

# Proposed Rules

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

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 338 and 390

RIN 3064–AF35

#### Transferred OTS Regulations Regarding Nondiscrimination Requirements

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Proposed rule.

**SUMMARY:** In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation (FDIC) proposes to rescind and remove from the Code of Federal Regulations rules entitled “Nondiscrimination Requirements” (part 390, subpart G), and to amend FDIC regulation part 338 to make it applicable to State savings associations. Part 390, subpart G was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The FDIC’s part 338 is entitled “Fair Housing” and applies to insured State nonmember banks. Several provisions for State savings associations in part 390, subpart G have substantively similar provisions in part 338. The remaining provisions in part 390, subpart G without a direct counterpart are largely duplicative of federal laws (Equal Credit Opportunity Act (ECOA), Fair Housing Act (FHA), Equal Employment Opportunity Act (EEOA) and other laws concerning nondiscrimination in lending, employment, and services) and implementing regulations. After careful review of part 390, subpart G, the FDIC proposes to rescind and remove in its entirety part 390, subpart G to streamline the FDIC’s rules and eliminate unnecessary, inconsistent, and duplicative regulations and to modify the scope of part 338 to include

State savings associations to reflect the scope of the FDIC’s current supervisory responsibilities as the appropriate Federal banking agency for those institutions. The FDIC also proposes to define “FDIC-supervised institution” and “State savings association.” If the proposal is adopted in final form, insured State nonmember banks and State savings associations will be subject to the same anti-discrimination requirements. Upon removal of part 390, subpart G, nondiscrimination regulations related to lending applicable for all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency will be found at part 338 and related nondiscrimination federal regulations listed above, as applicable.

**DATES:** Comments must be received on or before October 26, 2020.

**ADDRESSES:** You may submit comments, identified by RIN 3064–AF35, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments in the portal.
- *Agency Website:* <https://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments on the website.
- *Email:* [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN 3064–AF35 in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

*Instructions:* All submissions for this rulemaking must include the agency name and RIN 3064–AF35. Comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

*The Dodd-Frank Act*

Title III of the Dodd-Frank Act<sup>1</sup> provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,<sup>2</sup> the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act<sup>3</sup> provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. Section 316(b) states that if the materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act<sup>4</sup> further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC’s Board of Directors approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.<sup>5</sup>

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

<sup>2</sup> Codified at 12 U.S.C. 5411.

<sup>3</sup> Codified at 12 U.S.C. 5414(b).

<sup>4</sup> Codified at 12 U.S.C. 5414(c).

<sup>5</sup> 76 FR 39247 (July 6, 2011).

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act<sup>6</sup> granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act (FDI Act) and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of "appropriate Federal banking agency" contained in section 3(q) of the FDI Act<sup>7</sup> to add State savings associations to the list of entities for which the FDIC is designated as the "appropriate Federal banking agency." As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, insured State nonmember banks, and insured branches of foreign banks.

As noted, on June 14, 2011, operating pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferred OTS regulations. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.<sup>8</sup> When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS regulations and might later recommend incorporating them into other FDIC regulations, amending them, or rescinding them, as appropriate.

One of the OTS rules transferred to the FDIC requires State savings associations to not discriminate with respect to lending, employment, and other services provided. The OTS rule, formerly found at 12 CFR part 528 (part 528), was transferred to the FDIC with only technical changes and is now found in the FDIC's rules at part 390, subpart G, entitled "Nondiscrimination Requirements." Although few provisions of part 390, subpart G have a direct counterpart within the FDIC's regulations, the provisions are largely duplicative of regulations implementing federal laws (ECOA, FHA, EEOA, and other laws concerning nondiscrimination in lending, employment, and services) implemented by other agencies. After careful review of part 390, subpart G, the FDIC proposes to rescind and

remove part 390, subpart G, because, as discussed below, it is duplicative, unnecessary, and burdensome to require State savings associations to comply with additional requirements to which insured State nonmember banks are not subject. The FDIC also proposes to make technical conforming edits to part 338 to encompass State savings associations and update the regulation.

*FDIC's Existing 12 CFR Part 338 and Former OTS Part 528 (Transferred to FDIC Part 390, Subpart G)*

The Fair Housing Act of 1968 prohibits discrimination concerning the sale, rental and financing of housing based on race, religion, national origin or sex. Section 808 of the FHA directed all executive departments and agencies to administer their programs relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions, e.g., the OTS' predecessor, the Federal Home Loan Bank Board (FHLBB)) in a manner to further the purposes of the FHA. Effective May 1, 1972, the FHLBB amended Chapter V, subchapter B of Title 12, by issuing a new section part 528 which prohibited "discrimination by member institutions in their lending and employment practices and in their advertising and requiring that such institutions display an Equal Housing Lender Poster."<sup>9</sup>

Following this initial issuance of part 528 in 1972, in 1978 the FHLBB finalized major amendments to the regulation to update and strengthen its nondiscrimination in lending regulations to reflect provisions of the FHA, ECOA, and the Community Reinvestment Act (CRA) and to "strengthen the Bank Board's ability to enforce member institutions' compliance with these and other Federal laws which prohibit discriminatory lending practices."<sup>10</sup> Specifically, these amendments to the FHLBB's fair lending regulation: "(1) [p]rohibit member institutions from automatically refusing to lend because of the age or location of a dwelling; (2) prohibit loan decisions based on discriminatory appraisals; (3) emphasize that there is a right to file a written loan application; (4) require member institutions to have written loan underwriting standards which are available to the public upon request; (5) revise the Equal Housing Lender poster which member institutions display in their lobbies; and (6) establish a new

monitoring system for fair lending enforcement and analysis."<sup>11</sup>

In 1993, following the President's order for federal agencies to review all Federal regulations and policies to eliminate over-burdensome regulations that discourage economic growth,<sup>12</sup> the OTS (as successor to the FHLBB)<sup>13</sup> updated part 528 to eliminate certain definitions that were deemed unnecessary and amended § 528.6, regarding compliance with Home Mortgage Disclosure Act (HMDA) loan/application registers (LARs). Commenters favored elimination of the nondiscrimination disclosure requirements of § 528.6, arguing it was duplicative of the requirements set forth in 12 CFR part 203, which made HMDA requirements applicable to savings associations. In its proposed rule, the OTS stated that its own "loan application register" was "more comprehensive than required by Regulation C" and that "the additional register information is useful to examiners" but also stated that the additional information was available to examiners through other means.<sup>14</sup> In its final rule, the OTS agreed that part 528.6 was substantially duplicative of HMDA part 203 but disagreed that the OTS' requirement to report "reason for denial" is unnecessary. At the time, reporting the reason for denial was optional under Regulation C.<sup>15</sup> The OTS argued that "[t]he 'reason for denial' provides us with useful information that assists the examination process. We believe that retaining the regulatory requirement assures that this important data field is completed by all OTS-regulated filers, including any majority-owned savings association service corporations or affiliates."<sup>16</sup> As a result, the OTS continued to require that savings associations and other OTS regulated filers required to keep HMDA LARs pursuant to part 203 to report the "reason for denial" for all loan denials.

Part 528 was among the regulations that were transferred to the FDIC from the OTS on July 21, 2011, pursuant to

<sup>11</sup> 43 FR 22332 (May 25, 1978).

<sup>12</sup> In 1996, the Department of Housing and Urban Development (HUD), in accordance with the President's initiative on regulatory reinvention and reform which requires deletion of nonbinding guidance or explanations, entirely eliminated HUD's part 109 (Advertising Guidelines), which provided a variety of nonbinding suggestions and examples of advertising practices that would violate the FHA. 61 FR 14378 (April 1, 1996).

<sup>13</sup> The updates followed the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Public Law 101-73, 103 Stat. 183 (1989).

<sup>14</sup> 57 FR 40352 (Sept. 3, 1992).

<sup>15</sup> See 12 CFR 203.4(c) (1993).

<sup>16</sup> 58 FR 4309 (Jan. 14, 1993).

<sup>6</sup> Codified at 12 U.S.C. 5412(b)(2)(B)(i)(II).

<sup>7</sup> 12 U.S.C. 1813(q).

<sup>8</sup> 76 FR 47652 (Aug. 5, 2011).

<sup>9</sup> 37 FR 8436 (Apr. 3 1972).

<sup>10</sup> 43 FR 22332 (May 25, 1978).

the Dodd-Frank Act as noted above. OTS' part 528 was adopted as FDIC's part 390 subpart G and was not integrated with the FDIC's rules contained in part 338, entitled "Fair Housing." Both in 2011 when OTS part 528 was transferred and today, the FDIC's part 338, a regulation whose provisions are substantially similar to some provisions in the OTS' former part 528: (1) Prohibits insured State nonmember banks from engaging in discriminatory advertising with regard to residential real estate-related transactions; and (2) requires recordkeeping of certain home loan application data for compliance with the ECOA and HMDA with respect to insured State nonmember banks for which the FDIC has been designated the appropriate Federal banking agency.<sup>17</sup> These provisions have direct counterparts in part 390, subpart G.

