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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AE25

Record Retention Requirements

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (the ''FDIC'') is adopting a final rule that implements section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'' or the ''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 necessary determination has been made for the appointment of the FDIC as receiver pursuant to Title II of the Dodd-Frank Act) as well as for the records generated or maintained by the FDIC that relate to its exercise of its Title II orderly liquidation authorities as receiver with respect to such covered financial company.

DATES: This final rule is effective on July 27, 2016.

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SUPPLEMENTARY INFORMATION:

I. Policy Objectives

In enacting Title II [1] of the Dodd-Frank Act (''Title II''), Congress provided for the appointment of the FDIC as receiver for a financial company [2] in order to conduct an orderly liquidation of the financial company if, among other things, resolution of the financial company under bankruptcy (or other applicable insolvency regime) would have serious adverse effects on U.S. financial stability. Title II confers upon the FDIC as the appointed receiver for a financial company (after appointment of the receiver, the company is referred to as a covered financial company) [3] certain powers and authorities to effectuate an orderly liquidation of the covered financial company in a manner that is consistent with the statutory objectives. As part of this statutory undertaking, Congress foresaw the necessity for the FDIC and the public at large to have access to the records that would document the actions of the financial company prior to the FDIC's appointment as receiver and the records of the FDIC itself, in its receivership role. This regulation implements that statutory mandate in a manner promoting consistency and transparency in the maintenance of these records.

II. Background

Upon appointment of the FDIC as receiver for a financial company, the FDIC succeeds to all rights, titles, powers and privileges of the financial company, including title to the books and records of the financial company.[4] In addition, the FDIC necessarily will generate its own records in connection with its appointment as receiver and in connection with exercising the authorities conferred upon it by Title II.

Section 210(a)(16)(D) of the Dodd-Frank Act [5] requires the FDIC to prescribe such regulations and establish such retention schedules as are necessary to maintain two categories of records: The records of a financial company that were in existence at the time the FDIC is appointed as its receiver, as well as the records generated by the FDIC in connection with its appointment as receiver and in connection with its exercise of its orderly liquidation authorities. Section 210(a)(16)(D) of the Act provides guidance as to the types of records that must be retained. Specifically, section 210(a)(16)(D)(i) of the Act 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.

Section 210(a)(16)(D)(iii) of the Act, entitled ''Records Defined,'' describes the forms of documentary material addressed in the regulation and statute, specifying that any document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record is included. In addition, that section specifies that records inherited from the failed company are

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376 (2010) and codified at 12 U.S.C. 5301 *et seq.* Title II of the Dodd-Frank Act is codified at 12 U.S.C. 5381–5394.

[2] *See* 12 U.S.C. 5381(a)(11) (defining financial company) and the regulations promulgated thereunder.

[3] 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(a)(8).

[4] 12 U.S.C. 5390(a)(1)(A).

[5] 12 U.S.C. 5390(a)(16)(D).

those that were generated or maintained by the covered financial company in the course of and necessary to its transaction of business.

On October 21, 2014, the Board of Directors of the FDIC approved a notice of proposed rulemaking entitled ''Record Retention Requirements,'' promulgated pursuant to section 210(a)(16)(D) of the Dodd-Frank Act. The proposed rule was published in the **Federal Register** on October 24, 2014 with a 60-day comment period that ended on December 23, 2014.[6] In keeping with the statutory mandate, the proposed rule established retention schedules for both records inherited by the FDIC as receiver from the covered financial company and records created by the FDIC as receiver for the covered financial company. The retention schedule for records inherited from the covered financial company was modeled after the treatment of records of a failed insured depository institution pursuant to a regulation entitled ''Records of Failed Depository Institutions'' [7] (the ''FDIA records rule''). The FDIA records rule addresses the retention of records of failed insured depository institutions pursuant to section 11(d)(15)(D) [8] of the Federal Deposit Insurance Act.

Generally, the proposed rule required that records inherited from a covered financial company that were created less than ten years before the appointment of the FDIC as receiver be retained for not less than 6 years following the date of the appointment of the receiver. Under the proposed rule, records created by the FDIC in connection with the exercise of its orderly liquidation authority as receiver for a covered financial company were required to be maintained at least six years following the termination of the receivership, regardless of when they were created.

