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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 344 and 390

RIN 3064-AE06

Removal of Transferred OTS Regulations Regarding Recordkeeping and Confirmation Requirements for Securities Transactions Effected by State Savings Associations and Other Amendments

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) is adopting a final rule (“Final Rule”) to rescind and remove a regulation entitled “Recordkeeping and Confirmation Requirements for Securities Transactions,” and to amend another regulation also entitled “Recordkeeping and Confirmation Requirements for Securities Transactions.” The rescinded regulation was one of several rules transferred to the FDIC following dissolution of the former Office of Thrift Supervision (“OTS”) in connection with the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 Dodd-Frank Act provided that the former OTS rules that were transferred to the FDIC would be enforceable by or against the FDIC until they were modified, terminated, set aside, or superseded in accordance with applicable law by the FDIC, by any court of competent jurisdiction, or by operation of law.

The FDIC received no comments on the Proposed Rule and consequently is adopting the Final Rule as proposed in the NPR without change. As a result, the recordkeeping and confirmation requirements for securities transactions effected on behalf of customers by all

FDIC-supervised institutions will be found at the existing regulation entitled “Recordkeeping and Confirmation Requirements for Securities Transactions.”

DATES: The Final Rule is effective on January 21, 2014.

FOR FURTHER INFORMATION CONTACT:

Anthony J. DiMilo, Examination Specialist, Trust, Division of Risk Management Supervision, (202) 898-7496; John M. Jackwood, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898-3991; Julia E. Paris, Counsel, Legal Division, (202) 898-3821; Grace Pyun, Senior Attorney, Legal Division, (202) 898-3609.

SUPPLEMENTARY INFORMATION:

I. Background

Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, 12 U.S.C. 5411, the powers, duties and functions of the former 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 as to savings and loan holding companies.¹ Section 316(b) of the Dodd-Frank Act, 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such regulatory issuances were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

The Dodd-Frank Act directed the FDIC and OCC to consult with one another and to publish a list of continued OTS regulations to be enforced by each respective agency that would continue to remain in effect until the appropriate successor agency modified or removed the regulations in accordance with the applicable laws.

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

The list was published by the FDIC and OCC as a Joint Notice in the **Federal Register** on July 6, 2011, and shortly thereafter, the FDIC published its transferred OTS regulations as new FDIC regulations in 12 CFR parts 390 and 391. When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

Further, 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, to add State savings associations to the list of entities for which the FDIC is designated the “appropriate Federal banking agency.” As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does today, it has the authority to issue, modify, and rescind regulations involving such associations as well as for State nonmember banks and insured branches of foreign banks.²

II. Proposed Rule

A. Removal of Part 390, Subpart K (Former OTS 12 CFR Part 551)

On September 4, 2013, the FDIC published an NPR regarding the removal of part 390, subpart K (formerly OTS part 551), which governs recordkeeping and confirmation requirements for securities transactions effected for customers by State savings associations.³ The former OTS rule was transferred to the FDIC with only nominal changes. The NPR proposed removing part 390, subpart K from the CFR in an effort to streamline FDIC regulations for all FDIC-supervised institutions. As discussed in the Proposed Rule, the FDIC carefully reviewed the transferred rule, part 390, subpart K, and compared it with part 344, an FDIC regulation that existed before the transfer of part 390, subpart K and that continues to remain in effect today. Like the transferred rule, part 344 governs recordkeeping and confirmation requirements for securities transactions

² 12 U.S.C. 5412(b)-(c).

³ 78 FR 54403, 54408 (Sept. 4, 2013).

effected for customers by insured State nonmember banks and insured branches of foreign banks.⁴ Although the two rules were substantively the same, the FDIC noted some distinctions and minor technical differences between the transferred OTS rule and part 344.⁵ The primary distinction between part 390, subpart K and part 344 was the scope of the Small Transaction Exception. The Final Rule conforms the interpretations of that exception, as discussed below.

B. Amendments to Part 344

The Proposed Rule noted that the key difference between part 344 and part 390, subpart K is the number of transactions permitted under each rule's respective Small Transaction Exception. Specifically, the threshold for part 390, subpart K's Small Transaction Exception is an average of 500 or fewer transactions for customers per year over the three prior calendar years, while the threshold under part 344 is fewer than an average of 200 transactions during the same time period.