Specifically, the FDIC's fair housing recordkeeping provisions (see §§ 338.7 and 338.8) are a counterpart to the former OTS requirement to file a HMDA LAR (§ 390.147). The FDIC rules require supervised institutions to request and retain any monitoring information required by HMDA and its implementing Regulation C when receiving an application for credit for the purchase or refinancing of a dwelling to be occupied as a principal residence. Prior to the passage of the final HMDA rule in 2015 by the Bureau of Consumer Financial Protection (CFPB),<sup>18</sup> reporting of reason for denial was optional for insured State nonmember banks, as mentioned earlier. However, reporting of reason for denial became mandatory following the 2015 HMDA rule for covered institutions. FDIC-supervised institutions, under part 338, are already subject to the HMDA reporting requirement to provide a reason for denial as a result of the change in 2015. Therefore, the FDIC has not found any reasonable basis to add such a specific provision into its part 338, and the FDIC proposes to rescind and remove the former OTS rule as duplicative and unnecessary. Moreover, in 2018, the HMDA rule was further amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRCPA),<sup>19</sup> which provided that insured depository institutions and insured credit unions need not report certain data points for transactions that qualify for a partial

exemption, unless otherwise required by their regulator. Reason for denial is one such data point. Rescinding and removing former OTS's § 390.147 would promote regulatory consistency among insured State nonmember banks and State savings associations and enable State savings associations to take advantage of the partial exemption, if eligible.

In addition, FDIC requirements related to nondiscrimination in advertising and displaying a fair housing poster (§§ 338.3 and 338.4) are counterparts to substantially similar former OTS requirements (§§ 390.145 and 390.146). However, the FDIC's part 338 and the former OTS' part 390, subpart G differ with respect to where they require fair housing posters to be displayed and the presence of nonbinding recommendations about displaying Spanish-language posters in certain offices. With respect to poster location, FDIC's § 338.4 requires posting either the FDIC's Equal Housing Lender poster or the U.S. Department of Housing and Urban Development's Equal Housing Opportunity poster at "a central location within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering the area," whereas § 390.146 requires posting at each of a State savings association's offices. The FDIC has not identified a reason for State savings associations to post an Equal Housing Opportunity notice at locations where insured State nonmember banks are not required to post. Therefore, the FDIC proposes to rescind and remove § 390.146. As discussed below, the FDIC also proposes to amend § 338.4 to apply to State savings associations, in addition to insured State nonmember banks and to update the address provided for the FDIC's Consumer Response Center (CRC).

With respect to the presence of non-binding guidance, § 390.146 recommends, but does not require, that State savings associations "post a Spanish language version of the [Equal Housing Lender] poster in offices serving areas with a substantial Spanish-speaking population." The FDIC's part 338 does not contain guidance about posting supplemental foreign-language posters. The FDIC does not propose to add this nonbinding recommendation to the existing Equal Housing Lending poster requirements in § 338.4.<sup>20</sup>

Although several former OTS nondiscrimination rules codified in part

390, subpart G do not have direct FDIC counterparts, they are substantially duplicative of nondiscrimination provisions found in other federal laws (e.g., ECOA, FHA, EEOA, and other laws concerning nondiscrimination in lending, employment, and services) and implementing regulations of the CFPB or Department of Labor.<sup>21</sup> Additionally, the interagency Policy Statement on Discrimination in Lending applies to State savings associations.<sup>22</sup> The applicable prohibitions on discrimination addressed by these other laws, regulations, and policy statements apply to State savings associations regardless of specific references in the FDIC's regulation.

In addition, to the extent that any such provision of part 390, subpart G can be interpreted as applying in a case where ECOA, FHA, EEOA and other laws and regulations concerning nondiscrimination in lending, employment or services would not apply, the FDIC's authority to amend these former OTS provisions is not certain.<sup>23</sup> The OTS had authority under the Home Owners' Loan Act (HOLA) to adopt regulations that give primary consideration of the best practices of thrift institutions in the United States and appears to have used such authority in adopting and maintaining their nondiscrimination requirements.<sup>24</sup> However, such HOLA authority does not extend to the FDIC. Moreover, the FDIC has not identified cases where the OTS applied the nondiscrimination requirements of its part 528 to address acts or practices that were not prohibited by ECOA, FHA, or EEOA. The FDIC also has not found cases where a fair lending review of a State savings association identified acts or practices that were deemed appropriate to address under part 390 subpart G but not under ECOA or the FHA. For these reasons, the FDIC finds §§ 390.142 through 390.144 and 390.148 to be unnecessary and duplicative, as a result of the overlapping provisions in ECOA, FHA, or EEOA, and proposes to rescind §§ 390.142 through 390.144 and 390.148 in their entirety rather than revise them

<sup>21</sup> FDIC part 352 addresses nondiscrimination on the basis of disability to provide equal access to programs and activities conducted by the FDIC.

<sup>22</sup> 59 FR 18267 (April 15, 1994).

<sup>23</sup> See, e.g., OTS, Advance Notice of Proposed Rulemaking, Unfair or Deceptive Acts and Practices, 72 FR 43570, 43573 (Aug. 6, 2007) (stating that OTS' Nondiscrimination Rule, then 12 CFR part 528, "extends beyond the federal fair lending laws by prohibiting discrimination not covered by those laws" and providing examples of such broader applicability).

<sup>24</sup> See *id.*

<sup>17</sup> 12 CFR part 338.

<sup>18</sup> 80 FR 66127 (Oct. 28, 2015).

<sup>19</sup> Public Law 117-154 (2018). In recent CFPB rulemakings and other issuances, the requirement to report Reason for Denial in § 390.147 is stated to be independent of the partial exemption from reporting that data field under HMDA.

<sup>20</sup> <https://www.fdic.gov/news/news/press/2018/pr18059a.pdf>.

to address acts or practices not addressed by ECOA, FHA, or EEOA.

The FDIC has determined that several provisions of part 390 subpart G have no counterparts in either the FDIC's regulations or other nondiscrimination federal regulations. For these provisions, the FDIC has not identified a reasonable basis for retaining these requirements for State savings associations, given that they do not apply to insured State nonmember banks, and therefore proposes to rescind the following provisions, which—

1. Require each State savings association to have clearly written, nondiscriminatory loan underwriting standards, available to the public upon request, at each of its offices. Require each association to review its standards, and business practices that implement them, at least annually to ensure equal opportunity in lending.<sup>25</sup>

2. Require each State savings association notify each “inquirer” of a right to obtain a copy of its loan underwriting standards.<sup>26</sup>

3. Provide supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies and provide that each State savings association “should reexamine its underwriting standards at least annually in order to ensure equal opportunity.”<sup>27</sup>

4. Treat the age or location of a dwelling as a *per se* prohibited basis for discrimination.<sup>28</sup>

5. Provide certain guidelines relating to nondiscrimination in marketing practices.<sup>29</sup>

In summary, after careful review of part 390, subpart G (formerly part 528), and the former OTS's stated rationale for the rule, the FDIC, as the appropriate Federal banking agency for State savings associations, proposes to rescind and remove part 390, subpart G in its entirety. Rescinding part 390, subpart G also will serve to streamline the FDIC's rules and eliminate unnecessary, inconsistent, and duplicative regulations. If the proposal is adopted in final form, all insured State nonmember banks and State savings associations will be subject to the same anti-discrimination requirements.

## II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act<sup>30</sup> provides that the former OTS

regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the Nondiscrimination Requirements rule currently found in part 390, subpart G, the FDIC, as the appropriate Federal banking agency for State savings associations, proposes to rescind and remove part 390, subpart G in its entirety. Further, in part 338, the FDIC proposes to (1) revise § 338.1 to reflect that the advertising provisions of subpart A apply to State savings associations and their subsidiaries, to conform to and reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency for State savings associations; (2) in § 338.2, add a defined term “FDIC-supervised institution,” defined to mean “either a bank [defined in § 338.2(a) to mean “an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act”] or a State savings association”; (3) add a new subsection to define “State savings association” as having “the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act”;<sup>31</sup> (4) make conforming technical edits throughout, including replacing the term “FDIC-supervised institution” or “institution” in place of “bank” throughout the rule where necessary and revising references to the FRB's part 202 and part 203 throughout part 338 to refer to the CFPB's part 1002 and part 1003, respectively; and (5) amend § 338.4 to update the text required for the Equal Housing Lender poster to the correct address for the FDIC Consumer Response Center.