III. Comments to the Proposed Rule

Two comment letters were submitted in response to the proposed rule, both from individuals.

A. Retention Periods

Both commenters stated that the retention periods in the proposed rule were too short, and one of the commenters suggested that all records be kept indefinitely for ''analytical purposes.'' The requirement in section 210(a)(16)(D)(i) of the Dodd-Frank Act that retention schedules be established suggests that Congress expected that the FDIC would exercise its discretion to identify some appropriate period of time as a minimum period of time to retain records. [9] The periods identified in the proposed rule were based upon the experience of the FDIC as receiver for insured depository institutions. Thus, as noted in the preamble to the proposed rule, the FDIC prescribed minimum retention periods in the proposed rule, recognizing that the FDIC may, as it has in the past with regard to the records of failed insured depository institutions, retain certain records for longer periods of time or even indefinitely for analytical, historical, or other purposes. The proposed rule expressly provided for the establishment of policies that are consistent with the minimum schedules established in the proposed rule. With the changes more fully discussed below, the FDIC believes that the minimum retention periods provided in the final rule properly fulfill the intent of section 210(a)(16)(D) of the Act and comport with prudent record retention principles.

B. Reasonably Accessible

One of the commenters objected to the use of the phrase ''reasonably accessible'' in the definition of ''documentary material,'' which forms the basis for the types of materials that constitute a record for purposes of the proposed rule. The commenter suggested that if a party in litigation is willing to pay for the recovery of electronically-stored information, such a record should be made available. Unfortunately, this suggestion does not reflect the reality of record storage and accessibility.

A large component of record storage expense is the cost of maintaining legacy systems that house records, as well as the cost of retrieving and identifying possible relevant information from those systems and sources. To comply with the commenter's suggestion, all records systems, no matter how out-of-date or incompatible with the FDIC's systems, would have to be indefinitely maintained as accessible, together with the technological and staffing capacity to use these systems to retrieve obsolete records. This indefinite maintenance would be attempted on the remote chance that one record, or a portion thereof, stored on a legacy system would be requested by a litigant. The cost to indefinitely maintain an entire legacy system that could house an arguably relevant document would be impossible to calculate and to bill to a litigant. The ''reasonably accessible'' discovery standard requires maintenance of these systems where it is reasonable and practicable to do so. (See discussion on the ''reasonably accessible'' discovery standard used in the definition of documentary material in the section-by-section analysis.) Accordingly, the term ''reasonably accessible'' is included in the definition of ''documentary material'' in the final rule.

C. Bridge or Subsidiary Records

One of the commenters objected to the exclusion from records of documentary material generated or maintained by a bridge financial company or a subsidiary or affiliate of a covered financial company. This exclusion was included in paragraph (d)(3)(ii) of the proposed rule. As required by the statute, the proposed rule addresses only the records of a covered financial company and the records of the FDIC as receiver of such covered financial company. Retention of the records of any other legal entity, including a covered financial company's subsidiaries or affiliates, is beyond the scope of the requirements of the statute. Although bridge financial company records and subsidiary records are not expressly subject to the proposed rule, records generated by the FDIC receiver in its oversight of a bridge financial company, or records sent to the FDIC receiver by the bridge's management and maintained by the FDIC in the course of such oversight would be subject to the applicable minimum retention requirements of the proposed rule. Accordingly, no change was made to the final rule in this respect and the exclusion is found in paragraph (e)(2)(ii) of the final rule.

IV. The Final Rule

A. General

In response to the comment letters and pursuant to internal agency consideration, the FDIC made certain changes to the final rule. These changes are discussed below.

The proposed rule has been revised to eliminate the set retention period for records created by the FDIC in connection with its appointment as receiver for a covered financial company and in connection with its exercise of its Title II responsibilities. The proposed rule provided for a retention period for these records of not less than six years after the date of the termination of the related receivership.

[6] 79 FR 63585 (October 24, 2014).

[7] 12 CFR 360.11, 78 FR 54373 (September 4, 2013).

[8] 12 U.S.C. 1821(d)(15)(D).

