



FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064-AE25

Record Retention Requirements

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) is proposing a rule with request for comments that would implement section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). This statutory provision requires the promulgation of a regulation establishing schedules for the retention by the FDIC of the records of a covered financial company (i.e., a financial company for which the FDIC has been appointed receiver pursuant to title II of the Dodd-Frank Act) as well as the records generated by the FDIC in the exercise of its title II orderly liquidation authority (title II) with respect to such covered financial company.

DATES: Written comments on the proposed rule must be received by the FDIC no later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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

- Agency Web Site: <http://www.fdic.gov/regulations/laws/federal>. Follow instructions for Submitting comments on the Agency Web Site.
- E-mail: Comments@FDIC.gov. Include “RIN 3064-AE25” in the subject line of the message.

- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal> including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-I002, Arlington, VA 22226, between 9 a.m. and 5 p.m. (EST) on business days. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275-3342 or (703) 562-2200.

FOR FURTHER INFORMATION CONTACT: Legal Division: Elizabeth Falloon, (703) 562-6148; Jerilyn Rogin, (703) 562-2409. Division of Resolutions and Receiverships: Teresa J. Franks, (202) 898-7007; Manuel Ramilo, (202) 898- 3781. Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver for a financial company to conduct an orderly liquidation of the company if, among other things, resolution of the company under bankruptcy (or other applicable

insolvency regime) would have serious adverse effects on U.S. financial stability. Once appointed, Title II confers upon the FDIC as receiver for the company (the “covered financial company”) certain powers and authorities to effectuate an orderly liquidation of the covered financial company in a manner that is consistent with the statutory objectives. For example, upon appointment of the FDIC as receiver for a covered financial company, the FDIC succeeds to all rights, titles, powers and privileges of the covered financial company including title to the books and records of the covered financial company.¹

In addition, the FDIC necessarily will generate its own records in exercising the authorities conferred upon it by Title II. Section 210(a)(16)(D) of the Dodd-Frank Act (12 U.S.C. 5390(a)(16)(D), hereafter “section 210(a)(16)(D)”) sets forth the outlines of the FDIC’s responsibilities regarding the retention of both of these categories of records – the records of a financial company in existence at the time the FDIC is appointed receiver, as well as those generated by the FDIC in connection with its appointment as receiver and the exercise of its orderly liquidation authority as receiver. Section 210(a)(16)(D) provides guidance as to types of records that must be retained, and requires the FDIC to prescribe such regulations and establish such retention schedules as are necessary. Specifically, section 210(a)(16)(D)(i) requires that the FDIC prescribe the regulations and establish schedules for retention of these records with due regard for the avoidance of duplicative record retention and for the evidentiary needs of the FDIC as receiver and for the public. Once such regulations and retention schedules are prescribed, section 210(a)(16)(D)(ii) prohibits the destruction of records to the extent that they must be retained in accordance with the promulgated regulations and retention schedules. The

¹ 12 U.S.C. 5390(a)(1)(A).

proposed rule provides separate rules and retention schedules for inherited records of the covered financial company and for the records generated or maintained by the FDIC in connection with its receivership function. “Generated or maintained” refers in this context to records the FDIC creates, as well as records the FDIC receives and retains in connection with its Title II responsibilities.

Section 210(a)(16)(D)(iii), entitled “Records Defined,” describes the forms of documentary material to be addressed in the regulations and schedules, specifying that any document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record is included. In addition, that section specifies that the records inherited from the failed company are those that were generated or maintained by the covered financial company in the course of and necessary to its transaction of business. The proposed rule clarifies the definition of “records” by including factors to be considered in determining whether documentary material was generated by the company in the course of and necessary to its transaction of business, as well as by providing examples such as general ledger and financial reports and qualified financial contracts.

