate corporate existence. Each must operate so that:

(1) Their respective business transactions, accounts, and records are not intermingled;

(2) Each observes the formalities of their separate corporate procedures;

(3) Each is adequately financed as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) Each is held out to the public as a separate enterprise; and

(5) Unless the parent State savings association has guaranteed a loan to the subordinate organization, all borrowings by the subordinate organization indicate that the parent is not liable.

(b) The FDIC regulations that apply both to State savings associations and subordinate organizations shall not be construed as requiring a State savings association and its subordinate organizations to operate as a single entity.

§ 390.253 What notices are required to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary?

When required by section 18(m) of the Federal Deposit Insurance Act, a State savings association (“you”) must file a notice (“Notice”) with the FDIC before establishing or acquiring a subsidiary or engaging in new activities in a subsidiary. The Notice must contain all of the information the required under 12 CFR 362.15. If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must

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apply for and receive the FDIC’s prior written approval before establishing or acquiring the subsidiary or engaging in new activities in the subsidiary.

§ 390.254 How may a subsidiary of a State savings association issue securities?

(a) A subsidiary may issue, either directly or through a third party intermediary, any securities that its parent State savings association (“you”) may issue. The subsidiary must not state or imply that the securities it issues are covered by federal deposit insurance. A subsidiary may not issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that you are insolvent or have been placed into receivership.

(b) You must file a notice with the FDIC in accordance with § 390.253 at least 30 days before your first issuance of any securities through an existing subsidiary or in conjunction with establishing or acquiring a new subsidiary. If the FDIC notifies you within 30 days that the notice presents supervisory concerns or raises significant issues of law or policy, you must receive the FDIC’s prior written approval before issuing securities through your subsidiary.

(c) For as long as any securities are outstanding, you 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. Such records must include, but are not limited to:

(1) The amount of your assets or liabilities (including any guarantees you make 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 your 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 you 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 you have 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.

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

(a) In accordance with this section, a State savings association ("you") may exercise your salvage power to make 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. You must notify the FDIC at least 30 days before making such a salvage investment. This notice must demonstrate that:

(1) The salvage investment protects your interest in the lower-tier entity;

(2) The salvage investment is consistent with safety and soundness; and

(3) You considered alternatives to the salvage investment and determined that such alternatives would not adequately satisfy paragraphs (a)(1) and (2) of this section.

(b) If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the FDIC's prior written approval before making a salvage investment.

(c) If your lower-tier entity is a GAAP-consolidated subsidiary, your salvage investment under this section will be considered an investment in a subsidiary for purposes of subpart Z.

Subpart P [Reserved]

Subpart Q—Definitions for Regulations Affecting All State Savings Associations

§ 390.280 When do the definitions in this subpart apply?

The definitions in this subpart apply throughout parts 390 and 391, unless another definition is specifically provided.

§ 390.281 Account.

The term *account* means any savings account, demand account, certificate account, tax and loan account, note account, United States Treasury general account or United States Treasury time deposit-open account, whether in the form of a deposit or a share, held by an accountholder in a State savings association.

§ 390.282 Accountholder.

The term *accountholder* means the holder of an account or accounts in a State savings association insured by the Deposit Insurance Fund. The term does not include the holder of any subordinated debt security or any mortgage-backed bond issued by the State savings association.

§ 390.283 Affiliate.

The term *affiliate* of a State savings association, unless otherwise defined, means any corporation, business trust, association, or other similar organization:

(a) Of which a State savings association, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(b) Of which control is held, directly or indirectly through stock ownership or in any other manner, by the shareholders of a State savings association who own or control either a majority of the shares of such State savings association or more than 50 per centum of the number of shares voted for the

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election of directors of such State savings association at the preceding election, or by trustees for the benefit of the shareholders of any such State savings association; or

(c) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one State savings association.

§ 390.284 Affiliated person.

The term *affiliated person* of a State savings association means the following:

(a) A director, officer, or controlling person of such association;

(b) A spouse of a director, officer, or controlling person of such association;

(c) A member of the immediate family of a director, officer, or controlling person of such association, who has the same home as such person or who is a director or officer of any subsidiary of such association or of any holding company affiliate of such association;

(d) Any corporation or organization (other than the State savings association or a corporation or organization through which the State savings association operates) of which a director, officer or the controlling person of such association:

(1) Is chief executive officer, chief financial officer, or a person performing similar functions;

(2) Is a general partner;

(3) Is a limited partner who, directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns an interest of 10 percent or more in the partnership (based on the value of his or her contribution) or who, directly or indirectly with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, owns an interest of 25 percent or more in the partnership; or

(4) Directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns or controls 10 percent or more of any class of equity securities or owns or controls, with other directors, officers, and controlling per-

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sons of such association and their spouses and their immediate family members who are also affiliated persons of the association, 25 percent or more of any class of equity securities; and

(5) Any trust or other estate in which a director, officer, or controlling person of such association or the spouse of such person has a substantial beneficial interest or as to which such person or his or her spouse serves as trustee or in a similar fiduciary capacity.

§ 390.285 Audit period.

The *audit period* of a State savings association means the twelve month period (or other period in the case of a change in audit period) covered by the annual audit conducted to satisfy § 390.350.

§ 390.286 Certificate account.

The term *certificate account* means a savings account evidenced by a certificate that must be held for a fixed or minimum term.

§ 390.287 Consumer credit.

The term *consumer credit* means credit extended to a natural person for personal, family, or household purposes, including loans secured by liens on real estate and chattel liens secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security: *Provided*, the State savings association relies substantially upon other factors, such as the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. Appropriate evidence to demonstrate justification for such reliance should be retained in a State savings association's files. Among the types of credit included within this term are consumer loans; educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping of real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards.

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§ 390.288 Controlling person.

The term *controlling person* of a State savings association means any person or entity which, either directly or indirectly, or acting in concert with one or more other persons or entities, owns, controls, or holds with power to vote, or holds proxies representing, ten percent or more of the voting shares or rights of such State savings association; or controls in any manner the election or appointment of a majority of the directors of such State savings association. However, a director of a State savings association will not be deemed to be a controlling person of such State savings association based upon his or her voting, or acting in concert with other directors in voting, proxies:

(a) Obtained in connection with an annual solicitation of proxies, or

(b) Obtained from savings account holders and borrowers if such proxies are voted as directed by a majority vote of the entire board of directors of such association, or of a committee of such directors if such committee's composition and authority are controlled by a majority vote of the entire board and if its authority is revocable by such a majority.

§ 390.289 Corporation.

The terms *Corporation* and *FDIC* mean the Federal Deposit Insurance Corporation.

§ 390.290 Demand accounts.

The term *demand accounts* means non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the State savings association and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

§ 390.291 Director.

The term *director* means any director, trustee, or other person performing similar functions with respect to any organization whether incorporated or unincorporated. Such term does not include an advisory director, honorary director, director emeritus, or similar person, unless the person is otherwise

performing functions similar to those of a director.

§ 390.292 Financial institution.

The term *financial institution* has the same meaning as the term *depository institution* set forth in 12 U.S.C. 1813(c)(1).

§ 390.293 Immediate family.

The term *immediate family* of any natural person means the following (whether by the full or half blood or by adoption):

(a) Such person's spouse, father, mother, children, brothers, sisters, and grandchildren;

(b) The father, mother, brothers, and sisters of such person's spouse; and

(c) The spouse of a child, brother, or sister of such person.

§ 390.294 Land loan.

The term *land loan* means a loan:

(a) Secured by real estate upon which all facilities and improvements have been completely installed, as required by local regulations and practices, so that it is entirely prepared for the erection of structures;

(b) To finance the purchase of land and the accomplishment of all improvements required to convert it to developed building lots; or

(c) Secured by land upon which there is no structure.

§ 390.295 Low-rent housing.

The term *low-rent housing* means real estate which is, or which is being constructed, remodeled, rehabilitated, modernized, or renovated to be, the subject of an annual contributions contract for low-rent housing under the provisions of the United States Housing Act of 1937, as amended.

§ 390.296 Money Market Deposit Accounts.

(a) *Money Market Deposit Accounts (MMDAs)* offered by State savings associations in accordance with applicable state law are savings accounts on which interest may be paid if issued subject to the following limitations:

(1) The State savings association shall reserve the right to require at

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least seven days' notice prior to withdrawal or transfer of any funds in the account; and

(2)(i) The depositor is authorized by the State savings association to make no more than six transfers per calendar month or statement cycle (or similar period) of at least four weeks by means of preauthorized, automatic, telephonic, or data transmission agreement, order, or instruction to another account of the depositor at the same State savings association to the State savings association itself, or to a third party.

(ii) State savings associations may permit holders of MMDAs to make unlimited transfers for the purpose of repaying loans (except overdraft loans on the depositor's demand account) and associated expenses at the same State savings association (as originator or servicer), to make unlimited transfers of funds from this account to another account of the same depositor at the same State savings association or to make unlimited payments directly to the depositor from the account when such transfers or payments are made by mail, messenger, automated teller machine, or in person, or when such payments are made by telephone (via check mailed to the depositor).

(3) In order to ensure that no more than the number of transfers specified in paragraph (a)(2)(i) of this section are made, a State savings association must either:

(i) Prevent transfers of funds in excess of the limitations; or

(ii) Adopt procedures to monitor those transfers on an after-the-fact basis and contact customers who exceed the limits on more than an occasional basis. For customers who continue to violate those limits after being contacted by the depository State savings association the depository State savings association must either place funds in another account that the depositor is eligible to maintain or take away the account's transfer and draft capacities.

(iii) Insured State savings associations at their option, may use on a consistent basis either the date on a check or the date it is paid in determining whether the transfer limitations within the specified interval are exceeded.

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(b) State savings associations may offer MMDAs to any depositor not inconsistent with applicable state law.

§ 390.297 Negotiable Order of Withdrawal Accounts.

(a) *Negotiable Order of Withdrawal (NOW)* accounts are savings accounts authorized by 12 U.S.C. 1832 on which the State savings association reserves the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account.

(b) For purposes of 12 U.S.C. 1832:

(1) An organization shall be deemed "operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and * * * not * * * for profit" if it is described in sections 501(c)(3) through (13), 501(c)(19), or 528 of the Internal Revenue Code; and

(2) The funds of a sole proprietorship or unincorporated business owned by a husband and wife shall be deemed beneficially owned by "one or more individuals."

§ 390.298 Nonresidential construction loan.

The term *nonresidential construction loan* means a loan for construction of other than one or more dwelling units.

§ 390.299 Nonwithdrawable account.

The term *nonwithdrawable account* means an account which by the terms of the contract of the accountholder with the State savings association or by provisions of state law cannot be paid to the accountholder until all liabilities, including other classes of share liability of the State savings association have been fully liquidated and paid upon the winding up of the State savings association is referred to as a *nonwithdrawable account*.

§ 390.300 Note account.

The term *note account* means a note, subject to the right of immediate call, evidencing funds held by depositories electing the note option under applicable United States Treasury Department regulations. Note accounts are not savings accounts or savings deposits.

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§ 390.302 Officer.

The term *Officer* means the president, any vice-president (but not an assistant vice-president, second vice-president, or other vice president having authority similar to an assistant or second vice-president), the secretary, the treasurer, the comptroller, and any other person performing similar functions with respect to any organization whether incorporated or unincorporated. The term *officer* also includes the chairman of the board of directors if the chairman is authorized by the charter or by-laws of the organization to participate in its operating management or if the chairman in fact participates in such management.

§ 390.303 Parent company; subsidiary.

The term *parent company* means any company which directly or indirectly controls any other company or companies. The term *subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes a subsidiary owned in whole or in part by a State savings association, or a subsidiary of that subsidiary.

§ 390.304 Political subdivision.

The term *political subdivision* includes any subdivision of a public unit, any principal department of such public unit:

(a) The creation of which subdivision or department has been expressly authorized by state statute,

(b) To which some functions of government have been delegated by state statute, and

(c) To which funds have been allocated by statute or ordinance for its exclusive use and control. It also includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts and bridge or port authorities and other special districts created by state statute or compacts between the states. Excluded from the term are subordinate or nonautonomous divisions, agencies or boards within principal departments.

§ 390.305 Principal office.

The term *principal office* means the home office of a State savings associa-

tion established as such in conformity with the laws under which the State savings association is organized.

§ 390.306 Public unit.

The term *public unit* means the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, the Virgin Islands, any county, any municipality or any political subdivision thereof.

§ 390.307 Savings account.

The term *savings account* means any withdrawable account, except a demand account as defined in §390.290, a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

§ 390.308 State savings association.

The term *State savings association* means a State savings association as defined in section 3 of the Federal Deposit Insurance Act, the deposits of which are insured by the Corporation. It includes a building and loan, savings and loan, or homestead association, or a cooperative bank (other than a cooperative bank which is a State bank as defined in section 3(a)(2) of the Federal Deposit Insurance Act) organized and operating according to the laws of the State in which it is chartered or organized, or a corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act) that the Board of Directors of the Federal Deposit Insurance Corporation determine to be operating substantially in the same manner as a State savings association.

§ 390.309 Security.

The term *security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a *security*, or any certificate of interest or participation in, temporary or interim

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certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing, except that a *security* shall not include an account or deposit insured by the Federal Deposit Insurance Corporation.

§ 390.310 Service corporation.

The term *service corporation* means any corporation, the majority of the capital stock of which is owned by one or more savings associations and which engages, directly or indirectly, in any activities similar to activities which may be engaged in by a service corporation in which a Federal savings association may invest.

§ 390.311 State.

The term *State* means a State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands of the United States.

§ 390.312 Subordinated debt security.

The term *subordinated debt security* means any unsecured note, debenture, or other debt security issued by a State savings association and subordinated on liquidation to all claims having the same priority as account holders or any higher priority.

§ 390.313 Tax and loan account.

The term *tax and loan account* means an account, the balance of which is subject to the right of immediate withdrawal, established for receipt of payments of Federal taxes and certain United States obligations. Such accounts are not savings accounts or savings deposits.

§ 390.314 United States Treasury General Account.

The term *United States Treasury General Account* means an account maintained in the name of the United States Treasury the balance of which is subject to the right of immediate withdrawal, except in the case of the closure of the member, and in which a zero balance may be maintained. Such accounts are not savings accounts or savings deposits.

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§ 390.315 United States Treasury Time Deposit Open Account.

The term *United States Treasury Time Deposit Open Account* means a non-interest-bearing account maintained in the name of the United States Treasury which may not be withdrawn prior to the expiration of 30 days' written notice from the United States Treasury, or such other period of notice as the Treasury may require. Such accounts are not savings accounts or savings deposits.

§ 390.316 With recourse.