[9] Section 210(a)(16)(D)(ii) of the Act provides that unless otherwise required by applicable Federal law or court order, the FDIC may not, at any time, destroy any records that it is required to retain under Section 210(a)(16)(D)(i) of the Act and the regulations promulgated thereunder.

The change in the final rule requires the FDIC to retain these records indefinitely to the extent that there is a present or reasonably foreseeable future evidentiary or historical need for them on the part of the FDIC or the public, but in no event less than six years from the termination of the related receivership. This is in keeping with the suggestions of the commenters who objected to the imposition of specific retention periods, and is consistent with the statutory emphasis on the ''expected evidentiary needs of the Corporation [10] . . . and the public'' as required by section 210(a)(16)(D) of the Act. In addition, the paragraph clarifies that in the case of receivership records that are subject to a litigation hold, [11] a Congressional subpoena, or that relate to an investigation by Congress, the United States Government Accountability Office, or the FDIC's inspector general, such records will be retained pursuant to the conditions of the hold, subpoena, or investigation.

Two definitions have been added and appear in the final rule: ''Inherited records'' in paragraph (b)(2) and ''receivership records'' in paragraph (b)(3). Although the proposed rule separately addressed these two kinds of records, the wording used to describe these records (''records of a covered financial company for which the Corporation is appointed receiver'' and ''records of the Corporation as receiver for a covered financial company'') was unnecessarily repetitive. The use of the defined terms, which are both accurate and descriptive, results in more succinct language in the final rule.

Inherited records may be transferred to a third-party transferee in connection with a transfer, acquisition, or sale of a covered financial company's assets and liabilities. Paragraph (b)(4) of the proposed rule has been slightly expanded in the final rule (and is now paragraph (c)(3) of the final rule). The final rule requires that in order for the transfer of inherited records to satisfy the record retention requirements of the final rule and section 210(a)(16)(D) of the Act, the transferee must agree not only to maintain the inherited records for at least six years from the date of appointment of the FDIC as receiver for the covered financial company, as provided in the proposed rule, but must also agree that, prior to the destruction of any such inherited records, it will provide the FDIC with notice and the opportunity to cause the return of such inherited records to the FDIC.

B. Section-by-Section Analysis

1. Scope and Definitions

Paragraph (a) sets forth the scope of the final rule. It makes clear that the final rule applies to the two categories of records addressed by section 210(a)(16)(D) of the Act, *i.e.,* those records of a financial company that are inherited by the FDIC upon its appointment as receiver for the covered financial company and those records generated by the FDIC in connection with its appointment as receiver and the exercise of its orderly liquidation authorities.

Paragraph (b) provides definitions for terms used in the final rule that are not otherwise defined in the Dodd-Frank Act. Part 380 of title 12 of the Code of Federal Regulations concerns the FDIC's orderly liquidation authorities 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 necessary determinations have been made for the FDIC to be appointed receiver and the term *financial company.*[12] Thus it is unnecessary to include definitions of the terms *covered financial company* and *financial company* in the final rule.

Paragraph (b) sets forth three definitions. The first is that of *documentary material.* This definition follows closely the text of section 210(a)(16)(D)(iii) of the Act and describes the universe of forms and formats in which materials subject to the final rule may appear, including books, paper, maps, photographs, microfiche, microfilm, or writing regardless of physical form or characteristics and includes any computer or electronically-created data or file. The definition of documentary material included in the final rule is slightly different from the definition included in the proposed rule to make it clearer that the term documentary material covers material regardless of the physical form or characteristics of the material and includes any computer or electronically-created data or file.

The definition of documentary material clarifies that only documentary material that is reasonably accessible is included in the scope of the final rule. This reflects 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 material subject to the final rule with the discovery standard and would protect the FDIC as receiver from incurring inordinate 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.

Two definitions have been added and appear in the final rule in paragraphs (b)(2) and (b)(3): *Inherited records* and *receivership records.* Although the proposed rule separately addressed these two kinds of records, they were described rather than defined (''records of a covered financial company for which the Corporation is appointed receiver'' and ''records or the Corporation as receiver for a covered financial company''). The final rule uses defined terms for conciseness and clarity, as discussed above.