In addressing records generated by the FDIC, the proposed rule uses the same broadly inclusive description of documentary material provided in the statute and includes those records that the FDIC created or received in exercising the authorities of title II as required by section 210(a)(16)(D). This definition is also clarified in the proposed rule by including factors to be considered in determining whether documentary material was generated or maintained by the FDIC in the exercise of its title II authorities as well as by providing examples such as documentary material relating to the

appointment of the FDIC as receiver and documentary material relating to the administration, determination and payment of claims against the FDIC as receiver.

Exclusions from both categories of records addressed in the proposed rule include items such as duplicate copies, drafts superseded by later revisions, and non-publicly available confidential supervisory information.

In keeping with the statutory mandate, retention schedules are created for both receivership and inherited records. The retention schedule for inherited records of the financial company that existed at the time of appointment of the receiver was modeled after the treatment of such records upon the appointment of the FDIC as receiver for a failed insured depository institution. That regulation, entitled “Records of Failed Depository Institutions”² (hereafter the “FDIA final rule”), addressed the retention of records of failed insured depository institutions pursuant to section 11(d)(15)(D)³ of the Federal Deposit Insurance Act (hereafter the “FDIA provision”). Although certain aspects of the FDIA final rule provided guidance for this proposed rule, there are significant differences because the respective statutory underpinnings are different; in contrast to section 210(a)(16)(D), the FDIA provision contains neither a definition of records nor factors for the identification of records. In addition, the FDIA provision addresses only the retention of records of a failed insured depository institution and does not address the retention of the records generated or maintained by the FDIC in connection with its receivership functions. Accordingly, the FDIA final rule and this

² 12 CFR 360.11, 78 FR 54373 (September 4, 2013).

³ 12 U.S.C. 1821(d)(15)(D).

proposed rule promulgated under the Dodd-Frank Act each should be viewed and interpreted independently of each other.

II. Proposed Rule

Authority and Purpose

Title II of the Dodd-Frank Act sets forth the orderly liquidation authority over covered financial companies. Section 210(a)(16)(D) specifically requires the FDIC to prescribe such regulations and establish such retention schedules as are necessary to maintain the records of the FDIC generated in exercising the authorities of title II and the records of a covered financial company for which the FDIC is appointed receiver.

The purpose of this proposed rule is to fulfill the statutory mandate contained in section 210(a)(16)(D) by providing the factors necessary to identify such records and to establish retention schedules for those records in order to enable the FDIC to properly manage the records of that covered financial company⁴ as well as the records generated or maintained by the FDIC in the course of its function as the receiver for that covered financial company.

Section-by-section analysis

Scope and definition

Paragraph (a)(1) sets forth the scope of the proposed rule. It makes clear that the proposed rule would apply to those records that are addressed by section 210(a)(16)(D), *i.e.*, those records of a financial company that are inherited by the FDIC upon its

⁴ A “covered financial company” is a financial company (other than an insured depository institution) for which the necessary determinations have been made for the appointment of the FDIC as receiver. 12 U.S.C. 5381(8). “Financial company” is defined in the Dodd-Frank Act at 12 U.S.C. 5381(11) and the regulations promulgated thereunder.

appointment as receiver, as well as those generated by the FDIC in connection with its appointment as receiver and the exercise of its orderly liquidation authority.

Paragraph (a)(2) sets forth the definition of “documentary material.” This definition is taken directly from text of section 210(a)(16)(D)(iii) and describes the universe of forms and formats in which “records” (determined pursuant to the proposed rule’s criteria) may appear, including books, paper, maps, photographs, microfiche, and electronically-created records, regardless of medium or business value and regardless of whether they are user-created or system-generated.

The definition in the proposed regulation clarifies that only those documentary materials that are “reasonably accessible” are included in the scope of the rule in order to incorporate the policy behind Federal Rule of Civil Procedure 26(b)(2)(B), which provides that a party from whom discovery is sought need not provide electronically-stored information from sources that are not reasonably accessible because of undue cost or burden. For example, a party may be excused from restoring electronically-stored information from aging back-up tapes in order to produce it in response to a discovery request. Thus, the use of the phrase “reasonably accessible” would align the concept of “records” in the proposed rule with the discovery standard and would protect the FDIC as receiver from incurring expenses associated with restoring or maintaining the legacy system of a covered financial company in order to extract documentary material from those systems that is not otherwise needed by the FDIC to carry out its receivership functions.