To reconcile the difference between the two thresholds, the FDIC's Proposed Rule proposed amending 12 CFR 344.2(a)(1) to increase the threshold for the Small Transaction Exception applicable to all FDIC-supervised institutions effecting securities transactions for customers from an average of 200 transactions to 500 transactions per calendar year over the prior three calendar year period.⁶ As stated in the Proposed Rule, the FDIC believes that increasing the number of securities transactions to which the Small Transaction Exception would apply will not only ensure parity for all FDIC-supervised institutions, but recognizes that the securities activities of FDIC-supervised institutions have increased over the three decades since the FDIC established the original scope of the Small Transaction Exception.⁷

In addition, the Proposed Rule included a measure designed to clarify that part 344 applies to all insured depository institutions for which the FDIC has been designated the appropriate Federal banking agency. Specifically, the Proposed Rule proposed amending section 344.3 of part 344 to remove the definition of "bank" and add the defined term "FDIC-supervised institution" to the list of defined words.⁸ "FDIC-supervised institution" would mean "any insured depository institution for which the

FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q)." Under the Proposed Rule, the term "FDIC-supervised institution" and its plural form would replace "bank," "banks," "state nonmember insured bank (except a District bank)" and "foreign bank having an insured branch" throughout part 344.⁹

III. Comments

The FDIC issued the NPR with a 60-day comment period, which closed on November 4, 2013. The FDIC received no comments on its Proposed Rule, and consequently the Final Rule is adopted as proposed without any changes.

IV. Explanation of the Final Rule

As discussed in the NPR, part 390, subpart K is substantively similar to part 344, and the designation of part 344 as a single authority of recordkeeping requirements for all FDIC-supervised institutions will serve to streamline the FDIC's rules and eliminate unnecessary regulations. To that effect, the Final Rule removes and rescinds 12 CFR part 390, subpart K in its entirety.

Consistent with the Proposed Rule, the Final Rule also amends section 344.2(a)(1) to increase the threshold from an average of fewer than 200 transactions to an average of fewer than 500 transactions for all FDIC-supervised institutions availing themselves of the Small Transaction Exception.

In addition, in the Final Rule, the definition of the term "bank" has been deleted from section 344.3 of part 344 and has been replaced with the term "FDIC-supervised institution." As discussed in the Proposed Rule, "FDIC-supervised institution" is defined in section 344.3(h) as "any insured depository institution for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q)." In the Final Rule, the term "FDIC-supervised institution" and its plural form have replaced the terms "bank," "banks," "state nonmember bank (except a District bank)" and "foreign bank(s) having an insured branch" as used in sections 344.1 through 344.9. Section 344.10 of part 344 remains unchanged in the Final Rule.

V. Administrative Law Matters

A. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act ("PRA") of 1995 (44 U.S.C. 3501–3521), 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 information collections contained in part 344 are cleared by OMB under the FDIC's "Recordkeeping and Confirmation Requirements for Securities Transactions" information collection (OMB No. 3064–0028). The FDIC's burden estimates were updated in connection with the collection's 2012 renewal to include State savings associations transferred from the OTS to the FDIC.

The Final Rule rescinds and removes from FDIC regulations part 390, subpart K. Further, with regard to part 344, the Final Rule amends section 344.2(a)(1) to increase the threshold, from an average of 200 transactions to 500 transactions per calendar year over the prior three calendar year period, for the Small Transaction Exception to certain recordkeeping requirements applicable to all FDIC-supervised institutions. The effect of the increased threshold will be to increase the number of institutions that are exempt from more elaborate recordkeeping requirements in part 344 and from the need to have special written management policies and operational procedures relating to the execution of securities transactions for customers. However, the FDIC's burden calculations are based on an estimated average response time across all supervised institutions. Therefore, the nominal increase in exempted institutions will have no significant impact on overall current burden estimates. As such, this provision of the Final Rule will not involve any new collections of information under the PRA.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, generally requires an agency to consider whether a final rule will have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to \$500 million).¹⁰ Pursuant to section 605(b) of the RFA, a final regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the **Federal Register** together with the rule. For the reasons provided below, the FDIC certifies that

⁴ *Id.* at 54406.

⁵ *Id.*

⁶ *Id.*

⁷ 78 FR 54406.