2. Inherited Records

Paragraph (b)(2) of the final rule defines, and addresses the retention schedule for, inherited records. Under the final rule the term *inherited record* means documentary material of a covered financial company that existed on the date of the appointment of the FDIC as receiver for such financial company and was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business. The final rule provides additional guidance with respect to determining whether documentary material was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business and therefore constitutes an inherited record that is subject to the retention requirements of the final rule. The final rule sets forth three factors which the FDIC will consider in determining whether documentary material, as defined in paragraph (b)(1), was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business.

[10] The Dodd-Frank Act uses the term ''Corporation'' to refer to the FDIC.

[11] 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.

[12] 12 U.S.C. 5381(a)(11).

The first factor is whether the documentary material was generated or maintained in accordance with the covered financial company's own practices and procedures (including the document retention policies of the covered financial company) or pursuant to standards established by the covered financial company's regulators. In general, a company's own policies and procedures will reflect the significance of its records to its business and regulatory requirements and the importance of documentary material generated or maintained by the company. Thus, the FDIC will consider whether documentary material was created or maintained in accordance with the covered financial company's own practices and procedures (including its document retention policies) when determining whether specific documentary material is an inherited record for the purposes of section 210(a)(16)(D) of the Act and the final rule. Likewise, the FDIC will consider whether documentary material was generated or maintained pursuant to standards imposed by the covered financial company's regulators when determining whether specific documentary material is an inherited record for the purposes of section 210(a)(16)(D) of the Act and the final rule.

The second factor is whether the documentary material is necessary for the FDIC to carry out its obligations as receiver for the covered financial company. This inquiry would permit the classification of documentary material as an inherited record if it is necessary for the FDIC to maintain such documentary material in order to carry out its functions as receiver for the covered financial company, for example, where the documentary material is necessary in order for the FDIC to (i) transfer the covered financial company's assets or liabilities, (ii) assume or repudiate the covered financial company's contracts, (iii) determine claims against the receivership of the covered financial company, or (iv) collect obligations owed to the covered financial company.

The third factor is whether there is a present or reasonably foreseeable evidentiary need for such documentary material by the FDIC as receiver for the covered financial company or the public. The wording of this factor closely follows the wording of section 210(a)(16)(D)(i)(II) of the Dodd-Frank Act. That section emphasizes that the FDIC must retain documentary materials that have evidentiary value to the FDIC as receiver and to the public. The final rule reflects this statutory direction and makes it clear that in making any determination of future evidentiary value a ''reasonably foreseeable'' standard should be applied.

Paragraph (c)(1) of the final rule establishes the record retention schedule for inherited records. The time period included in the final rule is modeled on the time period contained in the FDIA statutory provision and the FDIA records rule.[13] Under the final rule, the FDIC shall retain any inherited record of a covered financial company that was created fewer than ten years before the date of the appointment of the FDIC as receiver for the covered financial company for a period of no less than six years from the date of such appointment, provided however that an inherited record shall be retained indefinitely so long as it is (i) subject to a litigation hold imposed by the FDIC, (ii) subject to a Congressional subpoena or relates to an ongoing investigation by Congress, the United States Government Accountability Office, or the FDIC's Inspector General, or (iii) an inherited record that the FDIC has determined is necessary for a present or reasonably foreseeable evidentiary need of the FDIC or the public. Therefore, similar to the FDIA final rule, paragraph (c)(1) of the final rule expressly provides that the FDIC will maintain inherited records subject to a litigation hold imposed by the FDIC in order to ensure retention of documentary material that is relevant to ongoing litigation matters. The final rule goes farther than the FDIA records rule, however, by expressly requiring the indefinite maintenance of inherited records subject to a Congressional subpoena or that relate to an ongoing investigation by Congress, the United States Government Accountability Office, or the FDIC's Office of Inspector General; or that otherwise have been deemed by the FDIC as necessary for a present or reasonably foreseeable evidentiary need of the FDIC or the public.

Paragraph (c)(2) provides a non-exclusive list of examples of material that would constitute inherited records to provide additional guidance and clarity with respect to the sorts of documentary material that are subject to the retention requirements of the final rule. Included examples are correspondence; tax forms; accounting forms and related work papers; internal audits; inventories; board of directors or committee meeting minutes; personnel files and employee benefits information; general ledger and financial reports; financial data; litigation files; loan documents including records relating to intercompany debt; contracts and agreements to which the covered 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 covered financial company that were provided to the covered financial company.