Part 380 of the Code of Federal Regulations concerns the FDIC’s orderly liquidation authority conferred by title II of the Dodd-Frank Act. Section 380.1 contains

the definition of the term “covered financial company” which is defined as a “financial company” for which the FDIC has been appointed receiver. Accordingly, it is not necessary to repeat the definitions of the terms “covered financial company” and “financial company” in this proposed regulation.

Records of a covered financial company for which the FDIC is appointed receiver

Paragraph (b) of the proposed rule addresses the records of the failed company that are inherited by the FDIC upon its appointment as receiver. The statute specifies that these records must be those that were generated or maintained by the financial company in the course of and necessary to its business. The proposed regulation provides additional guidance with respect to determining what documentary material constitutes a record that must be retained. It sets forth four factors which the FDIC will consider in determining whether documentary material, as defined in paragraph (a)(2), was generated or maintained in the course of and necessary to its business as a financial company.

The first of these factors is the extent to which the documentary material related to the business of the financial company prior to the appointment of the FDIC as receiver. In making its determination, the FDIC would consider the extent to which the particular documentary material relates to the business purpose of the financial company.

The second factor is whether the documentary material was generated or maintained in accordance with a financial company’s recordkeeping practices and procedures or pursuant to standards established by the financial company’s regulators. In general, a company’s own recordkeeping policies and procedures will reflect the significance of its records to its business and regulatory requirements and the importance of documentary material created or maintained by a financial company. Thus, the FDIC

will consider whether documentary material was retained pursuant to the financial company's recordkeeping practices when determining whether specific documentary material is a record for the purposes of section 210(a)(16)(D) and the proposed rule. Likewise, the FDIC will consider whether documentary material was retained pursuant to standards imposed by the financial company's regulators when determining whether specific documentary material is a record for the purposes of section 210(a)(16)(D) and the proposed rule.

The third factor is whether the documentary material is needed by the FDIC to carry out its functions as receiver. This inquiry would permit the classification of documentary material as a record if it would be used by the FDIC in carrying out its functions as receiver in, for example, transferring the financial company's assets or liabilities, assuming or repudiating the financial company's contracts, determining claims, or collecting obligations owed to the financial company.

The fourth factor used to determine whether documentary material should be classified as records is the expected evidentiary needs of the FDIC and the public. Some records generated or maintained by the financial company may be used to support enforcement actions and litigation. Certain information may be necessary for reports to Congress and the public that are required under the Dodd-Frank Act. This factor reflects the statutory text of section 210(a)(16)(D)(i)(II), which requires the FDIC to prescribe a records retention regulation with due regard for the expected evidentiary needs of the FDIC as receiver for a covered financial company and the public regarding the records of covered financial companies.

Paragraph (b)(2) of the proposed rule establishes the record retention schedule for the records of a covered financial company described in paragraph (b)(1). The retention and disposition schedule set forth in the proposed rule is modeled after that contained in the FDIA provision and the FDIA final rule: After the end of the six-year period beginning on the date of its appointment as receiver, the FDIC may destroy any records of a failed covered financial company that the FDIC determines to be unnecessary to maintain unless otherwise required by applicable law. In addition, the FDIC may at any time destroy any records that are at least 10 years old as of the date of its appointment as receiver. Also, similar to the FDIA final rule, paragraph (b)(2) of the proposed rule expressly provides that the FDIC will not destroy records subject to a litigation hold⁵ imposed by the FDIC in order to ensure retention of documentary material that is relevant to ongoing litigation matters. By including litigation holds, the proposed rule implements the policy of the FDIC to preserve information (both electronically-stored information and paper) that the FDIC may be required to produce in litigation or when otherwise subject to a legal requirement to produce information.