(a) The term *with recourse* means, in connection with the sale of a loan or a participation interest in a loan, an agreement or arrangement under which the purchaser is to be entitled to receive from the seller a sum of money or thing of value, whether tangible or intangible (including any substitution), upon default in payment of any loan involved or any part thereof or to withhold or to have withheld from the seller a sum of money or anything of value by way of security against default. The recourse liability resulting from a sale with recourse shall be the total book value of any loan sold with recourse less:

(1) The amount of any insurance or guarantee against loss in the event of default provided by a third party,

(2) The amount of any loss to be borne by the purchaser in the event of default, and

(3) The amount of any loss resulting from a recourse obligation entered on the books and records of the State savings association.

(b) The term *with recourse* does not include loans or interests therein where the agreement of sale provides for the State savings association directly or indirectly

(1) To hold or retain a subordinate interest in a specified percentage of the loans or interests; or

(2) To guarantee against loss up to a specified percentage of the loans or interests, which specified percentage shall not exceed ten percent of the outstanding balance of the loans or interests at the time of sale: *Provided*, that the State savings association designates adequate reserves for the subordinate interest or guarantee.

(c) This definition does not apply for purposes of determining the capital adequacy requirements under part 324 of this chapter.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

Subpart R—Regulatory Reporting Standards

§ 390.320 Regulatory reporting requirements.

(a) *Authority and scope.* This subpart is issued by the FDIC pursuant to 12 U.S.C. sections 1831m; 1831n(a)(2); 1831p-1;1464(v)(1). It applies to all State savings associations regulated by the FDIC.

(b) *Records and reports—general—(1) Records.* Each State savings association and its affiliates shall maintain accurate and complete records of all business transactions. Such records shall support and be readily reconcilable to any regulatory reports submitted to the FDIC and financial reports prepared in accordance with GAAP. The records shall be maintained in the United States and be readily accessible for examination and other supervisory purposes within 5 business days upon request by the FDIC, at a location acceptable to the FDIC.

(2) *Reports.* For purposes of examination by and regulatory reports to the FDIC and compliance with this section, all State savings associations shall use such forms and follow such regulatory reporting requirements as the FDIC may require by regulation or otherwise.

§ 390.321 Regulatory reports.

(a) *Definition and scope.* This section applies to all regulatory reports, as defined herein. A regulatory report is any report that the FDIC prepares, or is submitted to, or is used by the FDIC, to determine compliance with its rules and regulations, and to evaluate the safe and sound condition and operation of State savings associations. Regulatory reports are regulatory documents, not accounting documents.

(b) *Regulatory reporting requirements—(1) General.* The instructions to regulatory reports are referred to as “regulatory reporting requirements.” Regu-

latory reporting requirements include, but are not limited to, the accounting instructions, guidance contained in FDIC regulations, financial institution letters, manuals, bulletins, examination handbooks, and safe and sound practices. Regulatory reporting requirements are not limited to the minimum requirements under generally accepted accounting principles (GAAP) because of the special supervisory, regulatory, and economic policy needs served by such reports. Regulatory reporting by State savings associations that purports to comply with GAAP shall incorporate the GAAP that best reflects the underlying economic substance of the transaction at issue. Regulatory reporting requirements shall, at a minimum:

(i) Incorporate GAAP whenever GAAP is the referenced accounting instruction for regulatory reports to the Federal banking agencies;

(ii) Incorporate safe and sound practices contained in FDIC regulations, financial institution letters, bulletins, examination handbooks, manuals, and instructions to regulatory reports; and

(iii) Incorporate additional safety and soundness requirements more stringent than GAAP, as the FDIC may prescribe.

(2) *Exceptions.* Regulatory reporting requirements that are not consistent with GAAP, if any, are not required to be reflected in the audited financial statements, including financial statements contained in securities filings submitted to the FDIC pursuant to the Securities Exchange Act of 1934 or subpart W and 12 CFR part 192.

(3) *Compliance.* When the FDIC determines that a State savings association’s regulatory reports did not conform to regulatory reporting requirements in previous reporting periods, the association shall correct its regulatory reports in accordance with the directions of the FDIC.

[76 FR 47655, Aug. 5, 2011, as amended at 79 FR 63502, Oct. 24, 2014]

§ 390.322 Audit of State savings associations.

(a) *General.* The FDIC may require, at any time, an independent audit of the financial statements of, or the application of procedures agreed upon by the

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FDIC to a State savings association, by qualified independent public accountants when needed for any safety and soundness reason identified by the FDIC.

(b) *Audits required for safety and soundness purposes.* The FDIC requires an independent audit for safety and soundness purposes:

(1) If a State savings association has received a composite rating of 3, 4 or 5, as defined at § 390.101(c).

(2) [Reserved]

(c) *Procedures.* (1) When the FDIC requires an independent audit because such an audit is needed for safety and soundness purposes, the FDIC shall determine whether the audit was conducted and filed in a manner satisfactory to the FDIC.

(2) The FDIC may waive the independent audit requirement described at paragraph (b)(1) of this section, if the FDIC determines that an audit would not provide further information on safety and soundness issues relevant to the examination rating.

(3) When the FDIC requires the application of procedures agreed upon by the FDIC for safety and soundness purposes, the FDIC shall identify the procedures to be performed. The FDIC shall also determine whether the agreed upon procedures were conducted and filed in a manner satisfactory to the FDIC.

(d) *Qualifications for independent public accountants.* The audit shall be conducted by an independent public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the State savings association's or holding company's principal office is located;

(2) Agrees in the engagement letter to provide the FDIC with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Secu-

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rities and Exchange Commission and its staff; and

(4) Has received, or is enrolled in, a peer review program that meets guidelines acceptable to the FDIC.

(e) *Voluntary audits.* When a State savings association obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (2), and (3)(i) of this section.

Subpart S—State Savings Associations—Operations

§ 390.330 Chartering documents.

(a) *Submission for approval.* Any *de novo* State savings association prior to commencing operations shall file its charter and bylaws with the FDIC for approval, together with a certification that such charter and bylaws are permissible under all applicable laws, rules and regulations.

(b) *Availability of chartering documents.* Each State savings association shall cause a true copy of its charter and bylaws and all amendments thereto to be available to accountholders at all times in each office of the State savings association, and shall upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

§ 390.331 Securities: Statement of non-insurance.

Every security issued by a State savings association must include in its provisions a clear statement that the security is not insured by the Federal Deposit Insurance Corporation.

§ 390.332 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

(a) No State savings association may, without application to and approval by the FDIC:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a State savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No State savings association may, without notifying the FDIC, as

provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a State savings association is not the resulting institution; or

(ii) In the case of a State savings association that meets the conditions for expedited treatment under §390.101, convert, directly or indirectly, to a national or state bank.

(2) A State savings association that does not meet the conditions for expedited treatment under §390.101 may not, directly or indirectly, convert to a national or state bank without prior application to and approval of FDIC, as provided in paragraph (h)(2)(ii) of this section.

(c) No State savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the FDIC, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term “transfer” means purchases or sales of assets or liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the FDIC shall take into account the following:

(i) The capital level of any resulting State savings association;

(ii) The financial and managerial resources of the constituent institutions;

(iii) The future prospects of the constituent institutions;

(iv) The convenience and needs of the communities to be served;

(v) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if

any) of each State savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the result of arms’ length bargaining or, in the case of a stock State savings association, where controlling stockholders are receiving different consideration from other stockholders. No finder’s or similar fee should be paid to any officer, director, or controlling person of a State savings association which is a party to the transaction.

(B) *Full disclosure.* The filing should make full disclosure of all written or oral agreements or understandings by which any person or company will receive, directly or indirectly, any money, property, service, release of pledges made, or other thing of value, whether tangible or intangible, in connection with the transaction.

(C) *Compensation to officers.* Compensation, including deferred compensation, to officers, directors and controlling persons of the disappearing State savings association by the resulting institution or an affiliate thereof should not be in excess of a reasonable amount, and should be commensurate with their duties and responsibilities. The filing should fully justify the compensation to be paid to such persons. The transaction will be particularly scrutinized where any of such persons is to receive a material increase in compensation above that paid by the disappearing State savings association prior to the commencement of negotiations regarding the proposed transaction. An increase in compensation in excess of the greater of 15% or \$10,000 gives rise to presumptions of unreasonableness and sale of control. In the case of such an increase, evidence sufficient to rebut such presumptions should be submitted.

(D) *Advisory boards.* Advisory board members should be elected for a term not exceeding one year. No advisory board fees should be paid to salaried officers or employees of the resulting State savings association. The filing should describe and justify the duties and responsibilities and any compensation paid to any advisory board of the

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resulting State savings association that consists of officers, directors or controlling persons of the disappearing institution, particularly if the disappearing institution experienced significant supervisory problems prior to the transaction. No advisory board fees should exceed the director fees paid by the resulting State savings association. Advisory board fees that are in excess of 115 percent of the director fees paid by the disappearing State savings association prior to commencement of negotiations regarding the transaction give rise to presumptions of unreasonableness and sale of control unless sufficient evidence to rebut such presumptions is submitted. Rebuttal evidence is not required if:

(1) The advisory board fees do not exceed the fee that advisory board members of the resulting institution receive for each monthly meeting attended or \$150, whichever is greater; or

(2) The advisory board fees do not exceed \$100 per meeting attended for disappearing State savings associations with assets greater than \$10,000,000 or \$50 per meeting attended for disappearing State savings associations with assets of \$10,000,000 or less, based on a schedule of 12 meetings per year.

(E) The accounting and tax treatment of the transaction; and

(F) Fees paid and professional services rendered in connection with the transaction.

(2) In conferring approval of a transaction under paragraph (a) of this section, the FDIC also will consider the competitive impact of the transaction, including whether:

(i) The transaction would result in a monopoly, or would be in furtherance of any monopoly or conspiracy to monopolize or to attempt to monopolize the State savings association business in any part of the United States; or

(ii) The effect of the transaction on any section of the country may be substantially to lessen competition, or tend to create a monopoly, or in any other manner would be in restraint of trade, unless the FDIC finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the

convenience and needs of the communities to be served.

(3) Applications and notices filed under this section shall be upon forms prescribed by the FDIC.

(4) Applications filed under paragraph (a) of this section must be processed in accordance with the time frames set forth in §§390.127 through 390.135, provided that the period for review may be extended only if the FDIC determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

(e)(1) The following procedures apply to applications described in paragraph (a) of this section, unless the FDIC finds that it must act immediately to prevent the probable default of one of the depository institutions involved:

(i) The applicant must publish a public notice of the application in accordance with the procedures in §§390.111 through 390.115. In addition to the initial publication, the applicant must also publish on a weekly basis during the public comment period.

(ii) Commenters may submit comments on an application in accordance with the procedures in §§390.116 through 390.120. The public comment period is 30 calendar days after the date of publication of the initial public notice. However, if the FDIC has advised the Attorney General that an emergency exists requiring expeditious action, the public comment period is 10 calendar days after the date of publication of the initial public notice.

(iii) The FDIC may arrange a meeting in accordance with the procedures in §§390.121 through 390.125.

(iv) The FDIC will request the Attorney General, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System to provide reports on the competitive impacts involved in the transaction.

(v) The FDIC will immediately notify the Attorney General of the approval of the transaction. The applicant may not consummate the transaction before the date established under 12 U.S.C. 1828(c)(6).

(2) For applications described in § 390.332, certain State savings associations described below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring State savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring State savings association. The following State savings associations must provide the notices:

(i) A State savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(ii) Any mutual State savings association transferring account liabilities to a stock form depository institution.

(f) *Automatic approvals by the FDIC.* Applications filed pursuant to paragraph (a) of this section shall be deemed to be approved automatically by the FDIC 30 calendar days after the FDIC sends written notice to the applicant that the application is complete, unless:

(1) The acquiring State savings association does not meet the criteria for expedited treatment under § 390.101;

(2) The FDIC recommends the imposition of non-standard conditions prior to approving the application;

(3) The FDIC suspends the applicable processing time frames under § 390.125;

(4) The FDIC raises objections to the transaction;

(5) The resulting State savings association would be one of the 3 largest depository institutions competing in the relevant geographic area where before the transaction there were 5 or fewer depository institutions, the resulting State savings association would have 25 percent or more of the total deposits held by depository institutions in the relevant geographic area, and the share of total deposits would have increased by 5 percent or more;

(6) The resulting State savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 6 to 11 depository institutions the resulting State savings association would have

30 percent or more of the total deposits held by depository institutions in the relevant geographic area, and the share of total deposits would have increased by 10 percent or more;

(7) The resulting State savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 12 or more depository institutions, the resulting State savings association would have 35 percent or more of the total deposits held by the depository institutions in the relevant geographic area, and the share of total deposits would have increased by 15 percent or more;

(8) The Herfindahl-Hirschman Index (HHI) in the relevant geographic area was more than 1800 before the transaction, and the increase in the HHI used by the transaction would be 50 or more;

(9) In a transaction involving potential competition, the FDIC determines that the acquiring State savings association is one of three or fewer potential entrants into the relevant geographic area;

(10) The acquiring State savings association has assets of \$1 billion or more and proposes to acquire assets of \$1 billion or more;

(11) The State savings association that will be the resulting State savings association in the transaction has a composite Community Reinvestment Act rating of less than satisfactory, or is otherwise seriously deficient with respect to the FDIC's nondiscrimination regulations and the deficiencies have not been resolved to the satisfaction of the FDIC;

(12) The transaction involves any supervisory or assistance agreement with the FDIC;

(13) The transaction is part of a conversion under 12 CFR part 192;

(14) The transaction raises a significant issue of law or policy; or

(15) The transaction is opposed by any constituent institution or contested by a competing acquirer.

(g) *Definitions.* (1) The terms used in this subpart shall have the same meaning as set forth in 12 CFR 152.13(b).

(2) *Insured depository institution.* Insured depository institution has the same

meaning as defined in section 3(c)(2) of the Federal Deposit Insurance Act.

(3) With regard to paragraph (f) of this section, the term *relevant geographic area* is used as a substitute for *relevant geographic market*, which means the area within which the competitive effects of a merger or other combination may be evaluated. The relevant geographic area shall be delineated as a county or similar political subdivision, an area smaller than a county, or an aggregation of counties within which the merging or combining insured depository institutions compete. In addition, the FDIC may consider commuting patterns, newspaper and other advertising activities, or other factors as the FDIC deems relevant.

(h) *Special requirements and procedures for transactions under paragraphs (b) and (c) of this section*—(1)(i) *Certain transactions with no surviving State savings association*. The FDIC must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the FDIC may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the State savings association submitting the notification maintains a liquidation account established pursuant to 12 CFR part 192, the notification must state that the resulting institution will assume such liquidation account.

(ii) The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the FDIC's receipt of the notifica-

tion, a new notification must be submitted to the FDIC.

(2) *Other transfer transactions*—(i) *Expedited treatment*. A notice in conformity with § 390.105(a) may be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, under § 390.108 for any transaction under paragraph (c) of this section, provided all constituent State savings associations meet the conditions for expedited treatment under § 390.101. Notices submitted under this paragraph must be deemed approved automatically by the FDIC 30 days after receipt, unless the FDIC advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without the FDIC's approval of an application under paragraphs (h)(2)(ii) or (h)(2)(iii) of this section.