3. Transfer of Records

Paragraph (c)(3) of the final rule addresses the transfer of inherited records to a third party (including a bridge financial company) that acquires assets or liabilities of the covered financial company from the FDIC as receiver for the covered financial company. In a resolution of a covered financial company, the FDIC may transfer inherited records to the custody of a third party, including a bridge financial company, in connection with the transfer, acquisition, or sale of assets or liabilities of the covered financial company to such third party. Paragraph (c)(3) of the final rule provides that such a transfer will satisfy the records retention obligations under paragraph (c)(1) and section 210(a)(16)(D) of the Act so long as the transferee agrees, in writing, that it will maintain the inherited records for at least six years from the date of the appointment of the FDIC as receiver for the covered financial company unless otherwise notified in writing by the FDIC. In addition, the third party must agree that prior to the destruction of any such inherited records it will provide the FDIC with notice and the opportunity to cause return of such inherited records to the FDIC as receiver. The final rule differs from the proposed rule in that it adds the language emphasizing that prior to the destruction of any transferred records such transferee will be required to give the FDIC the opportunity to cause the return of such records to the FDIC as receiver.

4. Receivership Records

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, records that would be separate and apart from the inherited records. Section 210(a)(16)(D) of the Act

[13] The FDIC has been required to retain records inherited from failed insured depository institutions for a minimum of six 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. 101–73).

specifically requires that the FDIC develop policies to maintain the documents and records of the FDIC generated in exercising its authorities under Title II to assure that receivership records would be available for review following the exercise of the extraordinary authority granted to the FDIC under Title II. Paragraph (b)(3) sets forth the definition of receivership records. Receivership records are defined to include documentary material that is generated or maintained by the FDIC in accordance with the policies and procedures of the FDIC (including the document retention policies of the FDIC) that relates to the FDIC's appointment as receiver for a covered financial company or the exercise of its authorities as receiver for the covered financial company under Title II. Receivership records 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,[14] 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 authorities. This definition makes it clear that only documentary material that is related to the duties and functions of the FDIC as receiver and the exercise of its orderly liquidation authorities is subject to the retention requirements of section 210(a)(16)(d) of the Dodd-Frank Act.

To be a receivership record the documentary material must be generated or maintained in accordance with policies and procedures of the FDIC, including the record retention policies and procedures of the FDIC. The FDIC will look to its internal procedures and guidance for generating and maintaining all of its own records, including corporate and bank receivership records, and use them as a guideline to determine whether documentary material generated or maintained as receiver for a covered financial company comport with these procedures and, thus, constitute receivership records under the final rule. Like private companies and other governmental organizations, the FDIC has established protocols for the efficient and effective generation and maintenance of files, records, and non-record documentary materials. These protocols reflect the importance of these materials and their relevance to the work of the FDIC.

Paragraph (d)(1) of the final rule sets forth the retention requirements for the receivership records described in paragraph (b)(3). The final rule clarifies that receivership records are likely to be valuable and consequential, given the significance of an orderly liquidation under Title II. Thus, the final rule emphasizes that receivership records, those records generated and maintained by the FDIC as it conducts a receivership, shall be retained indefinitely for as long as there is a present or reasonably foreseeable future evidentiary or historical need for them. In addition, the final rule sets a minimum retention standard during which, in effect, evidentiary need is conclusively presumed. That minimum period is a six-year minimum retention period for all receivership records measured from the termination of the receivership. In the case of a three-year receivership,[15] that would establish a minimum retention period of nine years.

Receivership records that are subject to a litigation hold by the FDIC or are subject to a Congressional subpoena or relate to an ongoing investigation by Congress, the United States Government Accountability Office or the FDIC's Office of Inspector General will be retained pursuant to the conditions of such subpoena, hold, or investigation under paragraph (d)(1) of the final rule.

Paragraph (d)(2) makes it clear that receivership records are those that are generated or maintained by the FDIC as receiver in connection with a Title II orderly liquidation and do not include the inherited records generated or maintained by the financial company which are addressed in paragraph (c) of the final rule.