Paragraph (b)(3) provides a non-exclusive list of examples of material that would constitute records of financial companies to provide additional guidance and clarity with respect to the sorts of documentary material that are subject to the retention requirements of the rule. Included examples are correspondence, tax and accounting forms and work papers, internal audits, inventories, board of directors or committee meeting minutes,

⁵ A litigation hold (also known as a "preservation order", a "legal hold" or a "hold order") is a stipulation requiring a party to preserve all data that may relate to a legal action involving that party. When in place, it requires that parties preserve records when they learn of pending or imminent litigation, or when litigation is reasonably anticipated. This requirement ensures that documentary material will be available for the litigation's discovery process.

personnel files and employee benefits information, general ledger and financial reports or data, memoranda, litigation files, loan documents including records relating to intercompany debt, contracts and agreements to which the financial company was a party, customer accounts and transactions, qualified financial contracts and related information, and reports or other records of subsidiaries or affiliates of the financial company that were provided to the financial company.

Transfer of records

Paragraph (b)(4) addresses the transfer of the records of a financial company to a third party acquirer (including a bridge financial company) and is also modeled on a similar provision in the FDIA final rule. In a resolution of a covered financial company, the FDIC may transfer the records of a covered financial company to the custody of a third party including a bridge financial company in connection with a transaction involving the purchase and assumption of the assets and liabilities of the covered financial company. Paragraph (b)(4) of the proposed rule provides that such a transfer will satisfy the records retention obligations under paragraph (b)(2) and section 210(a)(16)(D) so long as the transfer is made pursuant to a purchase and assumption agreement under which the transferee agrees that it will not destroy the transferred records for at least six years from the date of the appointment of the FDIC as receiver for a covered financial company, unless otherwise notified in writing by the FDIC.

Records of the FDIC as receiver for a covered financial company

In fulfilling its duties and responsibilities as receiver for a covered financial company pursuant to title II of the Dodd-Frank Act, the FDIC itself would generate, receive and maintain documentary material in connection with and after its appointment

as receiver that would be separate and apart from the records that it inherited from the failed company. Section 210(a)(16)(D) requires retention of records generated by the FDIC in exercising the authorities of title II. Paragraph (c) of the proposed rule provides guidance with respect to the evaluation of whether documentary materials generated or maintained by the FDIC are subject to the retention requirement.

Paragraph (c)(1) sets forth three factors that will be considered by the FDIC to evaluate if documentary material was generated or maintained by the FDIC in the course of and necessary to the exercise of its title II authorities. The first factor is the extent to which the documentary material related to duties and functions of the FDIC as receiver in exercising its authorities under title II of the Dodd-Frank Act. These would include documentary material generated or maintained by the FDIC as receiver with respect to its appointment under section 202 of the Dodd-Frank Act, as well as documentary material generated or maintained by the FDIC as receiver for a covered financial company in connection with the exercise of its orderly liquidation authority. In making its determination, the FDIC would judge the degree to which particular documentary material is related to the duties and functions of the FDIC receiver and the exercise of its orderly liquidation authority.

The second factor is whether the documentary material was generated or maintained in accordance with the record retention policies and procedures of the FDIC. The FDIC will look to its internal procedures for maintaining its own corporate records and use them as a guideline to determine whether documentary material generated or maintained as receiver for a covered financial company comports with these procedures for retention and, thus, should constitute records. Like private companies and other

governmental organizations, the FDIC has established protocols for the efficient and effective maintenance of files, records and non-record documentary materials. These protocols reflect the importance of these materials to the work of the FDIC.

The third factor used to determine whether documentary material should be classified as records of the FDIC as receiver is the expected evidentiary needs of the FDIC and the public. Records generated or maintained by the FDIC as receiver may be needed to support enforcement actions and litigation. In addition, records of the FDIC as receiver may be needed to provide required reports to Congress and the public. This factor is based on section 210(a)(16)(D)(i)(II) which requires the FDIC to prescribe a records retention regulation with due regard for the expected evidentiary needs of the FDIC as receiver for a covered financial company and the public regarding the records of covered financial companies.