(ii) *Standard treatment*. An application in conformity with § 390.105(b) and paragraph (d) of this section must be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, under § 390.108 by each State savings association participating in a transaction under paragraph (b)(2) or (c) of this section, where any constituent State savings association does not meet the conditions for expedited treatment under § 390.101. Applications under this paragraph must be processed in accordance with §§ 390.103 through 390.110 and §§ 390.126 through 390.135.

§ 390.333 Advertising.

No State savings association shall use advertising (which includes print or broadcast media, displays or signs, stationery, and all other promotional materials), or make any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments, or financial condition.

§ 390.334 Directors, officers, and employees.

(a) *Directors*—(1) *Requirements*. The composition of the board of directors of a State savings association must be in accordance with the following requirements:

(i) A majority of the directors must not be salaried officers or employees of the State savings association or of any

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subsidiary or (except in the case of a State savings association having 80% or more of any class of voting shares owned by a holding company) any holding company affiliate thereof.

(ii) Not more than two of the directors may be members of the same immediate family.

(iii) Not more than one director may be an attorney with a particular law firm.

(2) *Prospective application.* In the case of an association whose board of directors does not conform with any requirement set forth in paragraph (a)(1) of this section as of October 5, 1983, this paragraph (a) shall not prohibit the uninterrupted service, including re-election and re-appointment, of any person serving on the board of directors at that date.

(b) [Reserved]

§ 390.335 Tying restriction exception.

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

§ 390.336 Employment contracts.

(a) *General.* A State savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by a State savings association's board of directors. A State savings association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the State savings association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the State savings association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The State savings association's board of directors may terminate the officer or employee's employment at any time, but any termination by the State savings association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the State savings association's affairs by a notice served under section 8(e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818(e)(3) and (g)(1)), the State savings association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the State savings association may in its discretion:

(i) Pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended; and

(ii) Reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the State savings association's affairs by an order issued under section 8(e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)(4) or (g)(1)), all obligations of the State savings association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

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(4) If the State savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: *Provided*, that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the FDIC.

(5)(i) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the State savings association

(A) By the FDIC, at the time the FDIC enters into an agreement to provide assistance to or on behalf of the State savings association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(B) By the FDIC, at the time the FDIC approves a supervisory merger to resolve problems related to operation of the State savings association or when the State savings association is determined by the FDIC to be in an unsafe or unsound condition.

(ii) Any rights of the parties that have already vested, however, shall not be affected by such action.

§ 390.337 Transactions with affiliates.

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

§ 390.338 Loans by State savings associations to their executive officers, directors, and principal shareholders.

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

§ 390.339 Pension plans.

(a) *General.* No State savings association shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor. For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability of a plan sponsor to

each plan participant shall be stated in or determinable from the plan, and, for a defined benefit plan, shall also be based upon an actuarial estimate of future experience under the plan.

(b) *Funding.* Actuarial cost methods permitted under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, shall be used to determine plan funding.

(c) *Plan amendment.* A plan may be amended to provide reasonable annual cost-of-living increases to retired participants: *Provided*, That

(1) Any such increase shall be for a period and amount determined by the sponsor's board of directors, but in no event shall it exceed the annual increase in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless:

(i) Anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and

(ii) The increase will not reduce the State savings association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the FDIC at least 60 days prior to the proposed termination date.

(e) *Records.* Each State savings association maintaining a plan not subject to recordkeeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

- (1) Plan description;
- (2) Schedule of participants and beneficiaries;
- (3) Schedule of participants and beneficiaries' rights and obligations;
- (4) Plan's financial statements; and
- (5) Except for defined contribution plans, an opinion signed by an enrolled actuary (as defined by the Employee Retirement Income Security Act of

1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

§ 390.340 Offers and sales of securities at an office of a State savings association.

(a) A State saving association may not offer or sell debt or equity securities issued by the State savings association or an affiliate of the State savings association at an office of the State savings association; except that equity securities issued by the State savings association or an affiliate in connection with the State savings association's conversion from the mutual to stock form of organization in a conversion approved pursuant to 12 CFR part 192 may be offered and sold at the State savings association's offices: *Provided*, That:

(1) The FDIC does not object on supervisory grounds that the offer and sale of the securities at the offices of the State savings association;

(2) No commissions, bonuses, or comparable payments are paid to any employee of the State savings association or its affiliates or to any other person in connection with the sale of securities at an office of a State savings association; except that compensation and commissions consistent with industry norms may be paid to securities personnel of registered broker-dealers;

(3) No offers or sales are made by tellers or at the teller counter, or by comparable persons at comparable locations;

(4) Sales activity is conducted in a segregated or separately identifiable area of the State savings association's offices apart from the area accessible to the general public for the purposes of making or withdrawing deposits;

(5) Offers and sales are made only by regular, full-time employees of the State savings association or by securities personnel who are subject to supervision by a registered broker-dealer;

(6) An acknowledgment, in the form set forth in paragraph (c) of this section, is signed by any customer to whom the security is sold in the State

savings association's offices prior to the sale of any such securities;

(7) A legend that the security is not a deposit or account and is not federally insured or guaranteed appears conspicuously on the security and in all offering documents and advertisements for the securities; the legend must state in bold or other prominent type at least as large as other textual type in the document that "This security is not a deposit or account and is not federally insured or guaranteed"; and

(8) The State savings association will be in compliance with its current capital requirements upon completion of the conversion stock offering.

(b) Securities sales practices, advertisements, and other sales literature used in connection with offers and sales of securities by State savings associations shall be subject to § 390.419.

(c) Offers and sales of securities of a State savings association or its affiliates in any office of the State savings association must use a one-page, unambiguous, certification in substantially the following form:

FORM OF CERTIFICATION

I ACKNOWLEDGE THAT THIS SECURITY IS NOT A DEPOSIT OR ACCOUNT AND IS NOT FEDERALLY INSURED, AND IS NOT GUARANTEED BY [insert name of State savings association] OR BY THE FEDERAL GOVERNMENT.

If anyone asserts that this security is federally insured or guaranteed, or is as safe as an insured deposit, I should call the FDIC's appropriate regional director [insert name and telephone number with area code of the appropriate regional director, as defined in section 303.2 of this chapter].

I further certify that, before purchasing the [description of security being offered] of [name of issuer, name of State savings association and affiliation to issuer (if different)], I received an offering circular.

The offering circular that I received contains disclosure concerning the nature of the security being offered and describes the risks involved in the investment, including:

[List briefly the principal risks involved and cross reference certain specified pages of the offering circular where a more complete description of the risks is made.]

Signature: _____

Date: _____

(d) For purposes of this section, an "office" of a State savings association means any premises used by the State savings association that are identified

to the public through advertising or signage using the State savings association's name, trade name, or logo.

§ 390.341 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital.

(a) *Scope.* A State savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock ("covered securities") in supplementary capital (tier 2 capital) under part 324 of this chapter. If a State savings association does not include covered securities in supplementary capital, it is not required to comply with this section.

(b) *Application and notice procedures.*

(1) A State savings association must file an application or notice under §§ 390.103 through 390.110 seeking FDIC approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The State savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the FDIC approves the application or does not object to the notice.

(2) A State savings association must also comply with the securities offering rules at subpart W by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that subpart.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: "This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;"

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the State savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the State savings association's assets or the assets of any affil-

iate of the State savings association. For purposes of this subpart, the term *affiliate* means any person or company which controls, is controlled by, or is under common control with such State savings association.

(D) State that the security is not eligible collateral for a loan by the State savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h);

(F) For subordinated debt securities, state or refer to a document stating the terms under which the State savings association may prepay the obligation; and

(G) State or refer to a document stating that the State savings association must obtain FDIC approval before the voluntarily prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntarily redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the State savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in subpart H of part 324 of this chapter, fails to meet the regulatory capital requirements in part 324, or would fail to meet any of these standards following the payment.

(ii) A State savings association must include such additional statements as the FDIC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Maturity requirements.* Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) *Mandatory prepayment.* Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the State savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a State savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in §390.413 and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the State savings association or an affiliate of the State savings association (as defined at §390.283) and for collective enforcement of the security holders' rights and remedies.

(ii) A State savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A State savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a State savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) *FDIC review.* (1) The FDIC will review notices and applications under §§390.126 through 390.135.

(2) In reviewing notices and applications under this section, the FDIC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the State savings association's charter and bylaws.

(ii) The State savings association is at least adequately capitalized under subpart H of part 324 of this chapter and meets the regulatory capital requirements in part 324.

(iii) The State savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) The FDIC has no objection to the issuance based on the State savings association's overall policies, condition, and operations.

(3) The FDIC approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the FDIC. The FDIC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the State savings association, or the Deposit Insurance Fund.

(e) *Amendments.* If a State savings association amends the covered securities or related documents following the completion of the FDIC's review, it must obtain the FDIC's approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) *Sale of covered securities.* The State savings association must complete the sale of covered securities within one year after the FDIC's approval or non-objection under this section. A State savings association may request an extension of the offering period by filing a written request with the FDIC. The State savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) *Reports.* A State savings association must file the following information with the FDIC within 30 days after the State savings association completes the sale of covered securities includable as supplementary capital. If the State savings association filed its application or notice following the completion of the sale, it must submit

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this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the State savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the State savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.342 Capital distributions by State savings associations.

Sections 390.342 through 390.348 apply to all capital distributions by a State savings association (“you”).

§ 390.343 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a mutual State savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the FDIC determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under part 324 of this chapter, and any extension of credit to finance an affiliate’s acquisition of your shares or interests;

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a cor-

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porate restructuring. This includes your payment of cash or property to shareholders of another savings association or to shareholders of its holding company to acquire ownership in that savings association, other than by a distribution of shares;

(d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in subpart H of part 324 of this chapter, following the distribution; and

(e) Any transaction that the FDIC determines, by order or regulation, to be in substance a distribution of capital.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.344 Definitions applicable to capital distributions.

The following definitions apply to sections 390.342 through 390.348:

Affiliate means an affiliate, as defined in regulations governing transactions with affiliates as issued by the Board of Governors of the Federal Reserve System.

Capital means total capital, as computed under part 324 of this chapter. For a qualifying community banking organization (as defined in §324.12 of this chapter) that is subject to the community bank leverage ratio framework (as defined in §324.12 of this chapter), total capital means the FDIC-supervised institution’s tier 1 capital, as defined under §324.2 of this chapter and calculated in accordance with §324.12(b) of this chapter.

Net income means your net income computed in accordance with generally accepted accounting principles.

Retained net income means your net income for a specified period less total capital distributions declared in that period.

Shares means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term “share” also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not

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equity securities at the time of a capital distribution.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018; 84 FR 61804, Nov. 13, 2019]

§ 390.345 Must I file with the FDIC?

Whether and what you must file with the FDIC depends on whether you and your proposed capital distribution fall within certain criteria.

(a) Application required.

If:	Then you:
(1) You are not eligible for expedited treatment under § 390.101	Must file an application with the FDIC.
(2) The total amount of all of your capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds your net income for that year to date plus your retained net income for the preceding two years.	Must file an application with the FDIC.
(3) You would not be at least adequately capitalized, as set forth in subpart H of part 324 of this chapter, following the distribution.	Must file an application with the FDIC.
(4) Your proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between you and the FDIC, or violate a condition imposed on you in an FDIC-approved application or notice.	Must file an application with the FDIC.

(b) Notice required.

If you are not required to file an application under paragraph (a) of this section, but:	Then you:
(1) You would not be well capitalized, as set forth under subpart H of part 324 of this chapter, following the distribution.	Must file a notice with the FDIC.
(2) Your proposed capital distribution would reduce the amount of or retire any part of your common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under subpart H of part 324 of this chapter (other than regular payments required under a debt instrument approved under subpart H of part 324 of this chapter).	Must file a notice with the FDIC.

(c) No prior notice required.

If neither you nor your proposed capital distribution meet any of the criteria listed in paragraphs (a) and (b) of this section.	Then you do not need to file a notice or an application with the FDIC before making a capital distribution.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.346 How do I file with the FDIC?

(a) *Contents.* Your notice or application must:

- (1) Be in narrative form.
- (2) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution.
- (3) Demonstrate compliance with § 390.348.

(b) *Schedules.* Your notice or application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months.

(c) *Timing.* You must file your notice or application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by your board of directors.

§ 390.347 May I combine my notice or application with other notices or applications?

You may combine the notice or application required under § 390.345 with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under Parts 390 and 391. If you submit a combined filing, you must:

(a) State that the related notice or application is intended to serve as a notice or application under §§ 390.342 through 390.348; and

(b) Submit the notice or application in a timely manner.

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§ 390.348 Will the FDIC permit my capital distribution?

The FDIC will review your notice or application under the review procedures in §§ 390.126 through 390.135. The FDIC may disapprove your notice or deny your application filed under § 390.345 in whole or in part, if the FDIC makes any of the following determinations.

(a) You will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in subpart H of part 324 of this chapter, following the capital distribution. If so, the FDIC will determine if your capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

(b) Your proposed capital distribution raises safety or soundness concerns.

(c) Your proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between you and the FDIC or a condition imposed on you in an FDIC-approved application or notice. If so, the FDIC will determine whether it may permit your capital distribution notwithstanding the prohibition or condition.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.349 Management and financial policies.

(a)(1) For the protection of depositors and other State savings associations, each State savings association must be well managed and operate safely and soundly. Each also must pursue financial policies that are safe and consistent with economical home financing and the purposes of State savings associations.

(2) As part of meeting its requirements under paragraph (a)(1) of this section, each State savings association must maintain sufficient liquidity to ensure its safe and sound operation.

(b) Compensation to officers, directors, and employees of each State savings association shall not be in excess of that which is reasonable and commensurate with their duties and responsibilities. Former officers, directors, and employees of State savings association who regularly perform services therefor under consulting con-

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tracts are employees thereof for purposes of this paragraph (b).

§ 390.350 Examinations and audits; appraisals; establishment and maintenance of records.

(a) *Examinations and audits.* Each State savings association and affiliate thereof shall be examined periodically, and may be examined at any time, by the FDIC, with appraisals when deemed advisable, in accordance with general policies from time to time established by the FDIC.

(b) *Appraisals.* (1) Unless otherwise ordered by the FDIC, appraisal of real estate by the FDIC in connection with any examination or audit of a State savings association or its affiliate shall be made by an appraiser, or by appraisers, selected by the appropriate FDIC region, as that term is defined in § 303.2 of this chapter, in which such State savings association is located. The cost of such appraisal shall promptly be paid by such State savings association or its affiliate direct to such appraiser or appraisers upon receipt by the State savings association or its affiliate of a statement of such cost as approved by the appropriate regional director. A copy of the report of each appraisal made by the FDIC pursuant to any of the foregoing provisions of this section shall be furnished to the State savings association or its affiliate, as appropriate within a reasonable time, not to exceed 90 days, following the completion of such appraisals and the filing of a report thereof by the appraiser, or appraisers, with the appropriate FDIC office.