Paragraph (d)(3) of the final rule sets forth a non-exclusive list of examples of receivership records in order to provide additional guidance and clarity with respect to the types of documentary material that are subject to the retention requirements of the final rule. Included examples are: Correspondence; tax forms; accounting forms and related 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, forfeiture litigation, and all other litigation matters in which the FDIC as receiver is a party; the charter and formation documents of a bridge financial company; contracts, other documents and information relating to the role of the FDIC as receiver in overseeing the operations of the bridge financial company; reports or other records of the bridge financial company and its subsidiaries or affiliates that were provided to the FDIC as receiver; and documentary material relating to the administration, determination, and payment of claims by the FDIC as receiver.

5. Limits of Effect of Determinations With Respect to Records

Paragraph (e) of the final rule applies to any documentary material that falls within the scope of the retention requirements of the final rule as that scope is described in paragraphs (c) and (d). Paragraph (e)(1) of the final rule makes clear that the FDIC's designation of documentary material as inherited records or receivership records pursuant to paragraph (c) or (d) is solely for the purpose of identifying documentary material subject to the retention requirements of section 210(a)(16)(D) of the Act and the final rule has 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 release under the Freedom of Information Act,[16] the Privacy Act of 1974,[17] or other law or court order. Thus, whether specific documentary material is an inherited record or a receivership record pursuant to the final 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 record) 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 an inherited record or a receivership record pursuant to the final 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 an inherited record or a receivership record for purposes of section 210(a)(16)(D) of the Act and the final rule does not determine whether it is subject to a litigation hold or a request

[14] 12 U.S.C. 5382.

[15] See 12 U.S.C. 5382(d) (providing for a three-year initial time limit on receivership authority, subject to extensions as provided in that section).

[16] 5 U.S.C. 552.

[17] 5 U.S.C. 552a.

under the Freedom of Information Act, the Privacy Act, or any other law.

Paragraph (e)(1) also clarifies that any designation made by the FDIC under the final rule 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.

6. Duplicate and Transitory Materials

Paragraph (e)(2) of the final rule lists three categories of documentary material that are excluded from the definition of inherited records and receivership records and thus will not be subject to the retention requirements of section 210(a)(16)(D) of the Act and the final rule. The first category includes duplicate copies, as required by the mandate in section 210(a)(16)(D)(I) of the Act 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, transitory information including routine system messages or system-generated log files, notes and other material of a personal nature, 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.[18]

7. Records of Affiliate; Supervisory Materials

The second category of exclusions from the final rule encompasses documentary material generated or maintained by a bridge financial company [19] 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 as receiver and any bridge financial company the FDIC may organize for the purpose of resolving a covered financial company. The final rule addresses only inherited records and receivership records. Information provided to the FDIC in connection with the formation or oversight of the bridge financial company or by a covered financial company's subsidiaries or affiliates would be within the scope of the regulation; however, documentary material generated or maintained by a bridge financial company or a covered financial company's 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 this final rule.

The third category of exclusions from the scope of the final rule and section 210(a)(16)(D) of the Act is non-publicly available supervisory information and operating or condition reports that were prepared by, on behalf of, or at the requirement of any agency responsible for the supervision or regulation of the covered financial company or its subsidiaries. This is consistent with the federal common law bank examination privilege, many state statutes, and 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.

8. Policies and Procedures

Paragraph (f) of the final rule provides that the FDIC may establish policies and procedures with respect to the retention of inherited records and receivership records that are consistent with the final rule. It is expected that these policies and procedures will address specific matters related to the capture, processing, and storage of inherited records 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 receivership records by the FDIC in its own files, information systems, and databases.

V. Expected Effects of the Final Rule

Immediately following the FDIC's appointment as receiver of a covered financial company pursuant to Title II of the Dodd-Frank Act, the FDIC's retention determinations and collections must begin with respect to both the records of the covered financial company and the FDIC's own records. The final rule will provide transparency and consistency with respect to these determinations and will ensure that records of a financial company that fails in a manner that would present systemic risk (absent the exercise of the Title II orderly liquidation authority), as well as the records generated in connection with the orderly liquidation of that financial company under Title II of the Dodd-Frank Act, will be available for as long as there is a reasonably foreseeable evidentiary need for such records. At the same time, the application of the factors described in the final rule will appropriately limit the costs of the maintenance of documentary material that is not covered by the statute.