Paragraph (c)(2) of the proposed rule sets forth the record retention schedule for the records described in paragraph (c)(1). The requirement that these records be maintained for at least six years following the termination of the receivership reflects the time periods contained in the FDIA final rule with respect to records of a failed insured depository institution and is also similar to the proposed rule's retention schedule time period regarding the inherited records of a covered financial company. The FDIA provision and final rule promulgated thereunder measure the six-year period from the appointment of the receiver which marks the legal termination of a failed insured depository institution. In keeping with the FDIC's long experience with this six-year retention period⁶, the final rule includes a six-year retention period for the records of the

⁶ The FDIC has been required to retain records inherited from failed insured depository institutions for six

FDIC as receiver of a covered financial company measured from the termination of the receivership, which is the comparable date after which no new records will be created.

As in the case of the retention of records inherited from covered financial companies, this minimum retention period is intended to ensure that these records are available for a long enough period to satisfy the evidentiary needs of the FDIC and the public in the aftermath of the receivership of a covered financial company.

Paragraph (c)(3) of the proposed rule sets forth a non-exclusive list of examples of documentary material that would constitute records of the FDIC in order to provide additional guidance and clarity with respect to the sorts of documentary material that are subject to the retention requirements of the rule. Included examples are: correspondence; tax and accounting forms and work papers; inventories; contracts and other information relating to the management and disposition of the assets of the covered financial company; documentary material relating to the appointment of the FDIC as receiver; administrative records and other information relating to administrative proceedings; pleadings and similar documents in civil litigation, criminal restitution and forfeiture litigation matters and all other litigation matters in which the FDIC as receiver is a party; the charter and formation documents of a bridge financial company and contracts and other documents and information relating to the role of the FDIC as receiver in overseeing the operations of the bridge financial company; and reports or other records of the bridge financial company and its subsidiaries or affiliates that were provided to the

years since the enactment of the FDIA provision which was added to the Federal Deposit Insurance Act by section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in 1989 (Pub. L. No. 101-73).

FDIC as receiver; and documentary material relating to the administration, determination and payment of claims against the FDIC as receiver.

Paragraph (c)(4) of the proposed rule makes clear that the records either generated or maintained by the FDIC as receiver do not include the inherited records that existed prior to the date of the appointment of the receiver by the covered financial company itself. The records of the covered financial company and the rules for their retention are addressed separately in paragraph (b).

Records subject to the record retention requirements of section 210(a)(16)(D) of the Dodd-Frank Act and the proposed regulation

Paragraph (d) of the proposed rule applies to all records that fall within the scope of the retention requirements of the rule as that scope is described in paragraphs (b) and (c). Paragraph (d)(1) of the proposed rule makes clear that the FDIC's designation of documentary material as records pursuant to paragraph (b) or (c) is solely for the purpose of identifying documentary material subject to the retention requirements of section 210(a)(16)(D) and the proposed rule should have no effect on whether the documentary material is discoverable or admissible in any court, tribunal or other adjudicative proceeding, nor on whether such material is subject to the Freedom of Information Act, the Privacy Act or other law or court order. Thus, whether specific documentary material is a record pursuant to the proposed rule does not alter its status under evidentiary rules such as the Federal Rules of Evidence ("FRE"). For example, FRE 803(1) provides that "records of regularly conducted activity" ("business records") are not excluded from evidence by the rule against hearsay, regardless of whether the declarant is available as a witness. If certain documentary material meets the requirements of a business record

pursuant to FRE 803(1), then whether or not the FDIC determines that specific documentary material constitutes “records of a covered financial company” or “records of the FDIC as receiver for a covered financial company” pursuant to the proposed rule will not affect the determination of whether the documentary material is a business record under FRE 803(1). In addition, whether specific material is or is not designated as a record for purposes of section 210(a)(16)(D) and the proposed rule is not intended to affect whether it may be subject to a litigation hold or a request under the Freedom of Information Act, the Privacy Act or other law.