(2) The FDIC may obtain at any time, at its expense, such appraisals of any of the assets, including the security therefor, of a State savings association or its affiliate as the FDIC deems appropriate.

(c) *Establishment and maintenance of records.* To enable the FDIC to examine State savings associations and affiliates and audit State savings associations and its affiliates, pursuant to the provisions of paragraph (a) of this section, each State savings association, and its affiliate shall establish and maintain such accounting and other records as will provide an accurate and complete record of all business it

transacts. This includes, without limitation, establishing and maintaining such other records as are required by statute or any other regulation to which the State savings association and its affiliate is subject. The documents, files, and other material or property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be.

(d) *Change in location of records.* A State savings association shall not transfer the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has:

(1) By resolution authorized the transfer or maintenance and;

(2) Sent a certified copy of the resolution to the appropriate regional director for the region in which the principal office of the State savings association is located.

(e) *Use of data processing services for maintenance of records.* A State savings association which determines to maintain any of its records by means of data processing services shall so notify the appropriate regional director for the region in which the principal office of such State savings association is located, in writing, at least 90 days prior to the date on which such maintenance of records will begin. Such notification shall include identification of the records to be maintained by data processing services and a statement as to the location at which such records will be maintained. Any contract, agreement, or arrangement made by a State savings association pursuant to which data processing services are to be performed for such State savings association shall be in writing and shall expressly provide that the records to be maintained by such services shall at all times be available for examination and audit.

§ 390.352 Financial derivatives.

(a) *What is a financial derivative?* A financial derivative is a financial con-

tract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this section.

(b) *May I engage in transactions involving financial derivatives?* (1) [Reserved]

(2) If you are a State savings association, you may engage in a transaction involving a financial derivative if your charter or applicable State law authorizes you to engage in such transactions, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(3) In general, if you engage in a transaction involving a financial derivative, you should do so to reduce your risk exposure.

(c) *What are my board of directors' responsibilities with respect to financial derivatives?* (1) Your board of directors is responsible for effective oversight of financial derivatives activities.

(2) Before you may engage in any transaction involving a financial derivative, your board of directors must establish written policies and procedures governing authorized financial derivatives. Your board of directors should review Thrift Bulletin 13a, "Management of Interest Rate Risk, Investment Securities, and Derivatives Activities," and other applicable agency guidance on establishing a sound risk management program.

(3) Your board of directors must periodically review:

(i) Compliance with the policies and procedures established under paragraph (c)(2) of this section; and

(ii) The adequacy of these policies and procedures to ensure that they continue to be appropriate to the nature and scope of your operations and existing market conditions.

(4) Your board of directors must ensure that management establishes an adequate system of internal controls for transactions involving financial derivatives.

(d) *What are management's responsibilities with respect to financial derivatives?*

(1) Management is responsible for daily

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oversight and management of financial derivatives activities. Management must implement the policies and procedures established by the board of directors and must establish a system of internal controls. This system of internal controls should, at a minimum, provide for periodic reporting to the board of directors and management, segregation of duties, and internal review procedures.

(2) Management must ensure that financial derivatives activities are conducted in a safe and sound manner and should review Thrift Bulletin 13a, "Management of Interest Rate Risk, Investment Securities, and Derivatives Activities," and other applicable agency guidance on implementing a sound risk management program.

(e) *What records must I keep on financial derivative transactions?* You must maintain records adequate to demonstrate compliance with this section and with your board of directors' policies and procedures on financial derivatives.

§ 390.353 Interest-rate-risk-management procedures.

State savings associations shall take the following actions:

(a) The board of directors or a committee thereof shall review the State savings association's interest-rate-risk exposure and devise a policy for the State savings association's management of that risk.

(b) The board of directors shall formerly adopt a policy for the management of interest-rate risk. The management of the State savings association shall establish guidelines and procedures to ensure that the board's policy is successfully implemented.

(c) The management of the State savings association shall periodically report to the board of directors regarding implementation of the State savings association's policy for interest-rate-risk management and shall make that information available upon request to the FDIC.

(d) The State savings association's board of directors shall review the results of operations at least quarterly and shall make such adjustments as it considers necessary and appropriate to the policy for interest-rate-risk man-

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agement, including adjustments to the authorized acceptable level of interest-rate risk.

§ 390.354 Procedures for monitoring Bank Secrecy Act (BSA) compliance.

(a) *Purpose.* The purpose of this regulation is to require State savings associations (as defined by § 390.308 to establish and maintain procedures reasonably designed to assure and monitor compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the U.S. Department of Treasury, 31 CFR part 103.

(b) *Establishment of a BSA compliance program—(1) Program requirement.* Each State savings association shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR part 103. The compliance program must be written, approved by the State savings association's board of directors, and reflected in the minutes of the State savings association.

(2) *Customer identification program.* Each State savings association is subject to the requirements of 31 U.S.C. 5318(1) and the implementing regulation promulgated at 31 CFR 103.121, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.

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

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

(2) Provide for independent testing for compliance to be conducted by a savings association's in-house personnel or by an outside party;

(3) Designate individual(s) responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

§ 390.355 Suspicious Activity Reports and other reports and statements.

(a) *Periodic reports.* Each State savings association shall make such periodic or other reports of its affairs in such manner and on such forms as the FDIC may prescribe. The FDIC may provide that reports filed by State savings associations to meet the requirements of other regulations also satisfy requirements imposed under this section.

(b) *False or misleading statements or omissions.* No State savings association or director, officer, agent, employee, affiliated person, or other person participating in the conduct of the affairs of such State savings association nor any person filing or seeking approval of any application shall knowingly:

(1) Make any written or oral statement to the FDIC or to an agent, representative or employee of the FDIC that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the FDIC; or

(2) Make any such statement or omission to a person or organization auditing a State savings association or otherwise preparing or reviewing its financial statements concerning the accounts, assets, management condition, ownership, safety, or soundness, or other affairs of the State savings association.

(c) *Notifications of loss and reports of increase in deductible amount of bond.* A State savings association maintaining bond coverage as required by § 390.356 shall promptly notify its bond company and file a proof of loss under the procedures provided by its bond, concerning any covered losses greater than twice the deductible amount.

(d) *Suspicious Activity Reports—(1) Purpose and scope.* This paragraph (d) ensures that State savings associations and service corporations file a Suspicious Activity Report when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act.

(2) *Definitions.* For the purposes of this paragraph (d):

(i) *FinCEN* means the Financial Crimes Enforcement Network of the Department of the Treasury.

(ii) *Institution-affiliated party* means any institution-affiliated party as that term is defined in sections 3(u) and 8(b)(9) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u) and 1818(b)(9)).

(iii) *SAR* means a Suspicious Activity Report on the form prescribed by the FDIC.

(3) *SARs required.* A State savings association shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

(i) *Insider abuse involving any amount.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association or involving a transaction or transactions conducted through the State savings association where the State savings association believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act, regardless of the amount involved in the violation.

(ii) *Violations aggregating \$5,000 or more where a suspect can be identified.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association involving a transaction or transactions conducted through the State savings association and involving or aggregating \$5,000 or more in funds or other assets, where the State savings association believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an alias,

then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as drivers' license or social security numbers, addresses and telephone numbers, must be reported.

(iii) *Violations aggregating \$25,000 or more regardless of potential suspects.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association involving a transaction or transactions conducted through the State savings association and involving or aggregating \$25,000 or more in funds or other assets, where the State savings association believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.

(iv) *Transactions aggregating \$5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.* Any transaction (which for purposes of this paragraph (d)(3)(iv) means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at or through the State savings association involving or aggregating \$5,000 or more in funds or other assets, if the State savings association knows, suspects, or has reason to suspect that:

(A) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;

(B) The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or

(C) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

(4) [Reserved]

(5) *Time for reporting.* A State savings association is required to file a SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR. If no suspect was identified on the date of detection of the incident requiring the filing, a State savings association may delay filing a SAR for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction. In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the State savings association shall immediately notify, by telephone, an appropriate law enforcement authority and the FDIC in addition to filing a timely SAR.

(6) *Reports to state and local authorities.* A State savings association is encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate.

(7) *Exception.* A State savings association need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

(8) *Retention of records.* A State savings association shall maintain a copy of any SAR filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of the filing of the SAR. Supporting documentation shall be identified and maintained by the State savings association as such, and shall be deemed to have been filed

with the SAR. A State savings association shall make all supporting documentation available to appropriate law enforcement agencies upon request.

(9) *Notification to board of directors*—(i) *Generally*. Whenever a State savings association files a SAR pursuant to this paragraph (d), the management of the State savings association shall promptly notify its board of directors, or a committee of directors or executive officers designated by the board of directors to receive notice.

(ii) *Suspect is a director or executive officer*. If the State savings association files a SAR pursuant to this paragraph (d) and the suspect is a director or executive officer, the State savings association may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but shall notify all directors who are not suspects.

(10) *Compliance*. Failure to file a SAR in accordance with this section and the instructions may subject the State savings association, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action.

(11) *Obtaining SARs*. A State savings association may obtain SARs and the instructions from the appropriate FDIC region as defined in §303.2 of this chapter.

(12) *Confidentiality of SARs*. SARs are confidential. Any institution or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, citing this paragraph (d), applicable law (*e.g.*, 31 U.S.C. 5318(g)), or both, and shall notify the FDIC.

(13) *Safe harbor*. The safe harbor provision of 31 U.S.C. 5318(g), which exempts any financial institution that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, covers all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of

whether such reports are filed pursuant to this paragraph (d), or are filed on a voluntary basis.

(e) *Adjustable-rate mortgage indices*—(1) *Reporting obligation*. Upon the request of a Federal Home Loan Bank, all State savings associations within the jurisdiction of that Federal Home Loan Bank shall report the data items set forth in paragraph (e)(2) of this section for the Federal Home Loan Bank to use in calculating and publishing an adjustable-rate mortgage index.

(2) *Data to be reported*. For purposes of paragraph (e)(1) of this section, the term “data items” means the data items previously collected from the monthly Thrift Financial Report or Consolidated Reports of Condition or Income (“Call Report”), as applicable, and such data items as may be altered, amended, or substituted by the requesting Federal Home Loan Bank.

(3) *Applicable indices*. For the purpose of this reporting requirement, the term “adjustable-rate mortgage index” means any of the adjustable-rate mortgage indices calculated and published by a Federal Home Loan Bank or the Federal Home Loan Bank Board on or before August 9, 1989.

§ 390.356 Bonds for directors, officers, employees, and agents; form of and amount of bonds.

(a) Each State savings association shall maintain fidelity bond coverage. The bond shall cover each director, officer, employee, and agent who has control over or access to cash, securities, or other property of the State savings association.

(b) The amount of coverage to be required for each State savings association shall be determined by the association’s management, based on its assessment of the level that would be safe and sound in view of the association’s potential exposure to risk; provided, such determination shall be subject to approval by the association’s board of directors.

(c) Each State savings association may maintain bond coverage in addition to that provided by the insurance underwriter industry’s standard forms, through the use of endorsements, riders, or other forms of supplemental coverage, if, in the judgment of the

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State savings association's board of directors, additional coverage is warranted.

(d) The board of directors of each State savings association shall formally approve the State savings association's bond coverage. In deciding whether to approve the bond coverage, the board shall review the adequacy of the standard coverage and the need for supplemental coverage. Documentation of the board's approval shall be included as a part of the minutes of the meeting at which the board approves coverage. Additionally, the board of directors shall review the State savings association's bond coverage at least annually to assess the continuing adequacy of coverage.

§ 390.357 Bonds for agents.

In lieu of the bond provided in § 390.356 in the case of agents appointed by a State savings association, a fidelity bond may be provided in an amount at least twice the average monthly collections of such agents, provided such agents shall be required to make settlement with the State savings association at least monthly, and provided such bond is approved by the board of directors of the State savings association. No bond need be obtained for any agent that is a financial institution insured by the FDIC.

§ 390.358 Conflicts of interest.

If you are a director, officer, or employee of a State savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a State savings association:

(a) You must not advance your own personal or business interests, or those of others with whom you have a personal or business relationship, at the expense of the State savings association; and

(b) You must, if you have an interest in a matter or transaction before the board of directors:

(1) Disclose to the board all material nonprivileged information relevant to the board's decision on the matter or transaction, including:

(i) The existence, nature and extent of your interests; and

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(ii) The facts known to you as to the matter or transaction under consideration;

(2) Refrain from participating in the board's discussion of the matter or transaction; and

(3) Recuse yourself from voting on the matter or transaction (if you are a director).

§ 390.359 Corporate opportunity.

(a) If you are a director or officer of a State savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a State savings association, you must not take advantage of corporate opportunities belonging to the State savings association.

(b) A corporate opportunity belongs to a State savings association if:

(1) The opportunity is within the corporate powers of the State savings association or a subsidiary of the State savings association; and

(2) The opportunity is of present or potential practical advantage to the State savings association, either directly or through its subsidiary.

(c) The FDIC will not deem you to have taken advantage of a corporate opportunity belonging to the State savings association if a disinterested and independent majority of the State savings association's board of directors, after receiving a full and fair presentation of the matter, rejected the opportunity as a matter of sound business judgment.

§ 390.360 Change of director or senior executive officer.

Sections 390.360 through 390.368 implement 12 U.S.C. 1831i, which requires certain State savings associations to notify the FDIC before appointing or employing directors and senior executive officers.

§ 390.361 Applicable definitions.

The following definitions apply to §§ 390.360 through 390.368:

Director means an individual who serves on the board of directors of a State savings association. This term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;

(3) Provides only general policy advice to the board of directors or any committee of the board of directors; and

(4) Has not been identified by the FDIC in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policy-making decisions of the board of directors.

Senior executive officer means an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the FDIC in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

Troubled condition means:

(1) A State savings association that has a composite rating of 4 or 5, as composite rating is defined in § 390.101(c).

(2) [Reserved]

(3) A State savings association that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt corrective action directive relating to the safety and soundness or financial viability of the State savings association, unless otherwise informed in writing by the FDIC; or

(4) A State savings association that is informed in writing by the FDIC that it is in troubled condition based on information available to the FDIC.

§ 390.362 Who must give prior notice?