⁸ *Id.*

⁹ *Id.*

¹⁰ 5 U.S.C. 601 *et seq.*

the Final Rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed previously, part 390, subpart K was transferred from OTS's part 551, which governed recordkeeping and confirmation requirements for Federal and State savings associations that effect securities transactions for customers. OTS's part 551 had been in effect since 2002, and all State savings associations were required to comply with it. Because it is redundant of existing part 344 of the FDIC's Rules, the Final Rule rescinds and removes part 390, subpart K. As a result, all FDIC-supervised institutions—including State savings associations—must comply with part 344 if they effect securities transactions for customers. Consequently, because all State savings associations have been required to comply with substantively similar recordkeeping and confirmation rules when they effected securities transactions for customers since 2002, today's Final Rule will have no significant economic impact on any State savings association.

Further, the Final Rule amends section 344.2(a)(1) to increase the threshold for all FDIC-supervised institutions relying on the Small Transaction Exception from an average of fewer than 200 to 500 transactions for customers per calendar year over the prior three calendar year period. As State savings associations currently comply with a 500-transaction small transaction threshold, the only impact of this portion of the Final Rule is to exempt more State nonmember banks and foreign banks having insured branches from complying with certain recordkeeping and written policy and procedure requirements, thus reducing regulatory burden for these insured depository institutions. There is no existing data that is helpful in determining how many State nonmember banks and foreign banks having insured branches that transact on average between 201 and 500 transactions for customers per calendar year over the prior three calendar year period will take advantage of the increased transaction threshold for the FDIC's Small Transaction Exception in today's Final Rule. Nevertheless, if the Final Rule reduces recordkeeping and written policy procedure requirements for any insured depository institutions, there still is no significant economic impact on a substantial number of small entities.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the Final Rule is not a "major rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), 5 U.S.C. 801 *et seq.*

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. In the NPR, the FDIC invited comments on whether the Proposed Rule was clearly stated and effectively organized, and how the FDIC might make it easier to understand. Although the FDIC did not receive any comments, the FDIC sought to present the Final Rule in a simple and straightforward manner.

E. 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 depository institutions.¹¹ The FDIC's EGRPRA review is ongoing and is expected to be completed by 2016. The NPR solicited comments on whether the proposed rescission of part 390, subpart K and amendments to part 344 would impose any outdated or unnecessary regulatory requirements on insured depository institutions. No comments on this issue were received. Upon review, the FDIC does not believe that part 344, as amended by the Final Rule, impose any outdated or unnecessary regulatory requirements on any insured depository institutions.

List of Subjects

12 CFR Part 344

Banks, banking; Reporting and recordkeeping requirements; Savings associations.

12 CFR Part 390

Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation revises part 344 of title 12 of the Code of Federal Regulations and amends part

390 of title 12 of the Code of Federal Regulations as set forth below:

PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

- 1. Revise part 344 to read as follows:

PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.

- 344.1 Purpose and scope.
- 344.2 Exceptions.
- 344.3 Definitions.
- 344.4 Recordkeeping.
- 344.5 Content and time of notification.
- 344.6 Notification by agreement; alternative forms and times of notification.
- 344.7 Settlement of securities transactions.
- 344.8 Securities trading policies and procedures.
- 344.9 Personal securities trading reporting by officers and employees.
- 344.10 Waivers.

Authority: 12 U.S.C. 1817, 1818, 1819, and 5412.

§ 344.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to ensure that purchasers of securities in transactions effected by FDIC-supervised institutions are provided adequate information regarding transactions. This part is also designed to ensure that FDIC-supervised institutions subject to this part maintain adequate records and controls with respect to the securities transactions they effect.

(b) *Scope; general.* Any security transaction effected for a customer by an FDIC-supervised institution is subject to this part unless excepted by § 344.2. An FDIC-supervised institution effecting transactions in government securities is subject to the notification, recordkeeping, and policies and procedures requirements of this part. This part also applies to municipal securities transactions by an FDIC-supervised institution that is not registered as a "municipal securities dealer" with the Securities and Exchange Commission. See 15 U.S.C. 78c(a)(30) and 78o-4.

§ 344.2 Exceptions.