Paragraph (d)(1) also clarifies that any record designation made by the FDIC will not prevent full compliance with any applicable legal or regulatory requirement or court order that establishes particular requirements with respect to certain records, such as a requirement that specific records be preserved, maintained, destroyed or kept under seal.

Exclusions

Paragraph (d)(2) of the proposed rule lists three categories of documentary material that will not qualify as records and thus will not be subject to the record retention requirements of section 210(a)(16)(D) and the proposed rule. The first category includes duplicate copies, as required by the mandate in section 210(a)(16)(D)(I) to accord due regard to the avoidance of duplicative record retention. Also in the first category is documentary material such as reference materials, drafts of documents that are superseded by later drafts or revisions, documentary material provided to the FDIC by other parties in concluded litigation for which all appeals have expired, and transitory information including personal notes, out-of-office replies, routine system messages or system-generated log files or other documentary material not routinely maintained under

the standard record retention policies and procedures of the FDIC. The term “transitory information” or “transitory record” is commonly used in record retention systems to describe records of temporary usefulness required only for a limited period of time for the completion of an action by an employee or official and that are not essential to the fulfillment of statutory obligations or the documentation of government or business functions.⁷

The second category of exclusions from record designation entails the documentary material generated or maintained by a bridge financial company⁸ or by a subsidiary or affiliate of a covered financial company. The exclusion of this documentary material emphasizes the separate legal status of the covered financial company and its subsidiaries and of the FDIC receiver and any bridge financial company the FDIC may organize for the purpose of resolving a covered financial company. The proposed rule addresses only the records of a covered financial company and of the FDIC as receiver for a covered financial company. Information provided to the FDIC in connection with the formation or oversight of the bridge financial company or its subsidiaries would be within the scope of the regulation; however, documentary material

⁷ For example, the Texas Administrative Code, Title 13, Chapter 6, Section 6.91 (2005) defines “transitory information” in the context of the state’s electronic record as “[r]ecords of temporary usefulness that are not an integral part of a records series of an agency, that are not regularly filed within an agency’s recordkeeping system, and that are required only for a limited period of time for the completion of an action by an official or employee of the agency or in the preparation of an on-going records series. Transitory records are not essential to the fulfillment of statutory obligations or to the documentation of agency functions.” The National Archives and Records Administration (NARA) Bulletin 2013-02 (August 29, 2013), “Guidance on a New Approach to Managing Email Records” provides that agencies must determine whether end users may delete “...non-record, transitory, or personal email from their accounts.” The Sedona Conference Commentary on Information Governance (December 2013) refers to the “...defensible deletion of transitory, non-substantive or non-record content.” A World Health Organisation publication refers to the need to differentiate between records of “...substantive, fixed-term and transitory value.” Deserno, Ineke and Kynaston, Donna, A Records Management Program that Works for Archives, *The Information Management Journal*, May/June 2005.

⁸ This term is defined in 12 U.S.C. 5381(a)(3) and 12 CFR 380.1.

generated or maintained by a bridge financial company or its subsidiaries or affiliates in the ordinary course of business that is not provided to the FDIC would fall outside the scope of the retention requirements of the proposed rule.

The third category of exclusions from the purview of the proposed rule and section 210(a)(16)(D) is non-publicly available supervisory information, operating or condition reports that were prepared by, on behalf of or at the requirement of any agency that may regulate financial companies or their subsidiaries. This is consistent with the FDIC's long-standing policy that reports of examination or other confidential supervisory correspondence or information prepared by FDIC examiners or for the use of the FDIC and other regulatory agencies with respect to a financial company or an insured depository institution or other regulated subsidiary of a financial company belong exclusively to such regulators and not to the institution, even though institutions may retain copies.