(a) *State savings association*. Except as provided under § 390.368, you must notify the FDIC at least 30 days before adding or replacing any member of your board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the per-

son would assume a different senior executive position if:

(1) You are a State savings association and at least one of the following circumstances apply:

(i) You do not comply with all minimum capital requirements under part 324 of this chapter;

(ii) You are in troubled condition; or

(iii) The FDIC has notified you, in connection with its review of a capital restoration plan required under section 38 of the Federal Deposit Insurance Act or subpart H of part 324 of this chapter or otherwise, that a notice is required under §§ 390.360 through 390.368; or

(2) [Reserved]

(b) *Notice by individual*. If you are an individual seeking election to the board of directors of a State savings association described in paragraph (a) of this section, and have not been nominated by management, you must either provide the prior notice required under paragraph (a) of this section or follow the process under § 390.368(b).

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.363 What procedures govern the filing of my notice?

The procedures found in §§ 390.103 through 390.110 govern the filing of your notice under § 390.362.

§ 390.364 What information must I include in my notice?

(a) *Content requirements*. Your notice must include:

(1) The information required under 12 U.S.C. 1817(j)(6)(A), and the information prescribed in the Interagency Notice of Change in Director or Senior Executive Officer and the Interagency Biographical and Financial Report which are available from the appropriate FDIC regions as defined in § 303.2 of this chapter;

(2) Legible fingerprints of the proposed director or senior executive officer. You are not required to file fingerprints if, within three years prior to the date of submission of the notice, the proposed director or senior executive officer provided legible fingerprints as part of a notice filed with the FDIC under 12 U.S.C. 1831i; and

(3) Such other information required by the FDIC.

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(b) *Modification of content requirements.* The FDIC may require or accept other information in place of the content requirements in paragraph (a) of this section.

§ 390.365 What procedures govern the FDIC's review of my notice for completeness?

The FDIC will first review your notice to determine whether it is complete.

(a) If your notice is complete, the FDIC will notify you in writing of the date that the FDIC received the complete notice.

(b) If your notice is not complete, the FDIC will notify you in writing what additional information you need to submit, why we need the information, and when you must submit it. You must, within the specified time period, provide additional information or request that the FDIC suspend processing of the notice. If you fail to act within the specified time period, the FDIC may treat the notice as withdrawn or may review the application based on the information provided.

§ 390.366 What standards and procedures will govern the FDIC review of the substance of my notice?

The FDIC will disapprove a notice if, pursuant to the standard set forth in 12 U.S.C. 1831i(e), the FDIC finds that the competence, experience, character, or integrity of the proposed FDIC or senior executive officer indicates that it would not be in the best interests of the depositors of the State savings association or of the public to permit the individual to be employed by, or associated with, the State savings association. If the FDIC disapproves a notice, it will issue a written notice that explains why the FDIC disapproved the notice. The FDIC will send the notice to the State savings association and the individual.

§ 390.367 When may a proposed director or senior executive officer begin service?

(a) A proposed director or senior executive officer may begin service 30 days after the date the FDIC receives all required information, unless:

(1) The FDIC notifies you that it has disapproved the notice; or

(2) The FDIC extends the 30-day period for an additional period not to exceed 60 days. If the FDIC extends the 30-day period, it will notify you in writing that the period has been extended, and will state the reason for the extension. The proposed director or senior executive officer may begin service upon expiration of the extended period, unless the FDIC notifies you that it has disapproved the notice during the extended period.

(b) Notwithstanding paragraph (a) of this section, a proposed or senior executive officer may begin service after the FDIC notifies you, in writing, of its intention not to disapprove the notice.

§ 390.368 When will the FDIC waive the prior notice requirement?

(a) *Waiver request.* (1) An individual may serve as a director or senior executive officer before filing a notice as described in §§ 390.360 through 390.368 if the FDIC issues a written finding that:

(i) Delay would threaten the safety or soundness of the State savings association;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) If the FDIC grants a waiver, you must file a notice as described in §§ 390.360–390.368 within the time period specified by the FDIC.

(b) *Automatic waiver.* An individual may serve as a director before filing a notice as described in §§ 390.360 through 390.368, if the individual was not nominated by management and the individual submits a notice as described in §§ 390.360 through 390.368 within seven days after election as a director.

(c) *Subsequent FDIC action.* The FDIC may disapprove a notice within 30 days after the FDIC issues a waiver under paragraph (a) of this section or within 30 days after the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (b) of this section.

Subpart T—Accounting Requirements

§ 390.380 Form and content of financial statements.

(a) This section states the requirements as to form and content of financial statements included by a State savings association in the following documents. However, the FDIC's regulations governing the applicable documents specify the actual financial statements that are to be included in that document.

(1) Any proxy statement or offering circular required to be used in connection with a conversion under 12 CFR part 192.

(2) Any offering circular or nonpublic offering materials required to be used in connection with an offer or sale of securities under subpart W.

(b) Except as otherwise provided by the FDIC by rule, regulation, or order made specifically applicable to financial statements governed by this section, financial statements shall:

(1) Be prepared and presented in accordance with generally accepted accounting principles;

(2) Comply with § 390.384;

(3) Consistent with the provisions of this subpart, comply with articles 1, 2, 3, 4, 10, and 11 of Regulation S-X adopted by the Securities and Exchange Commission (17 CFR 210.1 through 210.4, 210.10, and 210.11).

(4) Be audited, when required, by an independent auditor in accordance with the standards imposed by the American Institute of Certified Public Accountants.

(c) The term "financial statements" includes all notes to the statements and related schedules.

[76 FR 47655, Aug. 5, 2011, as amended at 79 FR 63502, Oct. 24, 2014]

§ 390.381 Definitions.

(See also 17 CFR 210.1-02.)

(a) *Registrant*. The term "registrant" means an applicant, a State savings association, or any other person required to prepare financial statements in accordance with this subpart.

(b) *Significant subsidiary*. The term "significant subsidiary" means a subsidiary, including its subsidiaries,

which meets any of the following conditions:

(1) The State savings association's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the association and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for purposes of determining whether financial statements of a business acquired or to be acquired in a business combination accounted for as a pooling of interests are required pursuant to 17 CFR 210.3-05, this condition is also met when the number of common shares exchanged by the State savings association exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The State savings association's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the State savings association and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The State savings association's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the State savings association and its subsidiaries consolidated for the most recently completed fiscal year.

(4) Computational note: For purposes of making the prescribed income test the following guidance should be applied:

(i) When a loss has been incurred by either the parent or its consolidated subsidiaries or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the State savings association and its subsidiaries consolidated for purposes of the computation.

(ii) If income of the State savings association and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should

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be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

§ 390.382 Qualification of public accountant. (See also 17 CFR 210.2-01.)

The term “qualified public accountant” means a certified public accountant or licensed public accountant certified or licensed by a regulatory authority of a State or other political subdivision of the United States who is in good standing as such under the laws of the jurisdiction where the home office of the registrant to be audited is located. Any person or firm who is suspended from practice before the Securities and Exchange Commission or other governmental agency is not a “qualified public accountant” for purposes of this section.

§ 390.383 Condensed financial information [Parent only].

(a) The information prescribed by Schedule III required by section IV of the appendix to § 390.384 shall be presented in a note to the financial statements when the restricted net assets (17 CFR 210.4-08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. The investment in and indebtedness of and to State savings association subsidiaries shall be stated separately in the condensed balance sheet from amounts for other subsidiaries; and the amount of cash dividends paid to the parent State savings association for each of the last three years by the State savings association subsidiaries shall be stated separately in the condensed income statement from amounts for other subsidiaries.

(b) For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the State savings association’s proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent year may not be transferred to the parent company by subsidiaries in the form of loans, advances, or cash dividends without the consent

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of a third party (*i.e.*, lender, regulatory agency, foreign government, *etc.*).

(c) Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (See item I (22) in the appendix to § 390.384) and minority interest (See item I (21) in the appendix to § 390.384) shall be deducted in computing net assets for purposes of this test.

§ 390.384 Financial statements for conversions, SEC filings, and offering circulars.

This section and its appendix pertain to the form and content of financial statements included as part of:

(a) A conversion application under 12 CFR part 192 including financial statements in proxy statements and offering circulars,

(b) A filing under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and

(c) Any offering circular required to be used in connection with the issuance of mutual capital certificates under 12 CFR 163.74 and debt securities under § 390.341.

APPENDIX TO § 390.384—FINANCIAL STATEMENT PRESENTATION.

This appendix specifies the various line items which should appear on the face of the financial statements governed by § 390.384 and additional disclosures which should be included with the financial statements in related notes.

I. BALANCE SHEET

Balance sheets shall comply with the following provisions:

Assets

1. *Cash and amounts due from depository institutions.* (a) The amounts in this caption should include noninterest-bearing deposits with depository institutions.

(b) State in a note the amount and terms of any deposits in depository institutions held as compensating balances against long- or short-term borrowing arrangements. This disclosure should include the provisions of any restrictions as to withdrawal or usage. Restrictions may include legally restricted deposits held as compensating balances against short-term borrowing arrangements,

contracts entered into with others, or company statements of intention with regard to particular deposits; however, time deposits and short-term certificates of deposits are not generally included in legally restricted deposits. In cases where compensating balance arrangements exist but are not agreements which legally restrict the use of cash amounts shown on the balance sheet, describe in the notes to the financial statements these arrangements and the amount involved, if determinable, for the most recent audited balance sheet required and for any subsequent unaudited balance sheet required. Compensating balances that are maintained under an agreement to ensure future credit availability shall be disclosed in the notes to the financial statements along with the amount and terms of the agreement.

(c) Checks outstanding in excess of an applicant's book balance in a demand deposit account shall be shown as a liability.

2. *Interest-bearing deposits in other banks.*

3. *Federal funds sold and securities purchased under resale agreements or similar arrangements.* These amounts should be presented, *i.e.*, gross and not netted against Federal funds purchased and securities sold under agreement to repurchase, as reported in caption 15.

4. *Trading account assets.* Include securities considered to be held for trading purposes.

5. *Other short-term investments.*

6. *Investment securities.* (a) Include securities considered to be held for investment purposes. Disclose the aggregate book value of investment securities as the line item on the balance sheet; and also show on the face of the balance sheet the aggregate market value at the balance sheet date. The aggregate amounts should include securities pledged, loaned, or sold under repurchase agreements and similar arrangements. Borrowed securities and securities purchased under resale agreements or similar arrangements should be excluded.

(b) Disclose in a note the carrying value and market value of securities of (i) the U.S. Treasury and other U.S. Government agencies and corporations; (ii) states of the U.S. and political subdivisions thereof; and (iii) other securities.

7. *Assets held for sale.* Investments in assets considered to be held for sale purposes should be reported separately in the statement of financial condition.

8. *Loans.* (a) Disclose separately: (i) Total loans (including financing type leases), (ii) allowance for loan losses, (iii) unearned income on installment loans, (iv) discount on loans purchased, and (v) loans in process.

(b) State on the balance sheet or in a note the amount of loans in each of the following categories: (i) Real estate mortgage; (ii) real estate construction; (iii) installment; and (iv) commercial, financial, and agricultural.

(c)(i) Include under the real estate mortgage category loans payable in monthly, quarterly, or other periodic installments and secured by developed income property and/or personal residences.

(ii) Include under the real estate construction category loans secured by real estate which are made for the purpose of financing construction of real estate and land development projects.

(iii) Include under the installment category loans to individuals generally repayable in monthly installments. This category shall include, but not be limited to, credit card and related activities, individual automobile loans, other installment loans, mobile home loans, and residential repair and modernization loans.

(iv) Include under the commercial, financial, and agricultural category all loans not included in another category. This category shall include, but not be limited to, loans to real estate investment trusts, mortgage companies, banks, and other financial institutions; loans for carrying securities; and loans for agricultural purposes. Do not include loans secured primarily by developed real estate.

(d) State separately any other loan category regardless of relative size if necessary to reflect any unusual risk concentration.

(e) Unearned income on installment loans shall be shown and deducted separately from total loans.

(f) Unamortized discounts on purchased loans shall be deducted separately from total loans.

(g) Loans in process shall be deducted separately from total loans.

(h) A series of categories other than those specified in item (b) of paragraph 8. may be used to present details of loans if considered a more appropriate presentation. The categories specified in item (b) of paragraph 8. should be considered the minimum categories that may be presented.

(i) For each period for which an income statement is presented, disclose in a note the total dollar amount of loans being serviced by the State savings association for the benefit of others.

(j)(i)(A) As of each balance sheet date, disclose in a note the aggregate dollar amount of loans (exclusive of loans to any such persons which in the aggregate do not exceed \$60,000 during the last year) made by the State savings association or any of its subsidiaries to directors, executive officers, or principal holders of equity securities (17 CFR 210.1-02) of the State savings association or any of its significant subsidiaries (17 CFR 210.1-02) or to any associate of such persons. For the latest fiscal year, an analysis of activity with respect to such aggregate loans to related parties should be provided. The analysis should include at the beginning of the period new loans, repayments, and other

changes. (Other changes, if significant, should be explained.)

(B) This disclosure need not be furnished when the aggregate amount of such loans at the balance sheet date (or with respect to the latest fiscal year, the maximum amount outstanding during the period) does not exceed 5 percent of stockholders' equity at the balance sheet date.

(ii) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to item (i)(A) of this paragraph (j) relates to non-accrual, past due, restructured, and potential problem loans (*see* Securities and Exchange Commission's Securities Act Industry Guide 3, section III.C.), so state and disclose the aggregate amount of such loans along with such other information necessary to an understanding of the effects of the transactions on the financial statements.

(iii) Notwithstanding the aggregate disclosure called for by paragraph (j)(i) of this balance sheet caption 8, if any loans were not made in the ordinary course of business during any period for which an income statement is required to be filed, provide an appropriate description of each such loan (*see* 17 CFR 210.9–03.7(e)(3)).

(iv) For purposes only of Balance Sheet item 8(j), the following definitions shall apply:

(A) *Associate* used to indicate a relationship with any person means (1) any corporation, venture, or organization of which such person is a general partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (2) any trust or other estate in which such person has a substantial beneficial interest or for which such person serves as trustee or in a similar capacity; and (3) any member of the immediate family of any of the foregoing persons.

(B) *Executive officer* means the president, any vice president in charge of a principal business unit, division, or function (such as loans, investments, operations, administration, or finance), and any other officer or person who performs similar policy-making functions.

(C) *Immediate family* with regard to a person means such person's spouse, parents, children, siblings, mother- and father-in-law, sons- and daughters-in-law, and brothers- and sisters-in-law.

(D) *Ordinary course of business* with regard to loans means those loans which were made on substantially the same terms, including interest rate and collateral, as those prevailing at the same time for comparable transactions with unrelated persons and did not involve more than the normal risk of collectibility or present other unfavorable features.

(k) For each period for which an income statement is presented, furnish in a note a

statement of changes in the allowance for loan losses, showing balances at beginning and end of the period, provision charged to income, recoveries of amounts previously charged off, and losses charged to the allowance.

9. *Premises and equipment.*

10. *Real estate owned.* State, parenthetically or otherwise:

(a) The amount of real estate owned by class as described in item (b) of paragraph 10, and the basis for determining that amount; and

(b) A description of each class of real estate owned (i) acquired by foreclosure or by deed in lieu of foreclosure, (ii) in judgment and subject to redemption, or (iii) acquired for development or resale. Show separately any accumulated depreciation or valuation allowances. Disclose the policies regarding, and amounts of, capitalized costs, including interest.