(a) An FDIC-supervised institution effecting securities transactions for customers is not subject to all or part of this part 344 to the extent that they qualify for one or more of the following exceptions:

(1) *Small number of transactions.* The requirements of §§ 344.4(a)(2) through (4) and 344.8(a)(1) through (3) do not apply to an FDIC-supervised institution

¹¹ Public Law 104-208 (Sept. 30, 1996).

effecting an average of fewer than 500 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(2) *Government securities.* The recordkeeping requirements of § 344.4 do not apply to FDIC-supervised institutions effecting fewer than 500 government securities brokerage transactions per year. This exemption does not apply to government securities dealer transactions by FDIC-supervised institutions.

(3) *Municipal securities.* This part does not apply to transactions in municipal securities effected by an FDIC-supervised institution registered with the Securities and Exchange Commission as a "municipal securities dealer" as defined in title 15 U.S.C. 78c(a)(30). See 15 U.S.C. 78o-4.

(4) *Foreign branches.* Activities of foreign branches of FDIC-supervised institutions shall not be subject to the requirements of this part.

(5) *Transactions effected by registered broker/dealers.* (i) This part does not apply to securities transactions effected for an FDIC-supervised institution's customer by a registered broker/dealer if:

(A) The broker/dealer is fully disclosed to the customer; and

(B) The customer has a direct contractual agreement with the broker/dealer.

(ii) This exemption extends to arrangements with broker/dealers which involve FDIC-supervised institution employees when acting as employees of, and subject to the supervision of, the registered broker/dealer when soliciting, recommending, or effecting securities transactions.

(b) *Safe and sound operations.* Notwithstanding this section, every FDIC-supervised institution effecting securities transactions for customers shall maintain, directly or indirectly, effective systems of records and controls regarding their customer securities transactions to ensure safe and sound operations. The records and systems maintained must clearly and accurately reflect the information required under this part and provide an adequate basis for an audit.

§ 344.3 Definitions.

(a) *Asset-backed security* means a security that is serviced primarily by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing

or timely distribution of proceeds to the security holders.

(b) *Cash management sweep account* means a prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

(c) *Collective investment fund* means funds held by an FDIC-supervised institution as fiduciary and, consistent with local law, invested collectively:

(1) In a common trust fund maintained by such FDIC-supervised institution exclusively for the collective investment and reinvestment of monies contributed thereto by the FDIC-supervised institution in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (26 U.S.C.).

(d) *Completion of the transaction* means:

(1) For purchase transactions, the time when the customer pays the FDIC-supervised institution any part of the purchase price (or the time when the FDIC-supervised institution makes the book-entry for any part of the purchase price, if applicable), however, if the customer pays for the security prior to the time payment is requested or becomes due, then the transaction shall be completed when the FDIC-supervised institution transfers the security into the account of the customer; and

(2) For sale transactions, the time when the FDIC-supervised institution transfers the security out of the account of the customer or, if the security is not in its custody, then the time when the security is delivered to it, however, if the customer delivers the security to the FDIC-supervised institution prior to the time delivery is requested or becomes due then the transaction shall be completed when the FDIC-supervised institution makes payment into the account of the customer.

(e) *Crossing of buy and sell orders* means a security transaction in which the same FDIC-supervised institution acts as agent for both the buyer and the seller.

(f) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which an FDIC-supervised institution effects or participates in

effecting the purchase or sale of securities, but does not include a broker, dealer, insured depository institution acting as a broker or a dealer, issuer of the securities that are the subject of the transaction or a person or account having a direct, contractual agreement with a fully disclosed broker/dealer.

(g) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; provided, however, that securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., shall not be included in this definition.

(h) *FDIC-supervised institution* means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

(i) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (i)(1), (2), or (3) of this section other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges, or for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(j) *Investment discretion* means that, with respect to an account, an FDIC-supervised institution directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for these investment decisions.

(k) *Municipal security* means a security which is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision, or any municipal corporate instrumentality of one or more States or any security which is an industrial development bond (as defined in 26 U.S.C. 103(c)(2)) the interest on which is excludable from gross income under 26 U.S.C. 103(a)(1) if, by reason of the application of paragraph (4) or (6) of 26 U.S.C. 103(c) (determined as if paragraphs (4)(A), (5) and (7) were not included in 26 U.S.C. 103(c), paragraph (1) of 26 U.S.C. 103(c) does not apply to such security. See 15. U.S.C. 78c(a)(29).