Policies and procedures

Paragraph (d)(3) of the proposed rule provides that the FDIC may establish policies and procedures with respect to the retention and destruction of records that are consistent with the proposed rule. It is expected that these policies and procedures will address specific matters related to the capture, processing, and storage of the records of covered financial companies such as collecting computer hard drives, email databases, and backup and disaster recovery tapes, as well as establishing standard policies with respect to the retention of information generated by the FDIC on its own files, information systems, and databases.

III. Request for Comments

The FDIC seeks comments on all aspects of the proposed rule. Comments will be considered by the FDIC and appropriate revisions will be made to the proposed rule, if necessary, before a final rule is issued. All comments must be received by the FDIC not later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, are contained in the proposed rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment. For purposes of the RFA analysis or certification, financial institutions with total assets of \$550 million or less are considered to be “small entities.” The FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule refines the definition of the term “records” under section 210(a)(16)(D) and establishes retention schedules that the FDIC must use in connection with its retention of these records. Accordingly, there will be no significant economic impact on a substantial number of small entities as a result of this rulemaking.

C. The Treasury and General Government Appropriations Act, 1999—

Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the proposed rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 380

Holding companies, Insurance companies, Records and records retention

Authority and Issuance

For the reasons set forth in the common preamble, the Federal Deposit Insurance Corporation proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

1. The authority citation for part 380 is revised to read as follows:

Authority: 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D); 5390(a)(16)(D); 12 U.S.C. 5381(b), 12 U.S.C. 5390(r).

2. Add § 380.14 to read as follows:

§ 380.14 Record retention requirements.

- (a) *Scope and definition.* (1) Section 210(a)(16)(D) of the Dodd-Frank Act requires retention of records of a financial company for which the Corporation has been appointed receiver and of records of the Corporation generated in connection with its appointment and function as receiver for that covered financial company in exercising its orderly liquidation authorities under title II of the Dodd-Frank Act. This section addresses retention of those records.
- (2) As used in this section, *documentary material* means any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created writing, data or file.
- (b) *Records of a covered financial company for which the Corporation is appointed receiver—*(1) *Determination.* In determining whether particular documentary material existing as of the date of the appointment of the Corporation as receiver was generated or maintained by a financial company in the course of and necessary to its transaction of business and thus constitutes records of a covered financial company, the Corporation will consider the following factors:
- (i) The extent to which the documentary material related to the business of the financial company;
 - (ii) Whether the documentary material was generated or maintained by the financial company as records in the regular course of the business of the financial company in accordance with its own record retention practices and procedures or pursuant to standards established by the financial company's regulators;
 - (iii) Whether the documentary material is needed by the Corporation to carry out its receivership function; and
 - (iv) The expected evidentiary needs of the Corporation and the public.

(2) *Record retention and disposition schedule for financial company records.* (i)

Except as provided in paragraph (b)(2)(ii) of this section, after the end of the six-year period beginning on the date of the appointment of the Corporation as receiver, the Corporation may destroy any records of the financial company that the Corporation determines to be unnecessary unless subject to a litigation hold imposed by the Corporation.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the Corporation may at any time after appointment of the Corporation as receiver for a covered financial company destroy any records of the financial company that are at least 10 years old as of the date of appointment unless subject to a litigation hold imposed by the Corporation.

(3) *Examples.* Examples of financial company records include, without limitation, correspondence, tax and accounting forms and work papers, internal audits, inventories, board of directors or committee meeting minutes, personnel files and employee benefits information, general ledger and financial reports or data, memoranda, litigation files, loan documents including records relating to intercompany debt, contracts and agreements to which the financial company was a party, customer accounts and transactions, qualified financial contracts and related information, and reports or other records of subsidiaries or affiliates of the financial company that were provided to the financial company.

