

July 24, 2013

**TO:** Board of Directors

**FROM:** Bret D. Edwards   
Director  
Division of Resolutions and Receiverships

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Acting General Counsel  
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**SUBJECT:** Final Rule Regarding the Retention of Records of an Insured Depository Institution in Receivership

### EXECUTIVE SUMMARY

It is recommended that the Board of Directors approve a Final Rule regarding the retention of the records of a failed insured depository institution by the FDIC as receiver. The purpose of the Final Rule is to enable the FDIC to identify and limit material that is subject to the records retention provision of the Federal Deposit Insurance Act ("FDI Act") in order to manage the records of an insured depository institution in receivership in a reasonable, efficient, and legally appropriate manner.

Section 11(d)(15)(D) of the FDI Act (12 U.S.C. §1821(d)(15)(D)), hereafter "Section 11(d)(15)(D)" provides that 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 insured depository institution that the FDIC in its discretion determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency or prohibited by law. In addition, the FDIC may destroy any records that are at least 10 years old as of the date of

appointment. The Final Rule incorporates these time frames and adds that the FDIC will not destroy records in the event of a legal hold<sup>1</sup> imposed by the FDIC.

The term “records” is not defined in the FDI Act. The Final Rule defines “records” as “any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created document generated or maintained by an insured depository institution in the course of and necessary to its transaction of business.” It contains a non-exclusive list of examples of records and excludes from the definition of records exam reports and multiple copies of a record.

The Final Rule provides that the FDIC may determine if a document is a record by considering whether it relates to the business of the failed institution, was generated or maintained by the institution in accordance with its own recordkeeping practices and procedures or pursuant to standards established by the institution’s regulators or is needed by the FDIC for its receivership function, or as evidence in litigation. This determination is solely for the purpose of applying the records retention requirements of Section 11(d)(15)(D).

The FDIC’s transfer of records to a third party in connection with that party’s acquisition of assets or assumption of liabilities satisfies the records retention obligations under Section 11(d)(15)(D) pursuant to the Final Rule so long as 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. Finally, the Final Rule provides that the FDIC may establish consistent policies and procedures with respect to records retention.

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<sup>1</sup> A legal hold is a suspension of the routine disposal of paper and electronic documents, data, and other records in any format that may be potentially relevant to litigation or other matters in which documents must be produced.

## DISCUSSION

### I. Proposed Rule

On January 15, 2013 the Board of Directors approved a notice of proposed rulemaking entitled “Records of Failed Insured Depository Institutions,” which was published in the Federal Register on January 22, 2013 with a 60-day comment period that ended on March 25, 2013.<sup>2</sup>

The Proposed Rule defined “records” to mean “any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record generated or maintained by an insured depository institution in the course of and necessary to its transaction of business.” Included in the Proposed Rule was a non-exclusive list of examples of documents ordinarily understood to constitute records. The Proposed Rule excluded from the definition of records (1) multiple copies of records, and (2) examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of insured depository institutions.

Under the Proposed Rule, the FDIC would determine that a document is a record if one or more of the following factors weighed in favor of doing so: (1) whether the documentary material relates to the business of the failed insured depository institution; (2) whether the documentary material was generated or maintained in accordance with the failed insured depository institution’s own recordkeeping practices and procedures or pursuant to standards established by the failed insured depository institution’s regulators; (3) whether the documentary material is needed by the FDIC to carry out its functions as receiver; and (4) the expected evidentiary needs of the FDIC. The FDIC’s designation of material as records under the Proposed Rule was solely for the purpose of identifying records that are subject to the retention requirements of Section 11(d)(15)(D) and that the designation had no bearing on the

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<sup>2</sup> 78 Fed.Reg. 4349, January 22, 2013.

discoverability or admissibility of documentary material in any court, tribunal or other adjudicative proceeding nor on whether such documentary material is subject to the Freedom of Information Act<sup>3</sup>, the Privacy Act<sup>4</sup> or other law.