VI. Alternatives Considered

The FDIC considered a range of alternatives from requiring permanent retention of all documentary material to providing for clear dates upon which records could be destroyed. The permanent retention of all documentary material is impractical, if not impossible. The FDIC deemed it important to include a broad definition of documentary material that could be considered inherited records or receivership record for the purpose of the final rule in light of the rapidly changing nature, forms, and format of data. At the same time, this explosion of data and changes in form and media make it important to differentiate between meaningful data and irrelevant information. In addition, as formats change the difficulty and expense of retrieving useful information becomes more complex. Accordingly, the FDIC identified factors that could be used to

[18] For example, the Texas Administrative Code, title 13, Chapter 6, Section 6.91 (2005) provides that transitory information are records 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. According to the Texas Administrative Code, 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.

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

determine what documentary material comprised meaningful records that should be retained. At the same time, a hard-and-fast date for destruction is inappropriate where it is possible that some documentary material may have evidentiary significance longer than a specified time period. Accordingly, the final rule adopts a flexible determination that takes into account the nature of the records and their likely evidentiary value.

VII. Regulatory Analysis and Procedure

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.,* requires that each Federal agency either certify that a rule will not have any 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 final rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The final rule refines the definition of the term ''records'' under section 210(a)(16)(D) of the Dodd-Frank Act and establishes retention schedules that the FDIC must use in connection with its retention of inherited records and receivership. Accordingly, the final rule affects only the internal operations of the FDIC and there will be no significant economic impact on a substantial number of small entities as a result of this final rule.

B. Paperwork Reduction Act

No new collections of information within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.,* are contained in the final rule as it addresses only the FDIC's obligation to maintain certain records.

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), which provides for agencies to report rules to Congress and for Congress to review such rules.[20] As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

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 presented the final rule in a simple and straightforward manner.

E. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final 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.[21]

List of Subjects in 12 CFR Part 380

Financial companies, Holding companies, Insurance companies, Records and records retention.

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR part 380 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); 12 U.S.C. 5381(b); 12 U.S.C. 5390(r); 12 U.S.C. 5390(a)(16)(D).

■ 2. Add § 380.14 to read as follows:

§ 380.14 Record retention requirements.

(a) *Scope.* 12 U.S.C. 5390(a)(16)(D) requires that the Corporation establish retention schedules for the maintenance of certain documents and records of a covered financial company for which the Corporation has been appointed receiver and certain documents and records generated by the Corporation as receiver for a covered financial company in connection with the exercise of its authorities under Title II of the Dodd-Frank Act, 12 U.S.C. 5381 through 5397. This section addresses retention of those two categories of documents and records.

(b) *Definitions.* For the purposes of this section, the following terms shall have the following meanings:

(1) *Documentary material.* The term *documentary material* means any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, or writing regardless of physical form or characteristics and includes any computer or electronically-created data or file.

(2) *Inherited record.* The term *inherited record* means documentary material of a covered financial company, provided that such documentary material existed on the date of the appointment of the Corporation as receiver for such covered financial company and was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business. The determination of whether documentary material was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business shall be based on an analysis of the following factors;

(i) Whether such documentary material was generated or maintained in accordance with the covered financial company's own practices and procedures (including the document retention policies of the covered financial company) or pursuant to standards established by the covered financial company's regulators;

(ii) Whether such documentary material is necessary for the Corporation to carry out its obligations as receiver for the covered financial company; and

(iii) Whether there is a present or reasonably foreseeable evidentiary need for such documentary material by the Corporation as receiver for the covered financial company or the public.

(3) *Receivership record.* The term *receivership record* means documentary material generated or maintained by the Corporation in accordance with the policies and procedures of the Corporation (including the document retention policies of the Corporation) that relates to the Corporation's appointment as receiver for a covered financial company or the exercise of its authorities as receiver for the covered financial company under 12 U.S.C. 5381 through 5397.