11. *Investment in joint ventures.* In a note, present summarized aggregate financial statements for investments in real estate or other joint ventures which individually (a) are 20 percent or more owned by the State savings association or any of its subsidiaries, or (b) have liabilities (including contingent liabilities) to the parent exceeding 10 percent of the parent's regulatory capital. If an allowance for real estate losses subsequent to acquisition is maintained, the amount shall be disclosed, deducted from the other real estate owned, and a statement of changes in the allowance showing balances at beginning and end of period should be included. Provision charged to income and losses charged to the allowance account shall be furnished for each period for which an income statement is filed.

12. *Other assets.* (a) Disclose separately on the balance sheet or in a note thereto any of the following assets or any other asset the amount of which exceeds 30 percent of stockholders' equity. The remaining assets may be shown as one amount.

(i) *Accrued interest receivable.* State separately those amounts relating to loans and those amounts relating to investments.

(ii) Excess of cost over assets acquired (net of amortization).

(b) State in a note (i) amounts representing investments in affiliates and investments in other persons which are accounted for by the equity method, and (ii) indebtedness of affiliates and other persons, the investments in which are accounted for by the equity method. State the basis of determining the amounts reported under paragraph (b)(i).

13. *Total assets.*

Liabilities, and Stockholders' Equity

14. *Deposits.* (a) Disclose separately on the balance sheet or in a note the amounts in the following categories of interest-bearing

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and noninterest-bearing deposits: (i) NOW account and MMDA deposits, (ii) savings deposits, and (iii) time deposits.

(b) Include under the savings-deposits category interest-bearing deposits without specified maturity or contractual provisions requiring advance notice of intention to withdraw funds. Include deposits for which a State savings association may require at its option written notice of intended withdrawal not less than 14 days in advance.

(c) Include under the time-deposits category deposits subject to provisions specifying maturity or other withdrawal conditions such as time certificates of deposits, open account time deposits, and deposits accumulated for the payment of personal loans.

(d) Include accrued interest or dividends, if appropriate.

15. *Short-term borrowings.* (a) State separately, here or in a note, the amounts payable for (i) Federal funds purchased and securities sold under agreements to repurchase, (ii) commercial paper, and (iii) other short-term borrowings.

(b) Federal funds purchased and sales of securities under repurchase agreements shall be reported gross and not netted against sales of Federal funds and purchase of securities under resale agreements.

(c) Include as securities sold under agreements to repurchase all transactions of this type regardless of (i) whether they are called simultaneous purchases and sales, buy-backs, turnarounds, overnight transactions, delayed deliveries, or other terms signifying the same substantive transaction, and (ii) whether the transactions are with the same or different institutions, if the purpose of the transactions is to repurchase identical or similar securities.

(d) The amount and terms (including commitment fees and the conditions under which lines may be withdrawn) of unused lines of credit for short-term financing shall be disclosed, if significant, in the notes to the financial statements. The amount of these lines of credit which support a commercial paper borrowing arrangement or similar arrangements shall be separately identified.

16. *Advance payments by borrowers for taxes and insurance.*

17. *Other liabilities.* Disclose separately on the balance sheet or in a note any of the following liabilities or any other items which are individually in excess of 30 percent of stockholders' equity (except that amounts in excess of 5 percent of stockholders' equity should be disclosed with respect to item (d)). The remaining items may be shown as one amount.

(a) Income taxes payable.

(b) Deferred income taxes.

(c) Indebtedness to affiliate and other persons the investment in which is accounted for by the equity method.

(d) Indebtedness to directors, executive officers, and principal holders of equity securities of the registrant or any of its significant subsidiaries. (The guidance in balance sheet caption "8(j)" shall be used to identify related parties for purposes of this disclosure.)

18. *Bonds, mortgages, and similar debt.* (a) Include bonds, Federal Home Loan Bank advances, capital notes, debentures, mortgages, and similar debt.

(b) For each issue or type of obligation state in a note:

(i) The general character of each type of debt, including: (A) The rate of interest, (B) the date of maturity, or, if maturing serially, a brief indication of the serial maturities, such as "maturing serially from 1980 to 1990," (C) if the payment of principal or interest is contingent, an appropriate indication of such contingency, (D) a brief indication of priority, and (E) if convertible, the basis. For amounts owed to related parties see 17 CFR 210.4-08(k).

(ii) The amount and terms (including commitment fees and the conditions under which commitments may be withdrawn) of unused commitments for long-term financing arrangements that, if used, would be disclosed under this caption shall be disclosed in the notes to the financial statements, if significant.

(c) State in the notes with appropriate explanations (i) the title and amount of each issue of debt of a subsidiary included in item (a) of paragraph 18 which has not been assumed or guaranteed by the State savings association, and (ii) any liens on premises of a subsidiary or its consolidated subsidiaries which have not been assumed by the subsidiary or its consolidated subsidiaries.

19. *Deferred credits.* State separately those items which exceed 30 percent of stockholders' equity.

20. *Commitments and contingent liabilities.* Total commitments to fund loans should be disclosed. The dollar amounts and terms of other than floating market-rate commitments should also be disclosed.

21. *Minority interest in consolidated subsidiaries.*

22. *Preferred stock subject to mandatory redemption requirements or the redemption of which is outside the control of the issuer.* (a) Include under this caption amounts applicable to any class of stock which has any of the following characteristics: (i) It is redeemable at a fixed or determinable price on a fixed or determinable date or dates, whether by operation of a sinking fund or otherwise; (ii) it is redeemable at the option of the holder; or (iii) it has conditions for redemption which are not solely within the control of the issuer, such as stock which must be redeemed out of future earnings. Amounts attributable to preferred stock which is not redeemable or is redeemable solely at the option of the issuer shall be included under

caption 23 unless it meets one or more of the above criteria.

(b) State on the face of the balance sheet the title, carrying amount, and redemption amount of each issue. (If there is more than one issue, these amounts may be aggregated on the face of the balance sheet and details concerning each issue may be presented in the note required by item (c) of paragraph 22.) Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable therefrom. If the carrying value is different from the redemption amount, describe the accounting treatment for such difference in the note required by item (c) of paragraph 22. Also state in this note or on the face of the balance sheet, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (See 17 CFR 210.4-07.)

(c) State in a separate note captioned "Redeemable Preferred Stock" (i) a general description of each issue, including its redemption features (e.g., sinking fund, at option of holders, out of future earnings) and the rights, if any, of holders in the event of default, including the effect, if any, on junior securities in the event a required dividend, sinking fund, or other redemption payment(s) is not made, (ii) the combined aggregate amount of redemption requirements for all issues each year for the five years following the date of the latest balance sheet, and (iii) the changes in each issue for each period for which an income statement is required to be presented. (See also 17 CFR 210.4-08(d).)

(d) Securities reported under this caption are not to be included under a general heading "stockholders' equity" or combined in a total with items described in captions 23, 24 or 25, which follow.

23. *Preferred stock which is not redeemable or is redeemed solely at the option of the issuer.* State on the face of the balance sheet, or, if more than one issue is outstanding, state in a note, the title of each issue and the dollar amount thereof. Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable. State on the face of the balance sheet or in a note, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (See 17 CFR 210.4-07.) Show in a note or separate statement the changes in each class of preferred shares reported under this caption for each period for which an income statement is required to be presented. (See also 17 CFR 210.4-08(d).)

24. *Common stock.* For each class of common shares state, on the face of the balance sheet, the number of shares issued or outstanding, as appropriate (see 17 CFR 210.4-07), and the dollar amount thereof. If convertible, this fact should be indicated on the

face of the balance sheet. For each class of common stock state, on the face of the balance sheet or in a note, the title of the issue, the number of shares authorized, and, if convertible, the basis for conversion (see also 17 CFR 210.4-08(d).) Show also the dollar amount of any common stock subscribed for but unissued, and show the deduction of subscriptions receivable. Show in a note or statement the changes in each class of common stock for each period for which an income statement is required to be presented.

25. *Other stockholders' equity.* (a) Separate captions shall be shown on the face of the balance sheet for (i) additional paid-in capital, (ii) other additional capital, and (iii) retained earnings, both (A) restricted and (B) unrestricted. (See 17 CFR 210.4-08(e).) Additional paid-in capital and other additional capital may be combined with the stock caption to which it applies, if appropriate. State whether or not the State savings association is in compliance with the Federal regulatory capital requirements (and state requirements where applicable). Also include the dollar amount of those regulatory capital requirements and the amount by which the State savings association exceeds or fails to meet those requirements.

(b) For a period of at least 10 years subsequent to the effective date of a quasi-reorganization, any description of retained earnings shall indicate the point in time from which the new retained earnings dates, and for a period of at least three years shall indicate, on the face of the balance sheet, the total amount of the deficit eliminated.

(c) Changes in stockholders' equity shall be disclosed in accordance with the requirements of 17 CFR 210.3-04.

26. *Total liabilities and stockholders' equity.*

II. INCOME STATEMENT

Income statements shall comply with the following provisions:

1. *Interest and fees on loans.* (a) Include interest, service charges, and fees which are related to or are an adjustment of the loan interest yield.

(b) Current amortization of premiums on mortgages or other loans shall be deducted from interest on loans, and current accretion of discount on such items shall be added to interest on loans.

(c) Discounts and other deferred amounts which are related to or are an adjustment of the loan interest yield shall be amortized into income using the interest (level yield) method.

2. *Interest and dividends on investment securities.* Include accretion of discount on securities and deduct amortization of premiums on securities.

3. *Trading account interest.* Include interest from securities carried in a dealer trading account or accounts that are held principally for resale to customers.

4. *Other interest income.* Include interest on short-term investments (Federal funds sold and securities purchased under agreements to resell) and interest on bank deposits.

5. *Total interest income.*

6. *Interest on deposits.* Include interest on all deposits. On the income statement or in a note, state separately, in the same categories as those specified for deposits at balance sheet caption 14(a), the interest on those deposits. Early withdrawal penalties should be netted against interest on deposits and, if material, disclosed on the income statement.

7. *Interest on short-term borrowings.* Include interest on borrowed funds, including Federal funds purchased, securities sold under agreements to repurchase, commercial paper, and other short-term borrowings.

8. *Interest on long-term borrowings.* Include interest on bonds, capital notes, debentures, mortgages on State savings association premises, capitalized leases, and similar debt.

9. *Total interest expense.*

10. *Net interest income.*

11. Provision for loan losses or provision for credit losses, as applicable.

12. *Net interest income after provision for loan losses or provision for credit losses, as applicable.*

13. *Other income.* Disclose separately any of the following amounts, or any other item of other income, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amount may be shown as one amount, except for investment securities gains or losses which shall be shown separately regardless of size.

(a) Commissions and fees from fiduciary activities.

(b) Fees for other services to customers.

(c) Commissions, fees, and markups on securities underwriting and other securities activities.

(d) Profit or loss on transactions in investment securities.

(e) Equity in earnings of unconsolidated subsidiaries and 50-percent- or less-owned persons.

(f) Gains or losses on disposition of investments in securities of subsidiaries and 50-percent- or less-owned persons.

(g) Profit or loss from real estate operations.

(h) Other fees related to loan originations or commitments not included in income statement caption 1.

The remaining other income may be shown in one amount.

(i) Investment securities gains or losses. The method followed in determining the cost of investments sold (e.g., "average cost," "first-in, first-out," or "identified certificate") and related income taxes shall be disclosed.

14. *Other expenses.* Disclose separately any of the following amounts, or any other item of other expense, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amounts may be shown as one amount.

(a) Salaries and employee benefits.

(b) Net occupancy expense of premises.

(c) Net cost of operations of other real estate (including provisions for real estate losses, rental income, and gains and losses on sales of real estate).

(d) Minority interest in income of consolidated subsidiaries.

(e) Goodwill amortization.

15. *Other income and expenses.* State separately material events or transactions that are unusual in nature or occur infrequently, but not both, and therefore do not meet both criteria for classification as an extraordinary item. Examples of items which would be reported separately are gain or loss from the sale of premises and equipment, provision for loss on real estate owned, or provision for gain or loss on the sale of loans.

16. *Income or losses before income tax expense.*

17. *Income tax expense.* The information required by 17 CFR 210.4-08(h) should be disclosed.

18. *Income or loss before extraordinary items effects of changes in accounting principles.*

19. *Extraordinary items, less applicable tax.*

20. *Cumulative effects of changes in accounting principles.*

21. *Net income or loss.*

22. *Earnings-per-share data.*

23. *Conversion footnote.* If the State savings association is an applicant for conversion from a mutual to a stock association or has converted within the last three years, describe in a note the general terms of the conversion and restrictions on the operations of the State savings association imposed by the conversion. Also, state the amount of net proceeds received from the conversion and costs associated with the conversion.

24. *Mergers and acquisitions.* For the period in which a business combination occurs and is accounted for by the purchase method of accounting, in addition to those disclosures required by Accounting Principles Board Opinion No. 16, the State savings association shall make those disclosures as noted below for all combinations involving significant acquisitions. (A significant acquisition is defined for this purpose to be one in which the assets of the acquired State savings association, or group of State savings associations, exceed 10 percent of the assets of the consolidated State savings association at the end of the most recent period being reported upon).

(a) Amounts and descriptions of discounts and premiums related to recording the aggregate interest-bearing assets and liabilities at their fair market value. The disclosure should also include the methods of amortization or accretion and the estimated remaining lives.

(b) The net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to the purchase accounting transaction(s). For subsequent periods, the State savings association shall disclose the remaining total unamortized or unaccreted amounts of discounts, premiums, and intangible assets as of the date of the most recent balance sheet presented. In addition, the State savings association shall disclose the net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to prior business combinations accounted for by the purchase method of accounting. Such disclosures need not be made if the total amounts of discounts, premiums, or intangible assets do not exceed 30 percent of stockholders' equity as of the date of the most recent balance sheet presented.

III. STATEMENT OF CASH FLOWS

The amounts shown in this statement should be those items which materially en-

hance the reader's understanding of the State savings association's business. For example, gains from sales of loans should be segregated from sales of mortgage-backed securities and other securities, if material, proceeds from principal repayments and maturities from loans and mortgage-backed securities should be segregated from proceeds from sales of loans and mortgage-backed securities, purchases of loans, mortgage-backed securities and other securities should be segregated, if material. Additional guidance may be found in the FASB's Statement of Financial Accounting Standards No. 95 Statement of Cash Flows.