The Proposed Rule incorporated the statutory provision that the FDIC may destroy records that are 10 years old as of the date of appointment and records that have been retained for six years from the date of appointment unless directed not to do so by a court of competent jurisdiction or governmental agency or prohibited by law and added that the FDIC would not destroy records subject to a legal hold imposed by the FDIC. Further provided in the Proposed Rule was that the FDIC's transfer of records to a third party in connection with that party's purchase of assets or assumption of liabilities would satisfy the records retention obligations under Section 11(d)(15)(D) so long as the transfer was made in connection with a transaction involving a purchase and assumption under which the transferee agreed that it would not destroy the transferred records for at least six years from the date of the appointment of the FDIC as receiver of the failed insured depository institution unless otherwise notified in writing by the FDIC. Finally, the Proposed Rule provided that the FDIC may establish policies and procedures with respect to the retention and destruction of records.

## **II. Comments on the Proposed Rule**

The FDIC received two comments in response to the Proposed Rule, both from individuals. One commenter commended the Proposed Rule as a measure that would ensure that the FDIC retains relevant material in an efficient and legally appropriate manner. The other commenter stated that social media and cell phones should be included as examples of records. This commenter also expressed concern that the use of the phrase "reasonably accessible" in the

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<sup>3</sup> 5 U.S.C. §552.

<sup>4</sup> 5 U.S.C. §552a.

definition of records was intended to conceal information from the public and that limiting records to those that relate to the institution's business would exclude evidence that should be used to prosecute individuals who caused the recent financial crisis. Both commenters expressed concern that the six and ten-year time frames with respect to records retention are too short and that records should be retained permanently.

### **III. The Final Rule**

#### **A. Authority**

The Final Rule is authorized under the FDI Act, which gives the FDIC broad authority to carry out its statutory responsibilities. Section 11(d)(1) of the FDI Act authorizes the FDIC to “prescribe such regulations as [it] determines to be appropriate regarding the conduct of conservatorships or receiverships.”<sup>5</sup> Additionally, section 10(g) of the FDI Act authorizes the FDIC to prescribe regulations, including defining terms, as necessary to carry out the FDI Act<sup>6</sup>

#### **B. Changes from the Proposed Rule**

The Proposed Rule provided that the FDIC would determine that a document is a record if one or more of four factors weighed in favor of doing so. Staff believes that this could, if applied literally, require the FDIC to designate as a record some documents that should not be so classified. For example, a published set of banking regulations kept at an institution would meet one factor (it is related to the institution's business) and therefore could be classified as a record under the Proposed Rule notwithstanding that this material would not be needed for the receiver's functions or as evidence and should not be classified as records for purposes of Section 11(d)(15)(D). Staff recommends that the Final Rule be changed to clarify that the factors are to be considered together in making the determination.

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<sup>5</sup> 12 U.S.C. §1821(d)(1).

<sup>6</sup> 12 U.S.C. §1820(g).

Staff also recommends that the text of paragraph (e) of the Proposed Rule referring to “transfers of records to a third party in connection with an agreement for the purchase and assumption of assets and liabilities” of a failed institution be changed to “transfers of records to a third party in connection with a transaction involving the purchase and assumption of assets and liabilities.” Staff believes the original text should be clarified so that it is not too narrowly construed such that only those assets transferred pursuant to a formal FDIC Purchase and Assumption Agreement are included and not those transferred by way of other vehicles such as structured transactions. Staff further recommends that paragraph (e) be modified so that the records retention requirement imposed on a transferee is at least six years from the date of appointment. This change will make the Final Rule consistent with existing contracts involving the transfer of the assets and liabilities of failed insured depository institutions that often include a retention requirement on the part of the transferee of more than six years.

Staff has included in the Final Rule non-substantive, technical changes to correct references to “insured depository institution” and “failed insured depository institution.”

### **RECOMMENDATION**

It is recommended that the Board of Directors approve and adopt the Final Rule. If approved and adopted by the Board, the Final Rule will amend Part 360 of the FDIC’s rules and regulations (12 C.F.R. Pt. 360). The Final Rule will be effective 30 days after publication.

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