### Part 390, Subpart G

#### A. Section 390.140—Definitions

Section 390.140 defines the terms “application,” “dwelling,” and “State savings association.” In light of the proposal to rescind subpart G of part 390 in its entirety, these definitions need not be retained. Therefore, the FDIC proposes to rescind § 390.140.

#### B. Section 390.141—Supplementary Guidelines

Section 390.141 cross-references a policy statement transferred from OTS regulations to § 390.151, HUD's fair housing regulations at 24 CFR part 100 *et seq.*, and Regulation B and Regulation C. The cross-reference to the policy statement would be obsolete if § 390.151 is rescinded as proposed. Moreover, the cross-references to HUD's fair housing

regulations and to the regulations that implement ECOA and HMDA are unnecessary. Therefore, the FDIC proposes to rescind § 390.141.

#### C. Section 390.142—Nondiscrimination in Lending and Other Services

Section 390.142 prohibits discrimination on a prohibited basis by State savings associations in lending and other services. The prohibited bases specified are location and age of a dwelling and race, color, religion, sex, handicap, familial status, marital status, or age of an applicant or a joint applicant, among other parties.<sup>32</sup> In general, § 390.142(a) prohibits denying a loan or other service, discriminating in the purchase of loans or securities, or discriminating in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or service, on a prohibited basis. Section 390.142(b) provides that “[a] State savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.” Section 390.142(c) prohibits a State savings association from discriminating against an applicant for a loan or other service on any prohibited basis, as defined in Regulation B or HUD's FHA regulation in 24 CFR part 100.

There is significant overlap between the requirements of § 390.142 and of the requirements of ECOA and Regulation B and the FHA and HUD's FHA regulations (the general federal fair lending laws). For example, under ECOA, it is “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction” on a prohibited basis.<sup>33</sup> Similarly, the FHA provides that it is “unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction” because of a prohibited basis.<sup>34</sup> Moreover, the following are prohibited bases under both subpart G of part 390 and the general federal fair lending laws: Race, color, religion, national origin, and sex.<sup>35</sup>

<sup>32</sup> The other parties specified in § 390.147(a) are a person associated with respect to a loan or service or the purpose thereof, present or prospective owners, lessees, tenants, or occupants of the dwelling(s), or present or prospective owners, lessees, tenant, or occupants of other dwellings in the vicinity of the dwelling(s).

<sup>33</sup> See 15 U.S.C. 1691(a).

<sup>34</sup> See 42 U.S.C. 3605(a).

<sup>35</sup> Prohibited bases for discrimination under ECOA but not the FHA are age (of an applicant),

<sup>25</sup> 12 CFR 390.143(b).

<sup>26</sup> 12 CFR 390.144(b).

<sup>27</sup> 12 CFR 390.150(a).

<sup>28</sup> 12 CFR 390.142 through 390.144.

<sup>29</sup> 12 CFR 390.150(d).

<sup>30</sup> 12 U.S.C. 5414(b)(3).

<sup>31</sup> 12 U.S.C. 1813(b)(3).

However, there are differences between § 390.142 and the general federal fair lending laws. For example, under § 390.142(a), prohibited bases for discrimination explicitly include the location and age of a dwelling, whereas prohibited bases for discrimination under ECOA, FHA, and their implementing regulations do not include such factors.

As discussed earlier, to the extent that a provision of § 390.142 can be interpreted as applying in a case where ECOA, FHA, EEOA and other laws and regulations concerning nondiscrimination in lending, employment or services would not apply, the FDIC's authority to amend these former OTS provisions is not certain. Because the general federal fair lending laws address substantially the same acts and practices as are addressed by § 390.142(a) and it is uncertain whether the FDIC could amend § 390.142(a) in connection with acts or practices not explicitly prohibited by the general federal fair lending laws, FDIC proposes to rescind § 390.142(a).

Similarly, § 390.142(b) addresses acts and practices addressed by the general federal fair lending laws but differs in ways that make FDIC's authority to amend § 390.142(b) uncertain. As mentioned, § 390.142(b) provides that “[a] State savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.” By contrast, Regulation B's provisions establishing standards for consideration of an applicant's income in § 1002.6(b)(5) does not require creditors to consider the combined income of joint applicants, and Comment 6(b)(5)–3.ii states that creditors need not consider income at all. In contrast with § 390.142(b), 12 CFR 1002.6(b)(5) in Regulation B prohibits treating joint applicants differently based on the existence, absence or likelihood of a marital relationship. The FDIC believes that the prohibition in § 1002.6(b)(5) addresses substantially the same issue that § 390.142(b) addresses and the latter is duplicative and arguably less clear. Therefore, the FDIC proposes to rescind § 390.142(b).<sup>36</sup>

marital status, and good faith exercise of a right under the Consumer Credit Protection Act (or any state law upon which the CFPB has granted an exception). Prohibited bases for discrimination under the FHA but not ECOA are handicap and familial status. Compare 15 U.S.C. 1691(a) with 42 U.S.C. 3604, 3605(a).

<sup>36</sup> Section 1002.6(b)(5) prohibits discounting, or excluding from consideration, the income of an applicant or his or her spouse because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit. The provision

As mentioned, § 390.142(c) prohibits a State savings association from discriminating against an applicant for a loan or other service on any prohibited basis, as defined in Regulation B or HUD's FHA regulation in 24 CFR part 100. The FDIC believes that § 390.142(c) is duplicative of the general federal fair lending laws and therefore proposes to rescind the provision.

#### D. Section 390.143—Nondiscriminatory Appraisal and Underwriting

Section 390.143(a) prohibits using or relying upon a dwelling appraisal that a 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 FHA or ECOA. The general federal fair lending laws prohibit appraisal-related discrimination on a prohibited basis.<sup>37</sup> Although the location of a dwelling is not a per se prohibited basis for discrimination under those statutes, ECOA prohibits discrimination because of the race, color, religion, national origin, etc. of residents in the neighborhood where the property offered as collateral.<sup>38</sup> To the extent that § 390.143(a) prohibits considering the age of a dwelling in a way that would not be prohibited under the general federal fair lending laws, the authority of the FDIC to amend the provision is unclear.

As stated, § 390.143(a) also prohibits using or relying upon a dwelling appraisal that is discriminatory per se or in effect under the FHA or ECOA. The FDIC believes that prohibition is duplicative of prohibitions under the general fair lending laws and therefore is unnecessary. For these reasons, the FDIC proposes to rescind § 390.143(a).

Section 390.143(b) requires each State savings association to have clearly written, nondiscriminatory loan underwriting standards available to the public upon request at each of its offices. In addition, § 390.143(b) requires each association to review its standards, and business practices that implement them, at least annually to ensure equal opportunity in lending. No

also prohibits treating joint applicants differently based on the existence, absence, or likelihood of a marital relationship.

<sup>37</sup> Regulation B prohibits discrimination “against an applicant on a prohibited basis regarding any aspect of a credit transaction.” 12 CFR 1002.4(a). Under HUD's FHA regulations, it is unlawful to use “an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration” a prohibited basis. 24 CFR 100.135(d)(1).

<sup>38</sup> See 12 CFR 1002.2(z) and Comment 2(z)–1.

such requirements apply to insured State nonmember banks. The provision is not required by ECOA or the FHA, and the authority of the FDIC to amend former OTS requirements that were adopted pursuant to HOLA authority is unclear. For these reasons, the FDIC proposes to rescind § 390.143(b).

#### E. Section 390.144—Nondiscrimination in Applications

Section 390.144(a) prohibits discouraging or refusing to allow, receive, or consider any applicant, request or inquiry about a loan or other service on a prohibited basis. Section 390.144(b) requires a State savings association to “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.”

Section 390.144(a) is substantially similar to, and duplicative of, prohibitions under the general federal fair lending laws.<sup>39</sup> To the extent that § 390.144(a) relies on HOLA authority to prohibit discrimination with respect to a service, or with respect to the age or the location of a dwelling, in cases where the general federal fair lending laws would not apply, the FDIC's authority to amend the provision is unclear. Therefore, the FDIC proposes to rescind § 390.144(a).

As discussed earlier, the FDIC proposes to rescind the requirement in § 390.143(b) for a State savings association to provide a copy of its underwriting standards upon request. Further, the FDIC believes that the requirement to post an Equal Housing Lender poster, discussed below in connection with 12 CFR 338.4, serves a substantially similar purpose as the requirement to “inform each inquirer of his or her right to file a written loan application” in 12 CFR 390.144(b). For the foregoing reasons, the FDIC proposes to rescind § 390.144(b).

#### F. Section 390.145—Nondiscriminatory Advertising

Section 390.145 prohibits directly or indirectly engaging in any form of advertising that implies or suggests a policy of discrimination or exclusion in violation of ECOA, the FHA, or subpart G of part 390. The provision also provides that advertisements for any loan for purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling must include the Equal Housing Lender symbol.