(4) *Transfer of covered financial company records to acquirer.* If the Corporation transfers records of a covered financial company to a third party including a bridge financial company in connection with a transaction involving the purchase and assumption of assets and liabilities of a covered financial company, the record retention requirements of section 210(a)(16)(D) of the Dodd-Frank Act and paragraph (b)(2) of this section shall be satisfied if the transferee agrees that it will not destroy such records for at least six years beginning on the date of the appointment of the Corporation as receiver for the covered financial company unless otherwise notified in writing by the Corporation.

(c) *Records of the Corporation as receiver for a covered financial company*—(1)

Determination. In determining whether particular documentary material constitutes records that were generated or maintained by the Corporation in connection with its appointment and function as receiver for a covered financial company and in exercising its orderly liquidation authorities under title II of the Dodd-Frank Act, the Corporation will consider the following factors:

- (i) The extent to which the documentary material related to the duties and functions of the Corporation as receiver in exercising its orderly liquidation authorities under title II of the Dodd-Frank Act;
- (ii) Whether the documentary material was generated or maintained by the Corporation in accordance with the record retention policies and procedures of the Corporation; and
- (iii) The expected evidentiary needs of the Corporation and the public.

(2) *Record retention and disposition schedule for receivership records.* Records generated or maintained by the Corporation as receiver for a covered financial company subject to the record retention requirements of this section shall be maintained for not less than six years after the date of the termination of the receivership.

(3) *Examples.* Examples of records generated or maintained by the Corporation as receiver for a covered financial company include, without limitation, correspondence; tax and accounting forms and work papers; inventories; contracts and other information relating to the management and disposition of the assets of the covered financial company; documentary material relating to the appointment of the FDIC as receiver; administrative records and other information relating to administrative proceedings; pleadings and similar documents in civil litigation, criminal restitution and forfeiture litigation matters and all other litigation matters in which the Corporation as receiver is a party; the charter and formation documents of a bridge financial company and contracts and other documents and information relating to the role of the Corporation as receiver in overseeing the operations of the bridge financial

company; and reports or other records of the bridge financial company and its subsidiaries or affiliates that were provided to the Corporation as receiver; and documentary material relating to the administration, determination and payment of claims against the Corporation as receiver.

- (4) Records generated or maintained by the Corporation as receiver for a covered financial company do not include records of a financial company described in paragraph (b) of this section.

(d) *Records subject to the record retention requirements of section 210(a)(16)(D) of the Dodd-Frank Act and this section.* With respect to all records described in paragraphs (b) and (c) of this section, the following applies:

- (1) *Impact on discoverability, admissibility or release; compliance with court orders.* The Corporation's determination that documentary material must be maintained pursuant to section 210(a)(16)(D) of the Dodd-Frank Act and this section shall not bear on the discoverability or admissibility of such documentary material in any court, tribunal or other adjudicative proceeding nor on whether such documentary material is subject to release under the Freedom of Information Act, the Privacy Act or other law. The Corporation will comply with any applicable court order concerning mandatory retention or destruction of any records subject to this section.

- (2) *Exclusions.* Documentary material not subject to the record requirements of section 210(a)(16)(D) of the Dodd-Frank Act and this section includes, without limitation:

- (i) Duplicate copies, reference materials, drafts of documents that are superseded by later drafts or revisions, documentary material provided to the Corporation by other parties in concluded litigation for which all appeals have expired, and transitory information including personal notes, routine system messages or system-generated log files or other documentary material not routinely maintained under the standard record retention policies and procedures of the Corporation;

(ii) Documentary material generated or maintained by a bridge financial company, or by a subsidiary or affiliate of a covered financial company that was not provided to the financial company or to the Corporation as receiver; and

(iii) Non-publicly available confidential supervisory information, operating, or condition reports prepared by, on behalf of, or at the requirement of any agency responsible for the regulation or supervision of financial companies or their subsidiaries.

(3) *Policies and procedures.* The Corporation may establish policies and procedures with respect to the retention and destruction of records that are consistent with this section.

Dated at Washington, D.C. this 21st day of October, 2014.

By Order of the Board of Directors, Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

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