IV. SCHEDULES REQUIRED TO BE FILED

The following schedules, which should be examined by an independent accountant, shall be filed unless the required information is not applicable or is presented in the related financial statements:

(1) *Schedule I—Indebtedness of and to related parties—Not Current.* For each period for which an income statement is required, the following schedule should be filed in support of the amounts required to be reported by balance sheet items 8(j) and 17(c) unless such aggregate amount does not exceed 5 percent of stockholders' equity at either the beginning or the end of the period:

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

Indebtedness of—				
Name of person ¹	Balance at beginning	Additions ²	Deductions ³	Balance at end
A	B	C	D	E

¹ The persons named shall be grouped as in the related schedule required for investments in related parties. The information called for shall be shown separately for any persons whose investments were shown separately in such related schedule.

² For each person named in column A, explain in a note the nature and purpose of any increase during the period that is in excess of 10 percent of the related balance at either the beginning or end of the period.

³ If deduction was other than a receipt or disbursement of cash, explain.

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

Indebtedness to—				
Name of person ¹	Balance at beginning	Additions ²	Deductions ³	Balance at end
A	F	G	H	I

¹ The persons named shall be grouped as in the related schedule required for investments in related parties. The information called for shall be shown separately for any persons whose investments were shown separately in such related schedule.

² For each person named in column A, explain in a note the nature and purpose of any increase during the period that is in excess of 10 percent of the related balance at either the beginning or end of the period.

³ If deduction was other than a receipt or disbursement of cash, explain.

(2) *Schedule II—Guarantees of securities of other issuers.* The following schedule should be filed as of the date of the most recently audited balance sheet with respect to any

guarantees of securities of other issuers by the person for which the statements are being filed:

GUARANTEES OF SECURITIES OF OTHER ISSUERS ⁴

Col. A. Name of issuer of securities guaranteed by person for which statement is filed	Col. B. Title of issue of each class of securities guaranteed	Col. C. Total amount guaranteed and outstanding ⁵	Col. D. Amount owned by person or persons for which statement is filed

⁴ Indicate in a note to the most recent schedule being filed for a particular person or group any significant changes since the date of the related balance sheet. If this schedule is filed in support of consolidated or combined statements, there shall be set forth guarantees by any person included in the consolidation or combination, except that such guarantees of securities which are included in the consolidated or combined balance sheet need not be set forth.

⁵ Indicate any amounts included in column C which are included also in column D or E.

GUARANTEES OF SECURITIES OF OTHER ISSUERS ⁴

Col. A. Name of issuer of securities guaranteed by person for which statement is filed	Col. E. Amount in treasury of issuer of securities guaranteed	Col. F. Nature of guarantee ⁶	Col. G. Nature of any default by issue of securities guaranteed in principal, interest, sinking fund or redemption provisions, or payment of dividends ⁷

⁴ Indicate in a note to the most recent schedule being filed for a particular person or group any significant changes since the date of the related balance sheet. If this schedule is filed in support of consolidated or combined statements, there shall be set forth guarantees by any person included in the consolidation or combination, except that such guarantees of securities which are included in the consolidated or combined balance sheet need not be set forth.

⁶ There need be made only a brief statement of the nature of the guarantee, such as "Guarantee of principal and interest," or "Guarantee of dividends." If the guarantee is of interest or dividends, state the annual aggregate amount of interest or dividends so guaranteed.

⁷ Only a brief statement as to any such defaults need be made.

(3) *Schedule III—Condensed financial information.* The following schedule shall be filed as of the dates and for the periods specified in the schedule.

Condensed Financial Information

[Parent only]

[The State savings association may determine disclosure based on information provided in footnotes below]

(a) Provide condensed financial information as to financial position, changes in financial position, and results of operations of the State savings association as of the same dates and for the same periods for which audited consolidated financial statements are required. The financial information required need not be presented in greater detail than is required for condensed statement by 17 CFR 210.10-01(a) (2), (3), (4). Detailed footnote disclosure which would normally be included with complete financial statements may be omitted with the exception of disclosure regarding material contingencies, long-term obligations, and guarantees. Description of significant provisions of the state savings association's long-term obligations, mandatory dividend, or redemption requirements of redeemable stocks, and guarantees of the State savings association shall be provided along with a 5-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the State savings association have been separately disclosed in the consolidated statements, they need not be repeated in this schedule.

(b) Disclose separately the amount of cash dividends paid to the State savings association for each of the last three fiscal years by consolidated subsidiaries, unconsolidated subsidiaries, and 50-percent- or less-owned persons accounted for by the equity method, respectively.

[76 FR 47655, Aug. 5, 2011, as amended at 84 FR 4250, Feb. 14, 2019]

Subparts U–V [Reserved]

Subpart W—Securities Offerings

§ 390.410 Definitions.

(a) For purposes of this subpart, the following definitions apply:

(1) *Accredited investor* means the same as in Commission Rule 501(a) (17 CFR 230.501(a)) under the Securities Act, and includes any State savings association.

(2) *Commission* means the Securities and Exchange Commission.

(3) *Dividend or interest reinvestment plan* means a plan which is offered solely to existing security holders of the State savings association which allows such persons to reinvest dividends or interest paid to them on securities issued by the State savings association, and which also may allow additional cash amounts to be contributed

by the participants in the plan, provided that the securities to be issued are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

(4) *Employee benefit plan* means any purchase, savings, option, rights, bonus, ownership, appreciation, profit sharing, thrift, incentive, pension or similar plan solely for officers, directors or employees.

(5) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj).

(6) *Filing date* means the date on which a document is actually received during business hours, 9 a.m. to 5 p.m. Eastern Standard Time, by the FDIC, 550 17th Street, NW., Washington, DC 20429. However if the last date on which a document can be accepted falls on a Saturday, Sunday, or holiday, such document may be filed on the next business day.

(7) *Issuer* means a State savings association which issues or proposes to issue any security.

(8) *Offer; Sale or sell*. For purposes of this subpart, the term *offer*, *offer to sell*, or *offer for sale* shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. However, these terms shall not include preliminary negotiations or agreements between an issuer and any underwriter or among underwriters who are or are to be in privity of contract with the issuer. *Sale* and *sell* includes every contract to sell or otherwise dispose of a security or interest in a security for value. Every offer or sale of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise

of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

(9) *Person* means the same as in 12 CFR 192.25, and includes a State savings association.

(10) *Purchase* and *buy* mean the same as in 12 CFR 192.25.

(11) *State savings association* means the same as in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)), and includes a state-chartered savings association in organization which is granted conditional approval of insurance of accounts by the Federal Deposit Insurance Corporation. In addition, for purposes of § 390.411, *State savings association* includes any underwriter participating in the distribution of securities of a State savings association.

(12) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a–77aa).

(13) *Security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization or subscription, transferable share, investment contract, voting trust certificate or, in general, any interest or instrument commonly known as a *security*, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing, except that a *security* shall not include an account insured, in whole or in part, by the Federal Deposit Insurance Corporation.

(14) *Underwriter* means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission and such term shall also not include any person who has continually held the securities being transferred for a period of two (2) consecutive

years provided that the securities sold in any one (1) transaction shall be less than ten percent (10%) of the issued and outstanding securities of the same class. The following shall apply for the purpose of determining the period securities have been held:

(i) *Stock dividends, splits and recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) *Conversions.* If the securities sold were acquired from the issuer for consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion.

(iii) *Contingent issuance of securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(iv) *Pledged securities.* Securities which are *bona fide* pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of securities.* Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts.* Securities acquired from the settler of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settler.

(vii) *Estates.* Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

(viii) *Exchange transactions.* A person receiving securities in a transaction involving an exchange of the securities of one issuer for securities of another issuer shall be deemed to have acquired the securities received when such person acquired the securities exchanged.

(b) A term not defined in this subpart but defined elsewhere in this part, when used in subpart, shall have the meanings given elsewhere in this part, unless the context otherwise requires.

(c) When used in the rules, regulations, or forms of the Commission referred to in this subpart, the term *Commission* shall be deemed to refer to the FDIC, the term *registrant* shall be deemed to refer to an issuer defined in this subpart, and the term *registration statement* or *prospectus* shall be deemed to refer to an offering circular filed under this subpart, unless the context otherwise requires.

§ 390.411 Offering circular requirement.

(a) *General.* No State savings association shall offer or sell, directly or indirectly, any security issued by it unless:

(1) The offer or sale is accompanied or preceded by an offering circular which includes the information required by this subpart and which has been filed and declared effective pursuant to this subpart; or

(2) An exemption is available under this subpart.

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(b) *Communications not deemed an offer.* The following communications shall not be deemed an offer under this subpart:

(1) Prior to filing an offering circular, any notice of a proposed offering which satisfies the requirements of Commission Rule 135 (17 CFR 230.135) under the Securities Act;

(2) Subsequent to filing an offering circular, any notice circular, advertisement, letter, or other communication published or transmitted to any person which satisfies the requirements of Commission Rule 134 (17 CFR 230.134) under the Securities Act; and

(3) Oral offers of securities covered by an offering circular made after filing the offering circular with the FDIC.

(c) *Preliminary offering circular.* Notwithstanding paragraph (a) of this section, a preliminary offering circular may be used for an offer of any security prior to the effective date of the offering circular if:

(1) The preliminary offering circular has been filed pursuant to this subpart;

(2) The preliminary offering circular includes the information required by this subpart, except for the omission of information relating to offering price, discounts or commissions, amount of proceeds, conversion rates, call prices, or other matters dependent on the offering price; and

(3) The offering circular declared effective by the FDIC is furnished to the purchaser prior to, or simultaneously with, the sale of any such security.

§ 390.412 Exemptions.

The offering circular requirement of § 390.411 shall not apply to an issuer's offer or sale of securities:

(a) [Reserved]

(b) Exempt from registration under either section 3(a) or section 4 of the Securities Act, but only by reason of an exemption other than section 3(a)(5) (for regulated State savings associations), and section 3(a)(11) (for intrastate offerings) of the Securities Act;

(c) In a conversion from the mutual to the stock form of organization pursuant to 12 CFR part 192, except for a supervisory conversion undertaken pursuant to subpart C of 12 CFR part 192;

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(d) In a non-public offering which satisfies the requirements of § 390.413;

(e) That are debt securities issued in denominations of \$100,000 or more, which are fully collateralized by cash, any security issued, or guaranteed as to principal and interest, by the United States, the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Government National Mortgage Association or by interests in mortgage notes secured by real property;

(f) Distributed exclusively abroad to foreign nationals: *Provided, That—*

(1) The offering is made subject to safeguards reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States; and

(2) Such safeguards include, without limitation, measures that would be sufficient to ensure that registration of the securities would not be required if the securities were not exempt under the Securities Act; or

(g) To its officers, directors or employees pursuant to an employee benefit plan or a dividend or interest reinvestment plan, and provided that any such plan has been approved by the majority of shareholders present in person or by proxy at an annual or special meeting of the shareholders of the State savings association.

§ 390.413 Non-public offering.

Offers and sales of securities by an issuer that satisfy the conditions of paragraph (a) or (b) of this section and the requirements of paragraphs (c) and (d) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Securities Act and §§ 390.412(b) and 390.412(d). However, an issuer shall not be deemed to be not in compliance with the provisions of this subpart solely by reason of making an untimely filing of the notice required to be filed by paragraph (c) of this section so long as the notice is actually filed and all other conditions and requirements of this subpart are satisfied.

(a) *Regulation D.* The offer and sale of all securities in the transaction satisfies the Commission's Regulation D (17

CFR 230.501–230.506), except for the notice requirements of Commission Rule 503 (17 CFR 230.503) and the limitations on resale in Commission Rule 502(d) (17 CFR 230.502(d)).

(b) *Sales to 35 persons.* The offer and sale of all securities in the transaction satisfies each of the following conditions:

(1) Sales of the security are not made to more than 35 persons during the offering period, as determined under the integration provisions of Commission Rule 502(a) (17 CFR 230.502(a)). The number of purchasers referred to above is exclusive of any accredited investor, officer, director or affiliate of the issuer. For purposes of paragraph (b) of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a partnership, corporation or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person.

(2) All purchasers either have a pre-existing personal or business relationship with the issuer or any of its officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

(4) The offer and sale of the security is not accomplished by the publication of any advertisement.

(c) *Filing of notice of sales.* Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to this subpart, the issuer, shall file with the FDIC a

report describing the results of the sale of securities as required by §390.421(b).

(d) *Limitation on resale.* The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of §390.410(a)(14), which reasonable care shall include, but not be limited to, the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for the purchaser or for other persons;

(2) Written disclosure to each purchaser prior to the sale that the securities are not offered by an offering circular filed with, and declared effective by, the FDIC pursuant to §390.411, but instead are being sold in reliance upon the exemption from the offering circular requirement provided for by this subpart; and

(3) Placement of a legend on the certificate, or other document evidencing the securities, indicating that the securities have not been offered by an offering circular filed with, and declared effective by, the FDIC and that due care should be taken to ensure that the seller of the securities is not an underwriter within the meaning of §390.410(a)(14).

§ 390.414 Filing and signature requirements.

(a) *Procedures.* An offering circular, amendment, notice, report, or other document required by this subpart shall, unless otherwise indicated, be filed in accordance with the requirements of 12 CFR 192.115(a), 192.150(a)(6), 192.155, 192.180(b), and Form AC, General Instruction B, of this subpart.

(b) *Number of copies.* (1) Unless otherwise required, any filing under this subpart shall include nine copies of the document to be filed with the FDIC, as follows:

(i) Seven copies, which shall include one manually signed copy with exhibits, three conformed copies with exhibits, and three conformed copies without exhibits, to the FDIC, ATTN: Accounting and Securities Disclosure Section, 550 17th Street NW, Washington, DC 20429; and

(ii) Two copies, which shall include one manually signed copy with exhibits

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and one conformed copy, without exhibits, to the appropriate regional director.

(2) Within five days after the effective date of an offering circular or the commencement of a public offering after the effective date, whichever occurs later, nine copies of the offering circular used shall be filed with the FDIC as follows: Seven copies to the FDIC, 550 17th Street NW., ATTN: Accounting and Securities Disclosure Section, Washington, DC, and two copies to the appropriate Regional Director.

(3) After the effective date of an offering circular, an offering circular which varies from the form previously filed shall not be used, unless it includes only non-material supplemental or additional information and until 10 copies have been filed with the FDIC in the manner required.

(c) *Signature.* (1) Any offering circular, amendment, or consent filed with the FDIC pursuant to this subpart shall include an attached manually signed signature page which authorizes the filing and has been signed by:

- (i) The issuer, by its duly authorized representative;
- (ii) The issuer's principal executive officer;
- (iii) The issuer's principal financial officer;
- (iv) The issuer's principal accounting officer; and
- (v) At least a majority of the issuer's directors.

(2) Any other document filed pursuant to this subpart shall be signed by a person authorized to do so.

(3) At least *one copy* of every document filed pursuant to this subpart shall be manually signed, and every copy of a document filed shall:

- (i) Have the name of each person who signs typed or printed beneath the signature;
- (ii) State the capacity or capacities in which the signature is provided;
- (iii) Provide the name of each director of the issuer, if a majority of directors is required to sign the document; and
- (iv) With regard to any copies not manually signed, bear typed or printed signatures.