The requirement in § 390.145 to include the Equal Housing Lender

<sup>39</sup> See, e.g., 15 U.S.C. 1691(a); 12 CFR 1002.4; 24 CFR 100.120.

symbol in dwelling-related advertising is substantially similar to the requirement in § 338.4(a) that an insured State nonmember bank prominently indicate in advertisements for dwelling-related loans “that the bank makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.” Section 338.4(a)(1) permits, but does not require, an insured State nonmember bank to comply “by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) of the FDIC’s regulations or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in” § 110.25(a) of HUD’s FHA regulation. Because § 390.145 is substantially similar to § 338.4, FDIC proposes to rescind § 390.145 and, as discussed below, amend § 338.4 to cover State savings associations in addition to insured State nonmember banks.

#### G. Section 390.146—Equal Housing Lender Poster

Section 390.146(a) requires each State savings association to post and maintain at least one Equal Housing Lender poster prominently in the lobby of each of its offices, requires the use of specified text, establishes a minimum poster size, and requires that the text be legible. Also, § 390.146(a) states that “[i]t is recommended that savings associations post a Spanish language version of the poster in offices serving areas with a substantial Spanish-speaking population.” Section 390.146(b) sets forth the required poster text and the Equal Housing Lender logotype.

The requirements of § 390.146 are substantially similar to the requirements applicable to insured State nonmember banks under § 338.4. As discussed later, although the FDIC’s Equal Housing Lender poster provisions do not include the Spanish-language recommendation included in § 390.146, the FDIC makes a Spanish-language poster available to the institutions it supervises. For these reasons, the FDIC proposes to rescind § 390.146 and, as discussed below, amend § 338.4 to also apply to State savings associations.

#### H. Section 390.147—Loan Application Register

Section 390.147 requires that State savings associations and other lenders required to file HMDA LARs with the FDIC to enter the reason for denial with respect to all loan denials. As discussed earlier in Section I, *Background*,

Regulation C now requires a covered financial institution to report “[t]he principal reason or reasons the financial institution denied the application, if applicable.”<sup>40</sup> The FDIC believes that § 390.147 is duplicative now that reporting reason for denial is required rather than optional under Regulation C. Furthermore, pursuant to the EGRRCPA, Regulation C provides a partial exemption from reporting reason for denial and certain other data points for financial institutions that meet specified conditions. Banks eligible for the partial exemption need not report reason for denial, but State savings associations supervised by the FDIC must report reason for denial pursuant to § 390.147.<sup>41</sup> The FDIC has not identified grounds for State savings associations that are eligible for the partial exemption under HMDA to be treated differently from similarly situated banks. For the foregoing reasons, the FDIC proposes to rescind § 390.147.

#### I. Section 390.148—Nondiscrimination in Employment

Section 390.148 prohibits discrimination on a prohibited basis by State savings associations in employment. The specified prohibited bases are race, color, religion, sex, and national origin. Section 390.148(a) prohibits discrimination in the hiring, firing, promoting, compensating, or training of an individual or similar discriminatory treatment during employment or with regard to training. Section 390.148(b) prohibits segregation or classification of employees in a way that would adversely affect their status as an employee on a prohibited basis. Section 390.148(c) prohibits State savings associations from retaliating against an employee for opposing an unlawful employment practice. Section 390.148(d) prohibits discrimination by State savings associations in advertisements for employment. Section 390.148(e) states the regulation does not apply in any case in which certain exemptions and exceptions under the EEOA apply. Section 390.148(f) states that any violation of specified laws or regulations, such as the EEOA and the Age Discrimination in Employment Act, shall be deemed a violation of this regulation.

There is significant overlap between the requirements of § 390.148(a) through (d) and the EEOA. Under the EEOA, it is unlawful for an employer to discriminate in hiring, firing,

compensating or providing training because of the same prohibited bases as under § 390.148(a).<sup>42</sup> Similarly, the EEOA prohibits employers from segregating or classifying employees that would adversely affect their status as an employee on a prohibited basis.<sup>43</sup> The EEOA also makes it unlawful for an employer to retaliate against an employee for opposing a practice made unlawful under a subchapter of the EEOA.<sup>44</sup> The EEOA makes it generally unlawful for an employer to discriminate in advertisements for employment.<sup>45</sup> The FDIC believes that §§ 390.148(a) through (d) are duplicative of the prohibitions under the EEOA and therefore are unnecessary. For these reasons, the FDIC proposes to rescind these provisions.

Section 390.148(e) cross-references the EEOA. The cross-reference to the statute would be obsolete if § 390.148 is rescinded as proposed. Section 390.148(f) cross-references multiple employment laws, including the EEOA. The FDIC believes such cross-references are unnecessary and therefore proposes to rescind §§ 390.148(e) and (f).

#### J. Section 390.149—Complaints

Section 390.149 provides that complaints about discrimination in lending by a State savings association “shall be referred” to the Secretary of HUD for processing under the FHA and the Director of the Division of Depositor and Consumer Protection at the FDIC for processing under FDIC regulations. In addition, § 390.149 provides that complaints about discrimination in employment by a State savings association “shall be referred” to the EEOC (with a copy to the FDIC) if they relate to employment. Similar, although more detailed, discrimination complaint processing provisions can be found in other federal laws, and their implementing regulations.<sup>46</sup> Moreover, as a matter of practice, consistent with the *1991 Memorandum of Understanding Between the U.S. Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies*, the FDIC has long had procedures for referring complaints to HUD regarding lending discrimination by financial institutions. These procedures apply to complaints involving lending by State savings associations. Therefore, the FDIC

<sup>42</sup> See 42 U.S.C. 2000e–2(a)(1) and (d).

<sup>43</sup> See 42 U.S.C. 2000e–2(a)(2).

<sup>44</sup> See 42 U.S.C. 2000e–3(a).

<sup>45</sup> See 42 U.S.C. 3605(a).

<sup>46</sup> See 24 CFR part 103 ((Fair Housing—Complaint Processing) (FHA)) and 29 CFR part 1601 ((Procedural Regulations) (EEOA)).

<sup>40</sup> See § 1003.4(a)(16).

<sup>41</sup> Financial institutions regulated by the OCC are required to report reasons for denial on their HMDA LARs pursuant to 12 CFR 27.3(a)(1)(i) and 128.6.

believes the provisions in § 390.149 regarding routing complaints about discrimination in lending are duplicative and unnecessary.

However, there appears to be no equivalent requirement to the provisions in § 390.149 regarding referring complaints to EEOC regarding employment discrimination by FDIC-supervised institutions. The FDIC believes it would be burdensome and unnecessary to require State savings associations to comply with this additional requirement to which insured State nonmember banks are not subject. For the foregoing reasons, the FDIC proposes to rescind § 390.149 in its entirety.

#### K. Section 390.150—Guidelines Relating to Nondiscrimination in Lending

Section 390.150 “provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies.” In general, § 390.150 states actions that State savings associations “should” take or actions that “can” or “may” constitute illegal discrimination.<sup>47</sup> The requirements in the guidelines generally have analogous requirements in the general federal fair lending laws; for example, with respect to discrimination on the basis of marital status,<sup>48</sup> discounting or excluding spousal income or supplementary income,<sup>49</sup> and inquiring about child

<sup>47</sup> See, e.g., § 390.150(a) (stating that “[e]ach State savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity”); § 390.150(c)(2) (stating that “[r]equiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin”); § 390.150(c)(6) (stating that “[r]efusing to lend, or offering less favorable terms (such as interest rate, down payment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons”).

<sup>48</sup> Compare § 390.150(c)(1) (“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.”) with 12 CFR 1002.6(b)(8) (stating that, except as otherwise permitted or required by law, a creditor must evaluate married and unmarried applicants by the same standards and must not treat applicants differently based on the existence, absence, or likelihood of a marital relationship between the parties) and 12 CFR 1002.7(a) (stating that a creditor must not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis).

<sup>49</sup> Compare § 390.150(c)(3) (stating that, when spouses apply jointly for a loan, discounting spousal income violates the FHA and that the determination 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) and § 390.150(c)(4) (“Lending standards which consider as effective only the non-

bearing or childrearing.<sup>50</sup> Therefore, the FDIC proposes to rescind this section as duplicative or unnecessary.

#### Part 338—Fair Housing

The FDIC’s part 338, Fair Housing, applies to insured State nonmember banks and addresses discrimination in advertising and recordkeeping requirements under ECOA and HMDA. The FDIC proposes to make technical amendments to part 338 to reflect the applicability of its provisions to State savings associations, as discussed below.