(c) *Inherited records.*—(1) *Retention schedule for inherited records.* The Corporation shall retain any inherited record of a covered financial company that was created fewer than ten years before the date of the appointment of the Corporation as receiver for the covered financial company for a period of no less than six years from the date of such appointment, provided however that an inherited record shall be retained indefinitely so long as it is:

(i) Subject to a litigation hold imposed by the Corporation;

[20] Public Law 104–121, 110 Stat. 857.

[21] Public Law 105–277, 112 Stat. 2681.

(ii) Subject to a Congressional subpoena or relates to an ongoing investigation by Congress, the United States Government Accountability Office, or the Corporation's Inspector General; or

(iii) An inherited record that the Corporation has determined is necessary for a present or reasonably foreseeable future evidentiary need of the Corporation or the public.

(2) *Examples.* Examples of inherited records include, without limitation: Correspondence; tax forms, accounting forms, and related work papers; internal audits; inventories; board of directors or committee meeting minutes; personnel files and employee benefits information; general ledger and financial reports; financial data; litigation files; loan documents including records relating to intercompany debt; contracts and agreements to which the covered 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 covered financial company that were provided to the covered financial company.

(3) *Transfer of an inherited record to an acquirer of assets or liabilities of a covered financial company.* If the Corporation transfers an inherited record of a covered financial company to a third party (including a bridge financial company) in connection with the acquisition of assets or liabilities of the covered financial company by such third party, the record retention requirements of 12 U.S.C. 5390(a)(16)(D) and paragraph (c)(1) of this section shall be satisfied if the third party agrees, in writing, that:

(i) It will maintain the inherited record for at least six years from the date of the appointment of the Corporation as receiver for the covered financial company unless otherwise notified in writing by the Corporation; and

(ii) Prior to destruction of such inherited record it will provide the Corporation with notice and the opportunity to cause the inherited record to be returned to the Corporation.

(d) *Receivership records*—(1) *Retention schedule for receivership records.* (i) A receivership record shall be retained indefinitely to the extent that there is a present or reasonably foreseeable future evidentiary or historical need for such receivership record.

(ii) A receivership record that is subject to a litigation hold imposed by the Corporation, is subject to a Congressional subpoena, or relates to an ongoing investigation by Congress, the United States Government Accountability Office, or the Corporation's Office of Inspector General shall be retained pursuant to the conditions of such hold, subpoena, or investigation.

(iii) In no event shall a receivership record be retained by the Corporation for a period of less than six years following the termination of the receivership to which it relates.

(2) *Not included in receivership records.* Receivership records do not include inherited records.

(3) *Examples.* Examples of receivership records include, without limitation: Correspondence; tax forms, accounting forms and related 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 Corporation as receiver; administrative records and other information relating to administrative proceedings; pleadings and similar documents in civil litigation, criminal restitution, forfeiture litigation, and all other litigation matters in which the Corporation as receiver is a party; the charter and formation documents of a bridge financial company; contracts, other documents, and information relating to the role of the Corporation as receiver in overseeing the operations of the bridge financial company; 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 by the Corporation as receiver.

(e) *General provisions.* With respect to any documentary material described in paragraphs (c) and (d) 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 12 U.S.C. 5390(a)(16)(D) 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, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or any other law. The Corporation shall comply with any applicable court order concerning mandatory retention or destruction of any documentary material subject to this section.

(2) *Exclusions.* Documentary material is not an inherited record nor a receivership record and is not subject to the record retention requirements of section 12 U.S.C. 5390(a)(16)(D) and this section if it is:

(i) A duplicate copy of retained documentary material, reference material, a draft of a document that is superseded by later drafts or revisions, documentary material provided to the Corporation by other parties in concluded litigation for which all appeals have expired, transitory information including routine system messages and system-generated log files, notes and other material of a personal nature, 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 covered financial company or to the Corporation as receiver; or

(iii) Non-publicly available confidential supervisory information or 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.

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

Dated at Washington, DC, this 21st day of June, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–15020 Filed 6–24–16; 8:45 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1026

Truth in Lending (Regulation Z) Annual Threshold Adjustments (CARD Act, HOEPA and ATR/QM)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule amending the regulatory text and official interpretations for