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§ 390.415 Effective date.

(a) Except as provided for in paragraph (d) of this section, an offering circular filed by a State savings association shall be deemed to be automatically declared effective by the FDIC on the twentieth day after filing or on such earlier date as the FDIC may determine for good cause shown.

(b) If any amendment is filed prior to the effective date, the offering circular shall be deemed to have been filed when such amendment was filed.

(c) The period until automatic effectiveness under this subpart shall be stated at the bottom of the facing page of the Form OC or any amendment.

(d) The effectiveness will be delayed if a duly authorized amendment, telegram confirmed in writing, or letter states that the effective date is delayed until a further amendment is filed specifically stating that the offering circular will become effective in accordance with this subpart.

(e) An amendment filed after the effective date of the offering circular shall become effective on such date as the FDIC may determine.

(f) If it appears to the FDIC at any time that the offering circular includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, then the FDIC may pursue any remedy it is authorized to pursue under section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818), including, but not limited to, institution of cease-and-desist proceedings.

§ 390.416 Form, content, and accounting.

(a) *Form and content.* Any offering circular or amendment filed pursuant to this subpart shall:

- (1) Be filed under cover of Form OC, which is under 12 CFR part 192;
- (2) Comply with the requirements of Items 3 and 4 of Form OC and the requirements of all items of the form for registration (17 CFR part 239) that the issuer would be eligible to use were it required to register the securities under the Securities Act;
- (3) Comply with all item requirements of the Form S-1 (17 CFR part

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239) for registration under the Securities Act, if the association issuing the securities is not in compliance with the FDIC's regulatory capital requirements during the time the offering is made;

(4) Where a form specifies that the information required by an item in the Commission's Regulation S-K (17 CFR part 229) should be furnished, include such information and all of the information required by Item 7 of Form PS, which is under 12 CFR part 192;

(5) Include after the facing page of the Form OC a cross-reference sheet listing each item requirement of the form for registration under the Securities Act and indicate for each item the applicable heading or subheading in the offering circular under which the required information is disclosed;

(6) Include in part II of the Form OC the applicable undertakings required by the form for registration under the Securities Act;

(7) If the issuer has not previously been required to file reports pursuant to section 13(a) of the Exchange Act or § 390.427, include in part II of Form OC the following undertaking: "The issuer hereby undertakes, in connection with any distribution of the offering circular, to have a preliminary or effective offering circular including the information required by this subpart distributed to all persons expected to be mailed confirmations of sale not less than 48 hours prior to the time such confirmations are expected to be mailed;"

(8) In offerings involving the issuance of options, warrants, subscription rights or conversion rights within the meaning of § 390.410(a)(8), include in part II of Form OC an undertaking to provide a copy of the issuer's most recent audited financial statements to persons exercising such options, warrants or rights promptly upon receiving written notification of the exercise thereof;

(9) Include as supplemental information and not as part of the Form OC and only with respect to *de novo* offerings, a copy of the application for insurance of accounts as submitted to the Federal Deposit Insurance Corporation for state-chartered savings associations; and

(10) In addition to the information expressly required to be included by this subpart, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(b) *Accounting requirements.* To be declared effective an offering circular or amendment shall satisfy the accounting requirements in subpart T.

§ 390.417 Use of the offering circular.

(a) An offering circular or amendment declared effective by the FDIC shall not be used more than nine months after the effective date, unless the information contained therein is as of a date not more than 16 months prior to such use.

(b) An offering circular filed under § 390.414(b)(3) shall not extend the period for which an effective offering circular or amendment may be used under paragraph (c) of this section.

(c) If any event arises, or change in fact occurs, after the effective date and such event or change in fact, individually or in the aggregate, results in the offering circular containing any untrue statement of material fact, or omitting to state a material fact necessary in order to make statements made in the offering circular not misleading under the circumstances, then no offering circular, which has been declared effective under this subpart, shall be used until an amendment reflecting such event or change in fact has been filed with, and declared effective by, the FDIC.

§ 390.418 Escrow requirement.

(a) Any funds received in an offering which is offered and sold on a best efforts all-or-none condition or with a minimum-maximum amount to be sold shall be held in an escrow or similar separate account until such time as all of the securities are sold with respect to a best efforts all-or-none offering or the stated minimum amount of securities are sold in a minimum-maximum offering.

(b) If the amount of securities required to be sold under escrow conditions in paragraph (a) of this section are not sold within the time period for

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the offering as disclosed in the offering circular, all funds in the escrow account shall be promptly refunded unless the FDIC otherwise approves an extension of the offering period upon a showing of good cause and provided that the extension is consistent with the public interest and the protection of investors.

§ 390.419 Unsafe or unsound practices.

(a) No person shall directly or indirectly,

(1) Employ any device, scheme or artifice to defraud,

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(3) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security of a State savings association.

(b) Violations of this subpart shall constitute an unsafe or unsound practice within the meaning of section 8 of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818.

(c) Nothing in this subpart shall be construed as a limitation on the applicability of section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) or Rule 10b-5 promulgated thereunder (17 CFR 240.10b-5).

§ 390.420 Withdrawal or abandonment.

(a) Any offering circular, amendment, or exhibit may be withdrawn prior to the effective date. A withdrawal shall be signed and state the grounds upon which it is made. Any document withdrawn will not be removed from the files of the FDIC, but will be marked "Withdrawn upon the request of the issuer on (date)."

(b) When an offering circular or amendment has been on file with the FDIC for a period of nine months and has not become effective, the FDIC may, in its discretion, determine whether the filing has been abandoned, after notifying the issuer that the filing is out of date and must either be amended to comply with the applicable requirements of this subpart or be

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withdrawn within 30 days after the date of such notice. When a filing is abandoned, the filing will not be removed from the files of the FDIC, but will be marked "Declared abandoned by the FDIC on (date)."

§ 390.421 Securities sale report.

(a) Within 30 days after the first sale of the securities, every six months after such 30 day period and not later than 30 days after the later of the last sale of securities in an offering pursuant to § 390.411 or the application of the proceeds therefrom, the issuer shall file with the FDIC a report describing the results of the sale of the securities and the application of the proceeds, which shall include all of the information required by Form G-12 set forth at § 390.429 and shall also include the following:

(1) The name, address, and docket number of the issuer;

(2) The title, number, aggregate and per-unit offering price of the securities sold;

(3) The aggregate and per-unit dollar amounts of actual itemized expenses, discounts or commissions, and other fees;

(4) The aggregate and per-unit dollar amounts of the net proceeds raised, and the use of proceeds therefrom; and

(5) The number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities after the issuance of the securities or termination of the offer.

(b) Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to § 390.413, the issuer shall file with the FDIC a report describing the results of the sale of securities, which shall include all of the information required by Form G-12 set forth at § 390.429, and shall also include the following:

(1) All of the information required by paragraph (a) of this section; and

(2) A detailed statement of the factual and legal grounds for the exemption claimed.

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§ 390.422 Public disclosure and confidential treatment.

(a) Any offering circular, amendment, exhibit, notice, or report filed pursuant to this subpart will be publicly available. Any other related documents will be treated in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), and parts 309 and 310 of this chapter.

(b) Any requests for confidential treatment of information in a document required to be filed under this subpart shall be made as required under Commission Rule 24b-2 (17 CFR 240.24b-2) under the Exchange Act.

§ 390.423 Waiver.

(a) The FDIC may waive any requirement of this subpart, or any required information:

(1) Determined to be unnecessary by the FDIC;

(2) In connection with a transaction approved by the FDIC for supervisory reasons, or

(3) Where a provision of this subpart conflicts with a requirement of applicable state law.

(b) Any condition, stipulation or provision binding any person acquiring a security issued by a State savings association which seeks to waive compliance with any provision of this subpart shall be void, unless approved by the FDIC.

§ 390.424 Requests for interpretive advice or waiver.

Any requests to the FDIC for interpretive advice or a waiver with respect to any provision of this subpart shall satisfy the following requirements:

(a) A copy of the request, including any attachments, shall be filed with the FDIC;

(b) The provisions of this subpart to which the request relates, the participants in the proposed transaction, and the reasons for the request, shall be specifically identified or described; and

(c) The request shall include a legal opinion as to each legal issue raised and an accounting opinion as to each accounting issue raised.

§ 390.425 Delayed or continuous offering and sale of securities.

Any offer or sale of securities under § 390.411 may be made on a continuous or delayed basis in the future, if:

(a) The securities would satisfy all of the eligibility requirements of the Commission's Rule 415, 17 CFR 230.415; and

(b) The association issuing the securities is in compliance with the FDIC's regulatory capital requirements during the time the offering is made.

§ 390.426 Sales of securities at an office of a State savings association.

Sales of securities of a State savings association or its affiliates at an office of a State savings association may only be made in accordance with the provisions of § 390.340.

§ 390.427 Current and periodic reports.

(a) Each State savings association which files an offering circular which becomes effective pursuant to this subpart, after such effective date, shall file with the FDIC periodic and current reports on Forms 8-K, 10-Q and 10-K as may be required by section 13 of the Exchange Act (15 U.S.C. 78m) as if the securities sold by such offering circular were securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l). The duty to file periodic and current reports under this subpart shall be automatically suspended if and so long as any issue of securities of the State savings association is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l). The duty to file under this subpart shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such offering circular became effective, if, at the beginning of such fiscal year, the securities of each class to which the offering circular relates are held of record by less than three hundred persons and upon the filing of a Form 15.

(b) For purposes of registering securities under section 12(b) or 12(g) of the Exchange Act, an issuer subject to the reporting requirements of paragraph (a) of this section may use the Commission's registration statement on Form 10 or Form 8-A or 8-B as applicable.

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§ 390.428 Approval of the security.

Any securities of a State savings association which are not exempt under this subpart and are offered or sold pursuant to an offering circular which becomes effective under this subpart, are deemed to be approved as to form and terms for purposes of this subpart.

§ 390.429 Form for securities sale report.

FDIC, 550 17th Street, NW.,
Washington, DC 20429

[Form G-12]

Securities Sale Report Pursuant to § 390.12

FDIC No. _____
Issuer's Name: _____
Address: _____

If in organization, state the date of FDIC certification of insurance of accounts: _____

State the title, number, aggregate and per-unit offering price of the securities sold: _____

State the aggregate and per-unit dollar amounts of actual itemized offering expenses, discounts, commissions, and other fees: _____

State the aggregate and per-unit dollar amounts of the net proceeds raised: _____

Describe the use of proceeds. If unknown, provide reasonable estimates of the dollar amount allocated to each purpose for which the proceeds will be used: _____

State the number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities at the close or termination of the offering: _____

For a non-public offering, also state the factual and legal grounds for the exemption claimed (attach additional pages if necessary): _____

For a non-public offering, all offering materials used should be listed: _____

Person to Contact: _____
Telephone No.: _____

This issuer has duly caused this securities sale report to be signed on its behalf by the undersigned person.

Date of securities sale report _____

Issuer: _____
Signature: _____
Name: _____
Title: _____

Instruction: Print the name and title of the signing representative under his or her signature. Ten copies of the securities sale report should be filed, including one copy manually signed, as required under 12 CFR 390.414.

Attention
Intentional misstatements or omissions of fact constitute violations of Federal law (See 18 U.S.C. 1001 and § 390.355(b)).

§ 390.430 Filing of copies of offering circulars in certain exempt offerings.

A copy of the offering circular, or similar document, if any, used in connection with an offering exempt from the offering circular requirement of § 390.411 by reason of § 390.412(e) or § 390.413 shall be mailed to the FDIC within 30 days after the first sale of such securities. Such copy of the offering circular, or similar document, is solely for the information of the FDIC and shall not be deemed to be "filed" with the FDIC pursuant to § 390.411. The mailing to the FDIC of such offering circular, or similar document, shall not be a pre-condition of the applicable exemption from the offering circular requirements of § 390.411.

Subpart X [Reserved]

Subpart Y—Prompt Corrective Action

§§ 390.450-390.455 [Reserved]

§ 390.456 Directives to take prompt corrective action.

(a) *Notice of intent to issue a directive—*
(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized State savings association or, where appropriate, any company that controls the State savings association, prior written notice of the FDIC's intention to issue a directive requiring such State savings association or company to take actions or to

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

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

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

(1) A statement of the State savings association's capital measures and capital levels;

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

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

(4) The date by which the State savings association or company subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice—(1) Time for response.* A State savings association or

company may file a written response to a notice of intent to issue a directive within the time period set by the FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the State savings association or other relevant circumstances.

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

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

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

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the State savings association or company regarding the proposed directive.

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

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

(2) Determine not to issue the directive and so notify the State savings association or company; or

(3) Seek additional information or clarification of the response from the State savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a State savings association or company to file with the FDIC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

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

§ 390.457 Procedures for reclassifying a State savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice—(1) Issuance of notice of proposed reclassification—(i) Grounds for reclassification.*

(A) Pursuant to § 324.403(d) of this chapter, the FDIC may reclassify a well capitalized State savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(1) The FDIC determines that the State savings association is in unsafe or unsound condition; or

(2) The FDIC deems the State savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as “reclassification.”

(i) *Prior notice to institution.* Prior to taking action pursuant to § 324.403(d) of this chapter, the FDIC shall issue and serve on the State savings association a written notice of the FDIC’s intention to reclassify the State savings association.

(2) *Contents of notice.* A notice of intention to reclassify a State savings association based on unsafe or unsound condition shall include:

(i) A statement of the State savings association’s capital measures and capital levels and the category to which the State savings association would be reclassified;

(ii) The reasons for reclassification of the State savings association;

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

(3) *Response to notice of proposed reclassification.* A State savings association may file a written response to a notice of proposed reclassification

within the time period set by the FDIC. The response should include:

(i) An explanation of why the State savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the State savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a State savings association to file, within the specified time period, a written response with the FDIC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

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

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

(7) *Hearing procedures.* (i) The State savings association shall have the right to introduce relevant written materials and to present oral argument at the

hearing. The State savings association may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor subpart C apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

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

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

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

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

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

while such request is pending before the FDIC.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17744, Apr. 24, 2018]

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

(a) *Service of notice.* When the FDIC issues and serves a directive on a State savings association pursuant to § 390.456 requiring the State savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the FDIC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

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

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

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

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive

requiring a State savings association to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

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

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

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

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

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

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification

of the State savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

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

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

§ 390.459 Enforcement of directives.

(a) *Judicial remedies.* Whenever a State savings association or company that controls a State savings association fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

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

(2) *Failure to implement capital restoration plan.* The failure of a State savings association to implement a capital restoration plan required under section 38, or this subpart, or the failure of a company having control of a State savings association to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the State savings association or company to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

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(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or this subpart

through any other judicial or administrative proceeding authorized by law.

Subpart Z [Reserved]

PARTS 391–399 [RESERVED]