##### A. Section 338.1—Purpose

Section 338.1 states that its purposes are to prohibit insured State nonmember banks from engaging in discriminatory advertising with regard to residential real estate-related transactions and require them to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) of the FDIC’s regulations or the Equal Housing Opportunity poster prescribed in 24 CFR part 110 in HUD’s regulations. To reflect that § 338.1 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.1 to change references to “insured State nonmember banks” to refer to “FDIC-supervised institutions.”

##### B. Section 338.2—Definitions Applicable to Subpart A of This Part

Section 338.2 defines terms used in subpart A of part 338, including the term “bank” defined in § 338.2(a) to mean “an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.” The FDIC proposes to add to § 338.2(c) a new defined term “FDIC-supervised institution” meaning a bank or a State savings association and to add § 338.2(f), a new defined term “State savings association” having “the same meaning as in section (3)(b)(3) of the

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.”) with § 1002.6(b)(5) (prohibiting discounting or excluding income of an applicant or an applicant’s spouse because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit).

<sup>50</sup> Compare § 390.150(c)(3) (“Information relating to child-bearing intentions of a couple or an individual may not be requested.”) with § 1002.6(b)(3) (stating that a creditor must not make assumptions or use aggregate statistics about the likelihood “that any category of persons will bear or rear children or will, for that reason, receive diminished or interrupted income in the future”) and § 1002.5(d)(3) (providing that a creditor must not “inquire about birth control practices, intentions regarding the bearing or rearing of children, or capability to bear children”).

Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3)”. Also, the FDIC proposes to make conforming technical edits to other subsections in § 338.2 to reflect the re-ordering of definitions.

##### C. Section 338.3—Nondiscriminatory Advertising

Section 338.3 provides certain requirements with respect to dwelling-related advertisements to reflect the bank’s nondiscrimination lending practice and prohibits such advertisements from including “words, symbols, models, or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the FHA or ECOA. To reflect that § 338.3 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.3 to change references to “bank” to refer to “FDIC-supervised institution.”

##### D. Section 338.4—Fair Housing Poster

Section 338.4(a) requires insured State nonmember banks engaged in extending dwelling-related loans to conspicuously display either an Equal Housing Lender poster or an Equal Housing Opportunity poster “in a central location within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering the area, where the poster is displayed.” This requirement is substantially similar to the requirement in § 390.146 for State savings associations to display an Equal Housing Lender poster, which the FDIC herein proposes to rescind and remove. To reflect that § 338.4(a) applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.4(a) to change references to “insured State nonmember banks” to refer to “FDIC-supervised institutions.”

Section 338.4(b) sets forth the required text of the FDIC’s Equal Housing Lender poster, including the former mailing address of the FDIC’s CRC, formatted as a Portable Document Format (PDF) image. Since the CRC mailing address changed in 2011, the FDIC has made available to FDIC-supervised institutions an Equal Housing Lender poster with the correct address of the CRC, both in English and in Spanish.<sup>51</sup> Because the CRC mailing address may change in the future, the FDIC proposes to amend § 338.4(b) to

<sup>51</sup> The poster is available to both insured State nonmember banks and State savings associations. Moreover, the current CRC mailing address is correctly stated in FDIC regulations applicable to State savings associations. 12 CFR 390.146.

reflect that the mailing address stated on the Equal Housing Lender poster should be the address for the Consumer Response Center stated on the FDIC's website at [www.fdic.gov](http://www.fdic.gov).<sup>52</sup> Furthermore, the FDIC proposes to set forth the required text of the Equal Housing Lender poster in § 338.4(b) as a text statement rather than as a PDF image.

To assist FDIC-supervised institutions, the FDIC expects to continue to provide them with access to a poster stating the required text, including the accurate CRC mailing address. If this rule is finalized as proposed, no change to posters would be required of FDIC-supervised institutions that use an Equal Housing Lender poster obtained from the FDIC since the CRC mailing address was updated in 2011. The FDIC believes that few insured State nonmember banks make their own Equal Housing Lender poster based on the text of § 338.4(b). Nonetheless, to facilitate the transition to the updated poster, the FDIC proposes to provide a transition period of one year for FDIC-supervised institutions to change their posters to reflect the current CRC mailing address, if needed. That is, the effective date of § 338.4(b), as amended, would be the date that is one year after a final rule amending the provision is published in the **Federal Register**.

#### E. Section 338.5—Purpose

Section 338.5 states that its purpose is to notify insured State nonmember banks of their duty both to collect and retain certain information about a home loan applicant's personal characteristics in accordance with Regulation B and to maintain, update and report a register of home loan applications in accordance with Regulation C. To reflect that § 338.5 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.5 to change references to "insured State nonmember banks" to refer to "FDIC-supervised institutions." The FDIC also proposes to make technical amendments to § 338.5 to reflect that Regulation B and Regulation C have been re-designated as 12 CFR part 1002 and 12 CFR part 1003, respectively, and are implemented by the CFPB.

<sup>52</sup> Currently, the mailing address for the Consumer Response Center (1100 Walnut St., Box #11 Kansas City, MO 64106) is provided at <https://www.fdic.gov/consumers/assistance/filecomplaint.html>. Since May 31, 2012, Regulation B has required the use of that address in adverse action notices, as applicable. See Board of Governors of the Federal Reserve System, Final Rule, Equal Credit Opportunity, 76 FR 31451 (Jun. 1, 2011).

#### F. Section 338.6—Definitions Applicable to This Subpart B

Section 338.6 defines terms used in subpart B of part 338, including the term "bank" defined in § 338.6(a) to mean "an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act." The FDIC proposes to add as § 338.2(c) a new defined term "FDIC-supervised institution" meaning a bank or a State savings association and to add as § 338.6(d) a new defined term "State savings association" having "the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3)."

#### G. Section 338.7—Recordkeeping Requirements

Section 338.7 requires banks that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling to request and retain the monitoring information required by Regulation B.<sup>53</sup> To reflect that § 338.7 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.7 to change references to "bank" to refer to "FDIC-supervised institution." The FDIC also proposes to make technical amendments to § 338.7 to reflect that Regulation B has been re-designated as 12 CFR part 1002 and is implemented by the CFPB.

#### H. Section 338.8—Compilation of Loan Data in Register Format

Section 338.8 requires banks and other lenders required to file a HMDA LAR with the FDIC to maintain, update and report such LAR in accordance with Regulation C. To reflect that § 338.8 applies to all institutions for which the FDIC is the appropriate Federal banking agency, the FDIC proposes to amend § 338.8 to change references to "bank" to refer to "FDIC-supervised institution." Additionally, to reflect amendments made to Regulation C regarding the responsibilities of a financial institution with respect to HMDA LAR data, the FDIC proposes to amend § 338.8 require banks and other lenders required to file a HMDA LAR with the FDIC to collect, record, and report such LAR in accordance with Regulation C. The FDIC also proposes to make technical amendments to § 338.8 to reflect that Regulation C has been re-

<sup>53</sup> This requirement relates to the collection of information for monitoring purposes required by 12 CFR 1002.13.

designated as 12 CFR part 1003 and is implemented by the CFPB.

#### I. Section 338.9—Mortgage Lending of a Controlled Entity

Section 338.9 establishes requirements that apply if a bank refers applicants to a "controlled entity," as defined in § 338.6, and purchases any home purchase loans or home improvement loans (as defined in Regulation C) that are originated by the controlled entity, as a condition to transacting any business with the controlled entity.<sup>54</sup> In such cases, § 338.9 provides that the bank must require the controlled entity to enter into a written agreement with the bank that states that the controlled entity must comply with the requirements of §§ 338.3, 338.4 and 338.7 and, if the controlled entity is subject to Regulation C, § 338.8. Further, the written agreement must provide that the controlled entity must open its books and records to FDIC examination and comply with all FDIC instructions and orders with respect to its home loan practices.

Because this notice of proposed rulemaking is intended to rescind and remove former OTS regulations that are duplicative of regulations under ECOA, FHA, or EEOA, the FDIC does not propose in this rulemaking to impose substantive requirements regarding the business transactions between a State savings association and any entity it controls. That is, the FDIC does not propose to replace the term "bank" with the term "FDIC-supervised institution" in § 338.9. However, the FDIC proposes to make technical amendments to § 338.9 to reflect that Regulation C has been re-designated as 12 CFR part 1003 and is implemented by the CFPB.

### III. Expected Effects

As of March 31, 2020, the FDIC-supervised 3,309 depository institutions,<sup>55</sup> of which 35 are State savings associations.<sup>56</sup>

If the proposed rule were adopted by the FDIC, §§ 390.140 and 390.141 would be rescinded. As discussed previously, these sections include definitions and cross-references to other parts of section 390, so their rescission has no independent significance for institutions or applicants, but rather is

<sup>54</sup> Pursuant to § 338.9, "controlled entity" means "a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise."