(l) *Periodic plan* means any written authorization for an FDIC-supervised institution to act as agent to purchase or sell for a customer a specific security or securities, in a specific amount (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and setting forth the commission or charges to be paid by the customer or the manner of calculating them. Periodic plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(m) *Security* means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. The term security does not include:

- (1) A deposit or share account in a federally or state insured depository institution;
- (2) A loan participation;
- (3) A letter of credit or other form of insured depository institution indebtedness incurred in the ordinary course of business;

(4) Currency;

(5) Any note, draft, bill of exchange, or bankers acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(6) Units of a collective investment fund;

(7) Interests in a variable amount (master) note of a borrower of prime credit; or

(8) U.S. Savings Bonds.

§ 344.4 Recordkeeping.

(a) *General rule.* An FDIC-supervised institution effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

- (i) Account or customer name for which each transaction was effected;
- (ii) Description of the securities;
- (iii) Unit and aggregate purchase or sale price;

(iv) Trade date; and
(v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

- (i) Purchases and sales of securities;
- (ii) Receipts and deliveries of securities;

(iii) Receipts and disbursements of cash; and

(iv) Other debits and credits pertaining to transactions in securities;

(3) *A separate memorandum (order ticket)* of each order to purchase or sell securities (whether executed or canceled), which shall include:

- (i) The accounts for which the transaction was effected;
- (ii) Whether the transaction was a market order, limit order, or subject to special instructions;

(iii) The time the order was received by the trader or other FDIC-supervised institution employee responsible for effecting the transaction;

(iv) The time the order was placed with the broker/dealer, or if there was no broker/dealer, time the order was executed or canceled;

(v) The price at which the order was executed; and

(vi) The broker/dealer utilized;

(4) *Record of broker/dealers.* A record of all broker/dealers selected by the FDIC-supervised institution to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year; and

(5) *Notifications.* A copy of the written notification required by §§ 344.5 and 344.6.

(b) *Manner of maintenance.* Records may be maintained in whatever manner, form or format an FDIC-supervised institution deems appropriate, provided however, the records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy. An FDIC-supervised institution may contract with third party service providers, including broker/dealers, to maintain records required under this part.

§ 344.5 Content and time of notification.

Every FDIC-supervised institution effecting a securities transaction for a customer shall give or send, by mail, facsimile or other means of electronic transmission, to the customer at or before completion of the transaction one of the types of written notification identified below:

(a) *Broker/dealer's confirmations.* (1) A copy of the confirmation of a broker/dealer relating to the securities transaction. An FDIC-supervised institution may either have the broker/dealer send the confirmation directly to the FDIC-supervised institution's customer or send a copy of the broker/dealer's confirmation to the customer upon receipt of the confirmation by the FDIC-supervised institution. If an FDIC-supervised institution chooses to send a copy of the broker/dealer's confirmation, it must be sent within one business day from the institution's receipt of the broker/dealer's confirmation; and

(2) If the FDIC-supervised institution is to receive remuneration from the customer or any other source in connection with the transaction, a statement of the source and amount of any remuneration to be received if such would be required under paragraph (b)(6) of this section; or

(b) *Written notification.* A written notification disclosing:

(1) Name of the FDIC-supervised institution;

(2) Name of the customer;

(3) Whether the FDIC-supervised institution is acting as agent for such customer, as agent for both such customer and some other person, as principal for its own account, or in any other capacity;

(4) The date and time of execution, or the fact that the time of execution will

be furnished within a reasonable time upon written request of the customer, and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) The amount of any remuneration received or to be received, directly or indirectly, by any broker/dealer from such customer in connection with the transaction;

(6)(i) The amount of any remuneration received or to be received by the FDIC-supervised institution from the customer, and the source and amount of any other remuneration received or to be received by the FDIC-supervised institution in connection with the transaction, unless:

(A) Remuneration is determined pursuant to a prior written agreement between the FDIC-supervised institution and the customer; or

(B) In the case of government securities and municipal securities, the FDIC-supervised institution received the remuneration in other than an agency transaction; or

(C) In the case of open end investment company securities, the FDIC-supervised institution has provided the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction;

(ii) If the FDIC-supervised institution elects not to disclose the source and amount of remuneration it has received or will receive from a party other than the customer pursuant to paragraph (b)(6)(i)(A), (B), or (C) of this section, the written notification must disclose whether the FDIC-supervised institution has received or will receive remuneration from a party other than the customer, and that the FDIC-supervised institution will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the FDIC-supervised institution was participating in a distribution of that security; or, with respect to a sale, the FDIC-supervised institution was participating in a tender offer for that security;

(7) Name of the broker/dealer utilized; or where there is no broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the FDIC-supervised institution will furnish this information within a reasonable time upon written request;

(8) In the case of a transaction in a debt security subject to redemption before maturity, a statement to the effect

that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, provided however, that this shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; provided however, that this paragraph (b)(10) shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer with a variable interest rate payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement of the fact that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government

security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 344.6 Notification by agreement; alternative forms and times of notification.