<sup>55</sup> FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

<sup>56</sup> FDIC Call Report data, March 31, 2020.



a technical amendment associated with the proposal to rescind subpart G of part 390 in its entirety.

As previously discussed, if the proposed rule were adopted by the FDIC, § 390.142 would be rescinded. This section has substantial overlap with the requirements of ECOA and Regulation B and the FHA and HUD's FHA regulations. Additionally, although some aspects of § 390.142 have no counterpart in existing regulations for insured State nonmember banks, as indicated earlier, the FDIC's authority to amend those elements is uncertain. Therefore, the FDIC believes that these aspects of the proposed rule are unlikely to significantly affect FDIC-supervised institutions or applicants.

If the proposed rule were adopted, the FDIC would rescind § 390.143. As discussed previously, aspects of § 390.143 are either duplicative of prohibitions under the general fair lending laws or the authority of the FDIC to amend them is uncertain. With regard to § 390.143(b), the proposed rule would reduce compliance requirements associated with maintaining and distributing relevant paperwork. The FDIC believes that this is likely to pose a relatively small benefit to the 35 institutions to which it applies. Further, the FDIC believes that it is unlikely that the rescission of the requirement to establish, maintain, and distribute upon request nondiscriminatory loan underwriting standards for these 35 State savings associations would lead to an increase in discriminatory lending behavior because these institutions are still subject to the general fair lending laws. Therefore, the FDIC does not believe that this aspect of the proposed rule, if adopted, is likely to have substantive effects on FDIC-supervised institutions or applicants.

As discussed previously, if the proposed rule were adopted by the FDIC, § 390.144 would be rescinded. Section 390.144(a) is substantially similar to, and duplicative of, prohibitions under the general federal fair lending laws.<sup>57</sup> Additionally, the authority of the FDIC to amend it is unclear. The FDIC also believes that the requirement to post an Equal Housing Lender poster, discussed above in connection with § 338.4, serves a substantially similar purpose as the requirement to "inform each inquirer of his or her right to file a written loan application" in § 390.144(b). Therefore, the FDIC believes that the rescission of § 390.144 is unlikely to have any

substantive effect on FDIC-supervised institutions or applicants.

As discussed previously, if the proposed rule were adopted by the FDIC, § 390.145 would be rescinded. Section 390.145 is substantially similar to § 338.4 and the proposed rule would amend § 338.4 to cover State savings associations in addition to insured State nonmember banks. Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to have any substantive effect on FDIC-supervised institutions or applicants.

As discussed previously, if the proposed rule were adopted by the FDIC, § 390.146 would be rescinded. The requirements of § 390.146 are substantially similar to the requirements applicable to insured State nonmember banks under § 338.4. Section 338.4, however, unlike § 390.146, does not include a "recommendation" that a Spanish-language version of the Equal Housing Lender poster be posted in offices serving areas with a substantial Spanish-speaking population. The FDIC does, however, make a Spanish-language poster available to the institutions it supervises. Given the substantive similarity of much of § 390.146 to § 338.4, the FDIC believes that rescinding it is unlikely to have substantial effects on covered institutions or applicants.

If the proposed rule were adopted, the FDIC would rescind § 390.147. As previously discussed, the FDIC believes that § 390.147 is duplicative now that reporting reason for denial is required rather than optional under Regulation C. Further, since Regulation C provides a partial exemption from reporting reason for denial and certain other data points for financial institutions that meet specified conditions, but no such exemption exists for State savings associations, the proposed rule would establish parity with respect to the reporting requirements for HMDA LARs for State savings associations and other FDIC-supervised institutions. The FDIC believes that this aspect of the proposed rule is unlikely to significantly affect FDIC-supervised institutions or applicants.

As previously discussed, the proposed rule would rescind § 390.148 if it were adopted. The FDIC believes that there is significant overlap between the requirements of § 390.148(a) through (d) and various aspects of the EEOA. Further, § 390.148(e) and (f) references multiple employment laws, including the EEOA, which if the rest of § 390.148 were rescinded as proposed, would be unnecessary. Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to substantively affect

FDIC-supervised institutions or applicants.

As previously discussed, the proposed rule would rescind § 390.149 if it were adopted. The FDIC has procedures for referring complaints to HUD regarding lending discrimination by financial institutions and these procedures apply to complaints involving lending by State savings associations. However, there appears to be no equivalent requirement to the provisions in § 390.149 regarding referring complaints to EEOC regarding employment discrimination by FDIC-supervised institutions. This aspect of the proposed rule would thus create parity between insured State nonmember banks and State savings associations with respect to complaints about discriminatory lending. Given that FDIC-supervised institutions are still subject to applicable elements of the EEOA and FDIC regulations and procedures, the FDIC does not believe that this aspect of the proposed rule is likely to have a substantive effect on covered institutions or their employees.

As previously discussed, the proposed rule would rescind § 390.150 if adopted. This section contains guidelines intended to serve as a resource for State savings associations when developing and implementing nondiscriminatory lending policies. State savings associations, like other FDIC-supervised banks, remain subject to federal fair lending laws and regulations and the FDIC does not believe removal of these guidelines will have any meaningful effect on these institutions or their applicants.

Finally, the proposed rule, if adopted, would make some technical changes to FDIC's part 338 in order to make it applicable to State savings associations and provide for Equal Housing Lender posters to state the accurate CRC mailing address. As previously discussed, these proposed changes are unlikely to have significant effects on State savings associations because they are already subject to substantively similar regulations.

Rescinding part 390, subpart G also will serve to streamline the FDIC's rules and eliminate unnecessary, inconsistent, and duplicative regulations. If the proposal is adopted in its final form, insured State nonmember banks and State savings associations will be subject to the same anti-discrimination requirements.

## V. Alternatives

Several alternatives to the proposed rulemaking were available to the FDIC. The FDIC could have retained the current regulations in part 390, subpart

<sup>57</sup> See, e.g., 15 U.S.C. 1691(a); 12 CFR 1002.4; 24 CFR 100.120.

G, but chose not to do so since most of the requirements in subpart G are duplicative of or substantively similar to existing requirements under federal law or under the FDIC's current fair housing requirements in part 338. As previously discussed, the FDIC also could have retained certain requirements in subpart G that the OTS issued pursuant to the HOLA, but chose not to do so because the FDIC's legal authority to amend requirements that the OTS issued pursuant to HOLA is not clear.

In the instances where the regulations in part 390, subpart G were more stringent than similar requirements for insured State nonmember banks, the FDIC could have applied those requirements to insured State nonmember banks. However, the FDIC chose not to adopt this alternative because it believes the fair lending laws and regulations that already apply to insured State nonmember banks provide an appropriate and sufficient framework to prohibit discrimination.

The FDIC believes that this proposed rule, which would remove and rescind part 390, subpart G, and make the FDIC's existing nondiscrimination regulations applicable to State savings associations, is less burdensome to State savings associations and the public than the alternatives discussed above since it would promote consistency among the regulatory requirements for all FDIC-supervised institutions and improve the public's understanding and ease of reference. Additionally, the FDIC believes that the proposed rule does not materially change the nondiscrimination requirements to which insured State nonmember banks and State savings associations are required to adhere, relative to the alternatives discussed.

#### IV. Request for Comments

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

What impacts, positive or negative, can you foresee in the FDIC's proposal to rescind and remove part 390, subpart G?

#### V. Regulatory Analysis and Procedure

##### A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),<sup>58</sup> the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently

valid Office of Management and Budget (OMB) control number.

The Proposed Rule would rescind and remove from FDIC regulations part 390, subpart G because it is duplicative and unnecessary. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by title III of the Dodd-Frank Act. Although few provisions of part 390, subpart G have a direct counterpart within the FDIC's existing nondiscrimination requirements for insured State nonmember banks in part 338, it is largely duplicative of federal laws (ECOA, FHA, EEOA, and other laws concerning nondiscrimination in lending, employment, and services) and implementing regulations of the CFPB or the Department of Labor. Where provisions of part 390, subpart G had no such counterparts, the FDIC concluded no reasonable basis exists for applying these requirements to State savings associations but not to insured State nonmember banks or that the requirements are inconsistent with current agency policy.

In addition, the proposed rule would: (1) Amend part 338 to include State savings associations and their subsidiaries within its scope; (2) define the new terms "FDIC-supervised institution" and "State savings association;" and (3) make conforming technical edits throughout to update the regulation. These revisions would clarify that State savings associations, as well as insured State nonmember banks, are subject to part 338 with the exception of § 338.9.

Therefore, the Proposed Rule does not revise any existing, or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the OMB for review.

##### B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities.<sup>59</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or owned by a holding company with less than or equal to \$600

million in total assets.<sup>60</sup> Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

As of March 31, 2020, the FDIC-supervised 3,309 depository institutions,<sup>61</sup> of which 2,548 were considered small entities for the purposes of RFA.<sup>62</sup> There are 33 State savings associations that are small entities for the purposes of RFA.<sup>63</sup> If the proposed rule were adopted by the FDIC, §§ 390.140 and 390.141 would be rescinded. As discussed previously, these sections include definitions and cross-references to other parts of § 390, so their rescission has no independent significance for institutions or borrowers, but rather is a technical amendment associated with the proposal to rescind subpart G of part 390 in its entirety.

As previously discussed, if the proposed rule were adopted by the FDIC § 390.142 would be rescinded. This section has substantial overlap with the requirements of ECOA and Regulation B and the FHA and HUD's FHA regulations. Additionally, although some aspects of § 390.142 have no counterpart in existing regulations for State nonmember banks, as indicated earlier the FDIC is uncertain if it has the authority to amend those elements. Therefore, the FDIC believes that these aspects of the proposed rule are unlikely to significantly affect small FDIC-supervised institutions or borrowers.

If the proposed rule were adopted, the FDIC would rescind § 390.143. As discussed previously, aspects of 390.143 are either duplicative of prohibitions

<sup>60</sup> The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

<sup>61</sup> FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

<sup>62</sup> FDIC Call Report data, March 31, 2020.

<sup>63</sup> Id.

<sup>58</sup> 44 U.S.C. 3501–3521.

<sup>59</sup> 5 U.S.C. 601 *et seq.*

under the general fair lending laws or the authority of the FDIC to amend them is uncertain. With regard to § 390.143(b), the proposed rule would reduce compliance requirements associated with maintaining and distributing relevant paperwork. The FDIC believes that this is likely to pose a relatively small benefit to the 33 small institutions to which it applies. Further, the FDIC believes that it is unlikely that the rescission of the requirement to establish, maintain, and distribute upon request nondiscriminatory loan underwriting standards for these 33 small State savings associations would lead to an increase in discriminatory lending behavior because these institutions are still subject to the general fair lending laws. Therefore, the FDIC does not believe that this aspect of the proposed rule, if adopted, is likely to have substantive effects on small FDIC-supervised institutions or borrowers.

As discussed previously, if the proposed rule were adopted by the FDIC § 390.144 would be rescinded. Section 390.144(a) is substantially similar to, and duplicative of, prohibitions under the general federal fair lending laws.<sup>64</sup> Additionally, the authority of the FDIC to amend them is uncertain. The FDIC also believes that the requirement to post an Equal Housing Lender poster, discussed above in connection with 12 CFR 338.4, serves a substantially similar purpose as the requirement to “inform each inquirer of his or her right to file a written loan application” in 12 CFR 390.144(b). Therefore, the FDIC believes that the rescission of § 390.144 is unlikely to have any substantive effect on small FDIC-supervised institutions or borrowers.

As discussed previously, if the proposed rule were adopted by the FDIC § 390.145 would be rescinded. Section 390.145 is substantially similar to § 338.4 and the proposed rule would amend § 338.4 to cover State savings associations in addition to insured State nonmember banks. Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to have any substantive effect on small FDIC-supervised institutions or borrowers.

As discussed previously, if the proposed rule were adopted by the FDIC, § 390.146 would be rescinded. The requirements of § 390.146 are substantially similar to the requirements applicable to insured State nonmember banks under § 338.4. However, § 338.4, unlike § 390.146, does not include a “recommendation” that a Spanish-language version of the Equal Housing Lender poster be posted in offices serving areas with a substantial

Spanish-speaking population. As indicated earlier, the FDIC is taking the approach of not including non-binding recommendations in the proposed rule. The FDIC does, however, make a Spanish-language poster available to the institutions it supervises. Given the substantive similarity of much of §§ 390.146 to 338.4, the FDIC believes that rescinding it is unlikely to have substantial effects on small covered institutions or borrowers.

If the proposed rule were adopted, the FDIC would rescind § 390.147. As previously discussed, the FDIC believes that § 390.147 is duplicative now that reporting reason for denial is required rather than optional under Regulation C. Further, since Regulation C provides a partial exemption from reporting reason for denial and certain other data points for financial institutions that meet specified conditions, but no such exemption exists for State savings associations, the proposed rule would establish parity with respect to the reporting requirements for HMDA LARs for State savings associations and other FDIC-supervised institutions. The FDIC believes that this aspect of the proposed rule is unlikely to substantively affect small FDIC-supervised institutions or borrowers.

As previously discussed, the proposed rule would rescind § 390.148 if it were adopted. The FDIC believes that there is significant overlap between the requirements of § 390.148(a) through (d) and various aspect of the EEOA. Further, § 390.148(e) and (f) references multiple employment laws, including the EEOA, which if the rest of § 390.148 were rescinded as proposed, would be unnecessary. Therefore, the FDIC believes that this aspect of the proposed rule is unlikely to substantively affect small FDIC-supervised institutions or borrowers.

As previously discussed, the proposed rule would rescind § 390.149 if it were adopted. The FDIC has procedures for referring complaints to HUD regarding lending discrimination by financial institutions and these procedures apply to complaints involving lending by State savings associations. However, there appears to be no equivalent requirement to the provisions in § 390.149 regarding referring complaints to EEOC regarding employment discrimination by FDIC-supervised institutions. This aspect of the proposed rule would thus create parity between State nonmember banks and State savings associations with respect to discriminatory complaints. Given that FDIC-supervised institutions are still subject to applicable elements of the EEOA and FDIC regulations and

procedures, the FDIC does not believe that this aspect of the proposed rule is likely to have a substantive effect on covered institutions or their employees.

As previously discussed, the proposed rule would rescind § 390.150 if adopted. This section contains guidelines intended to serve as a resource for State savings associations when developing and implementing nondiscriminatory lending policies. Small State savings associations, like other FDIC-supervised banks, remain subject to federal fair lending laws and regulations and the FDIC does not believe removal of these guidelines will have any meaningful effect on these institutions or their borrowers.

Finally, the proposed rule if adopted would make some technical changes to FDIC’s part 338 in order to make it applicable to State savings associations and provide for Equal Housing Lender posters to state the accurate CRC mailing address. As previously discussed, these proposed changes are unlikely to pose significant effects for small State savings associations because they are already subject to substantively similar regulations.

Rescinding part 390, subpart G also will serve to streamline the FDIC’s rules and eliminate unnecessary, inconsistent, and duplicative regulations. If the proposal is adopted in its final form, all small insured State nonmember banks and State savings associations—will be subject to the same anti-discrimination requirements.

The FDIC does not have data with which to estimate the costs that State savings associations currently incur to comply with subpart G or how those costs will change if this proposal were adopted in its current form. However, since this proposal would only affect 33 small entities, and since the differences between subpart G and existing regulation and law are modest, the FDIC certifies that this proposal would not have a significant economic effect on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this section, and in particular, whether the proposed rule would have any significant effects on small entities that the FDIC has not identified.

### C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act<sup>65</sup> requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC has sought to present the Proposed

<sup>65</sup> 12 U.S.C. 4809.

Rule in a simple and straightforward manner. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

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

#### *D. The Economic Growth and Regulatory Paperwork Reduction Act*

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.<sup>66</sup> The FDIC, along with the other Federal banking agencies, submitted a Joint Report to Congress on March 21, 2017 (EGRPRA Report) discussing how the review was conducted, what has been done to date to address regulatory burden, and further measures the FDIC will take to address issues that were identified.<sup>67</sup> As noted in the EGRPRA Report, the FDIC is continuing to streamline and clarify its regulations through the OTS rule integration process. By removing outdated or unnecessary regulations, such as part 390, subpart G, this Proposed Rule complements other actions that the FDIC has taken, separately and with the other Federal banking agencies, to further the EGRPRA mandate.

#### *E. Riegle Community Development and Regulatory Improvement Act of 1994*

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>68</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each

Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>69</sup> The FDIC invites comments that further will inform its consideration of RCDRIA.

#### List of Subjects

##### *12 CFR Part 338*

Aged, Banks, Banking, Civil rights, Credit, Fair housing, Individuals with disabilities, Marital status discrimination, Mortgages, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination, Signs and symbols.

##### *12 CFR Part 390*

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

#### Authority and Issuance

For the reasons stated in the preamble, the FDIC proposes to amend 12 CFR parts 338 and 390 as follows:

- 1. Revise part 338 to read as follows:

### **PART 338—FAIR HOUSING**

#### **Subpart A—Advertising**

Sec.

§ 338.1 Purpose.

§ 338.2 Definitions applicable to subpart A of this part.

§ 338.3 Nondiscriminatory advertising.

§ 338.4 Fair housing poster.

#### **Subpart B—Recordkeeping**

§ 338.5 Purpose.

§ 338.6 Definitions applicable to this subpart B.