An FDIC-supervised institution may elect to use the following alternative notification procedures if the transaction is effected for:

(a) *Notification by agreement.*

Accounts (except periodic plans) where the FDIC-supervised institution does not exercise investment discretion and the FDIC-supervised institution and the customer agree in writing to a different arrangement as to the time and content of the written notification; provided however, that such agreement makes clear the customer's right to receive the written notification pursuant to § 344.5(a) or (b) at no additional cost to the customer.

(b) *Trust accounts.* Accounts (except collective investment funds) where the FDIC-supervised institution exercises investment discretion in other than in an agency capacity, in which instance it shall, upon request of the person having the power to terminate the account or, if there is no such person, upon the request of any person holding a vested beneficial interest in such account, give or send to such person the written notification within a reasonable time. The FDIC-supervised institution may charge such person a reasonable fee for providing this information.

(c) *Agency accounts.* Accounts where the FDIC-supervised institution exercises investment discretion in an agency capacity, in which instance:

(1) The FDIC-supervised institution shall give or send to each customer not less frequently than once every three months an itemized statement which shall specify the funds and securities in the custody or possession of the FDIC-supervised institution at the end of such period and all debits, credits and transactions in the customer's accounts during such period; and

(2) If requested by the customer, the FDIC-supervised institution shall give or send to each customer within a reasonable time the written notification described in § 344.5. The FDIC-supervised institution may charge a reasonable fee for providing the information described in § 344.5.

(d) *Cash management sweep accounts.* An FDIC-supervised institution effecting a securities transaction for a cash management sweep account shall give or send its customer a written statement, in the same form as required under paragraph (f) of this section, for each month in which a purchase or sale of a security

takes place in the account and not less than once every three months if there are no securities transactions in the account. Notwithstanding the provisions of this paragraph (d), FDIC-supervised institutions that retain custody of government securities that are the subject of a hold-in-custody repurchase agreement are subject to the requirements of 17 CFR 403.5(d).

(e) *Collective investment fund accounts.* The FDIC-supervised institution shall at least annually give or send to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. This report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors of the FDIC-supervised institution.

(f) *Periodic plan accounts.* The FDIC-supervised institution shall give or send to the customer not less than once every three months a written statement showing:

(1) The funds and securities in the custody or possession of the FDIC-supervised institution;

(2) All service charges and commissions paid by the customer in connection with the transaction; and

(3) All other debits and credits of the customer's account involved in the transaction; provided that upon written request of the customer, the FDIC-supervised institution shall give or send the information described in § 344.5, except that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when the remuneration is paid by a source other than the customer. The FDIC-supervised institution may charge a reasonable fee for providing information described in § 344.5.

§ 344.7 Settlement of securities transactions.

(a) An FDIC-supervised institution shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(b) Paragraphs (a) and (c) of this section shall not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; or

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6-1, 17 CFR 240.15c6-1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section shall not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a et seq., or sold to an initial purchaser by an FDIC-supervised institution participating in the offering. An FDIC-supervised institution shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(d) For the purposes of paragraphs (a) and (c) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

§ 344.8 Securities trading policies and procedures.

(a) *Policies and procedures.* Every FDIC-supervised institution effecting securities transactions for customers shall establish written policies and procedures providing:

(1) Assignment of responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with broker/dealers; or

(ii) Execute transactions in securities for customers;

(2) Assignment of responsibility for supervision and reporting, separate from those in paragraph (a)(1) of this section, with respect to all officers or employees who process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers;

(3) For the fair and equitable allocation of securities and prices to accounts when orders for the same security are received at approximately the same time and are placed for execution either individually or in combination; and

(4) Where applicable, and where permissible under local law, for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction.

§ 344.9 Personal securities trading reporting by officers and employees of FDIC-supervised institutions.