§ 338.7 Recordkeeping requirements.

§ 338.8 Compilation of loan data in register format.

§ 338.9 Mortgage lending of a controlled entity.

The authority citation for part 338 is revised to read as follows:

**Authority:** 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR parts 1002, 1003; 24 CFR part 110.

#### **Subpart A—Advertising**

##### **§ 338.1 Purpose.**

The purpose of this subpart A is to prohibit FDIC-supervised institutions from engaging in discriminatory advertising with regard to residential real estate-related transactions. This subpart A also requires FDIC-supervised institutions to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) of the FDIC's regulations or the Equal Housing Opportunity poster prescribed by part 110 of the regulations of the United States Department of Housing and Urban Development (24 CFR part 110). This subpart A enforces section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–3619 (Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988.

##### **§ 338.2 Definitions applicable to subpart A of this part.**

For purposes of subpart A of this part:

(a) *Bank* means an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Dwelling* means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

(d) *Handicap* means, with respect to a person:

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) A record of having such an impairment; or

(3) Being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

(e) *Familial status* means one or more individuals (who have not attained the age of 18 years) being domiciled with:

(1) A parent or another person having legal custody of such individual or individuals; or

(2) The designee of such parent or other person having such custody, with

<sup>66</sup> Public Law 104–208, 110 Stat. 3009 (1996).

<sup>67</sup> 82 FR 15900 (March 31, 2017).

<sup>68</sup> 12 U.S.C. 4802(a).

<sup>69</sup> *Id.*

the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(f) *State savings association* has the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

### § 338.3 Nondiscriminatory advertising.

(a) Any FDIC-supervised institution which directly or through third parties engages in any form of advertising of any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall prominently indicate in such advertisement, in a manner appropriate to the advertising medium and format utilized, that the FDIC-supervised institutions makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.

(1) With respect to written and visual advertisements, this requirement may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) of the FDIC's regulations or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in § 110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)).

(2) With respect to oral advertisements, this requirement may be satisfied by a statement, in the spoken text of the advertisement, that the FDIC-supervised institution is an "Equal Housing Lender" or an "Equal Opportunity Lender."

(3) When an oral advertisement is used in conjunction with a written or visual advertisement, the use of either of the methods specified in paragraphs (a)(1) and (2) of this section will satisfy the requirements of this paragraph (a).

(b) No advertisement shall contain any words, symbols, models or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the Fair Housing Act or the Equal Credit Opportunity Act.

### § 338.4 Fair housing poster.

(a) Each FDIC-supervised institution engaged in extending loans for the purpose of purchasing, constructing,

improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall conspicuously display either the Equal Housing Lender poster set forth in paragraph (b) of this section or the Equal Housing Opportunity poster prescribed by § 110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)), in a central location within the FDIC-supervised institution where deposits are received or where such loans are made, in a manner clearly visible to the general public entering the area, where the poster is displayed.

(b) The Equal Housing Lender Poster shall be at least 11 by 14 inches in size and have the following text:

We Do Business in Accordance with Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF 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, [Insert address for the Consumer Response Center stated on the FDIC's website at [www.fdic.gov](http://www.fdic.gov)]

For processing under the 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, [Insert address for the Consumer Response Center stated on the FDIC's website at [www.fdic.gov](http://www.fdic.gov)]

(c) The Equal Housing Lender Poster specified in this section was adopted under § 110.25(b) of the United States Department of Housing and Urban Development's rules and regulations as an authorized substitution for the poster required in § 110.25(a) of those rules and regulations.

### Subpart B—Recordkeeping

#### § 338.5 Purpose.

The purpose of this subpart B is two-fold. First, this subpart B notifies all FDIC-supervised institutions of their duty to collect and retain certain information about a home loan applicant's personal characteristics in accordance with Regulation B of the Bureau of Consumer Financial Protection (12 CFR part 1002) in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691 *et seq.*). Second, this subpart B notifies certain FDIC-supervised institutions of their duty to maintain, update and report a register of home loan applications in accordance with Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003), which implements the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*).

#### § 338.6 Definitions applicable to this subpart B.

For purposes of this subpart B—

(a) *Bank* means an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Controlled entity* means a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

(d) *State savings association* has the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

#### § 338.7 Recordkeeping requirements.

All FDIC-supervised institutions that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling

shall request and retain the monitoring information required by Regulation B of the Bureau of Consumer Financial Protection (12 CFR part 1002).

**§ 338.8 Compilation of loan data in register format.**

FDIC-supervised institutions and other lenders required to file a Home Mortgage Disclosure Act loan application register (LAR) with the Federal Deposit Insurance Corporation shall collect, record and report such LAR in accordance with Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003).

**§ 338.9 Mortgage lending of a controlled entity.**

Any bank which refers any applicants to a controlled entity and which purchases any covered loan as defined in Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003) originated by the controlled entity, as a condition to transacting any business with the controlled entity, shall require the controlled entity to enter into a written agreement with the bank. The written agreement shall provide that the entity shall:

(a) Comply with the requirements of §§ 338.3, 338.4, and 338.7, and, if otherwise subject to Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003), § 338.8;

(b) Open its books and records to examination by the Federal Deposit Insurance Corporation; and

(c) Comply with all instructions and orders issued by the Federal Deposit Insurance Corporation with respect to its home loan practices.

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

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

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

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

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

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

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

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

**Subpart G—[Removed and Reserved]**

■ 3. Remove and reserve subpart G, consisting of §§ 390.140 through 390.150.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on August 21, 2020.

**James P. Sheesley,**

*Acting Assistant Executive Secretary.*

[FR Doc. 2020–18813 Filed 9–24–20; 8:45 am]

**BILLING CODE 6714–01–P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Chapter III**

**RIN 3064–ZA19**

**Statement of Policy Regarding Minority Depository Institutions**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Proposed revisions to statement of policy; request for comment.

**SUMMARY:** The FDIC is proposing to revise its Statement of Policy Regarding Minority Depository Institutions. Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 established several goals related to encouraging, assisting, and preserving minority depository institutions. The FDIC has long recognized the unique role and importance of minority depository institutions and has historically taken steps to preserve and encourage minority-owned and minority-led financial institutions. The revised Statement of Policy updates, strengthens, and clarifies the agency's policies and procedures related to minority depository institutions.

**DATES:** Written comments must be received on or before November 24, 2020.

**ADDRESSES:** Interested parties are encouraged to submit written comments. Commenters are encouraged to use the title “Statement of Policy Regarding Minority Depository Institutions” to facilitate the organization and distribution of comments. You may submit comments, identified by RIN 3064–ZA19, by any of the following methods:

- **Agency Website:** <https://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments on the FDIC's website.

- **Email:** [comments@fdic.gov](mailto:comments@fdic.gov). Include RIN 3064–ZA19 in the subject line of the message.

- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

**Instructions:** Comments submitted must include “FDIC” and “RIN 3064–ZA19.” Comments received will be

posted without change to <https://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

Misty Mobley, Senior Review Examiner, Division of Risk Management and Supervision, (202) 898–3771, [mimobley@fdic.gov](mailto:mimobley@fdic.gov); Lauren Whitaker, Senior Attorney, Legal Division, (202) 898–3872, [lwhitaker@fdic.gov](mailto:lwhitaker@fdic.gov); or Gregory Feder, Counsel, Legal Division, (202) 898–8724, [gfeder@fdic.gov](mailto:gfeder@fdic.gov), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, TDD users may contact (202) 925–4618.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background
- II. Revisions to the Proposed Statement of Policy
- III. Proposed Statement of Policy Regarding Minority Depository Institutions
- IV. Administrative Matters

**I. Background**

Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)<sup>1</sup> established several goals related to minority depository institutions (MDIs): (1) Preserving the number of MDIs; (2) preserving the minority character in cases of merger or acquisition; (3) providing technical assistance to prevent insolvency of institutions not now insolvent; (4) promoting and encouraging creation of new MDIs; and (5) providing for training, technical assistance, and education programs.

On April 3, 1990, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC Board and FDIC, respectively) adopted the Policy Statement on Encouragement and Preservation of Minority Ownership of Financial Institutions (1990 Policy Statement). The framework for the 1990 Policy Statement resulted from key provisions contained in Section 308 of FIRREA. The 1990 Policy Statement provided information to the public and minority banking industry regarding the agency's efforts in achieving the goals of Section 308.

During the 1990s, many MDIs continued to underperform industry averages for profitability and experience failure rates that were significantly higher than those of the industry overall. In order to discuss the challenges that MDIs faced, and identify

<sup>1</sup> Public Law 101–73, title III, § 308, Aug. 9, 1989, 103 Stat. 353, as amended by Public Law 111–203, title III, § 367(4), July 21, 2010, 124 Stat. 1556, codified at 12 U.S.C. 1463 note.