(a) *Officers and employees subject to reporting.* FDIC-supervised institution officers and employees who:

(1) Make investment recommendations or decisions for the accounts of customers;

(2) Participate in the determination of such recommendations or decisions; or

(3) In connection with their duties, obtain information concerning which securities are being purchased or sold or recommend such action, must report to the FDIC-supervised institution, within 30-calendar days after the end of the calendar quarter, all transactions in securities made by them or on their behalf, either at the FDIC-supervised institution or elsewhere in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales.

(b) *Exempt transactions.* Excluded from this reporting requirement are:

(1) Transactions for the benefit of the officer or employee over which the officer or employee has no direct or indirect influence or control;

(2) Transactions in registered investment company shares;

(3) Transactions in government securities; and

(4) All transactions involving in the aggregate \$10,000 or less during the calendar quarter.

(c) *Alternative report.* Where an FDIC-supervised institution acts as an investment adviser to an investment company registered under the

Investment Company Act of 1940, the FDIC-supervised institution's officers and employees may fulfill their reporting requirement under paragraph (a) of this section by filing with the FDIC-supervised institution the "access persons" personal securities trading report required by SEC Rule 17j-1, 17 CFR 270.17j-1.

§ 344.10 Waivers.

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

■ 3. Subpart K—[Removed and reserved]

■ Remove and reserve subpart K consisting of §§ 390.200 through 390.214.

Dated at Washington, DC, this 10th day of December, 2013.

By order of the Board of Directors.
Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–29786 Filed 12–18–13; 8:45 am]

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 721

RIN 3133–AE17

Charitable Donation Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule to amend its regulations to clarify that federal credit unions are authorized to create and fund a charitable donation account, a hybrid charitable and investment vehicle, as an activity incidental to the business for which the credit union is chartered, provided the account is primarily charitable in nature and meets other regulatory conditions to ensure safety and soundness.

DATES: The effective date for this rule is December 19, 2013.

FOR FURTHER INFORMATION CONTACT: Rick Mayfield, Senior Capital Markets Specialist, Office of Examination and Insurance, at 1775 Duke Street, Alexandria, VA 22314 or by telephone: (703) 518–6360; or Steven W. Widerman, Senior Staff Attorney, Office of General Counsel, at the above address or by telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

II. Summary of Comments on Proposed Rule

III. Regulatory Procedures

I. Background

NCUA is amending parts 703 and 721 of its regulations to clarify that, under certain circumstances, federal credit

unions (FCUs) are authorized to fund a charitable donation account (CDA), which may hold investments that are otherwise impermissible, as a charitable contribution or donation under its incidental powers authority.¹ This will help facilitate charitable activities for FCUs. To be considered an incidental powers activity, the rule requires a CDA to be primarily charitable in nature. Any investment feature benefitting the FCU must be incidental to the CDA's primary charitable purpose. The CDA must also be structured to preserve safety and soundness and to limit the FCU's exposure to the risks of otherwise impermissible investments.

Summary of Proposed Rule

On September 12, 2013, the Board issued a Notice of Proposed Rulemaking (NPRM)² allowing FCUs to invest in CDAs while creating safeguards to ensure the donations are used for their intended charitable purposes. The Board proposed several requirements for FCUs that invest in these accounts, including:

- The primary purpose of a CDA must be to generate funds to donate to tax-exempt charities chosen by FCUs.

- The total investment in all such accounts, in the aggregate, must be limited to three percent of the FCU's net worth for the duration of the accounts.

- A minimum of 51 percent of the total return from such an account must be distributed to one or more qualified charities.

- Distributions must be made to qualified charities no less frequently than every five years, or in the event the account terminates in less than five years.

- Assets of these accounts must be held in segregated custodial accounts or special purpose entities specifically identified as a CDA.

- If the FCU structures its CDA using a trust, the trustee must be an entity regulated by the Office of the Comptroller of the Currency (OCC), the U.S. Securities and Exchange Commission (SEC) or another federal regulatory agency. The regulated trustee or other person who is authorized to make investment decisions for a CDA (manager) must be a Registered Investment Adviser (RIA) with the SEC.

- The terms and conditions controlling the account must be documented in a written agreement.

- An FCU, upon termination of its CDA, may receive a distribution of the remaining assets in cash, or a distribution in kind of the remaining

¹ 12 CFR 721.3(b).

² 78 FR 57539 (Sept. 19, 2013).