June 21, 2016

TO: Board of Directors

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

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SUBJECT: Final Rule Regarding the Retention of Records of a Covered Financial Company and of the FDIC as Receiver pursuant to Section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010—12 CFR Part 380

RECOMMENDATION: That the Board of Directors (the "Board") of the Federal Deposit Insurance Corporation (the "FDIC") approve and adopt a final rule (the "Final Rule") that meets the requirements of section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[1] (the "Dodd-Frank Act" or the "Act"). Section 210(a)(16)(D) of the Dodd-Frank Act requires that the FDIC adopt regulations and establish retention schedules that are necessary to maintain the documents and records of the FDIC generated in exercising its authorities under Title II of the Dodd-Frank Act ("Title II")[2] and the records of a covered

[1] 12 U.S.C. 5301 *et seq.*
[2] Title II of the Dodd-Frank Act is codified at 12 U.S.C. 5381-5394.

financial company[3] for which the FDIC is appointed receiver. The Final Rule would be effective 30 days after its publication in the *Federal Register*.

DISCUSSION:

I. Background

On October 21, 2014, the Board approved the publication for notice and comment of a proposed rule 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.[4] In keeping with the statutory mandate, the proposed rule established retention schedules for both (i) records inherited by the FDIC as receiver from a covered financial company and (ii) records created by the FDIC as receiver in connection with its appointment as receiver for a covered financial company and in connection with exercising the authorities conferred upon it under Title II. The retention schedule for records inherited from the covered financial company was in part modeled after the treatment of records of a failed insured depository institution pursuant to a regulation entitled "Records of Failed Depository Institutions"[5] (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) of the Federal Deposit Insurance Act.[6]

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

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[3] *See*, 12 U.S.C 5381(a)(8). 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. A financial company is defined at 12 U.S.C. 5381(a)(11).
[4] 79 FR 63585 (October 24, 2014).
[5] 12 CFR 360.11, 78 FR 54373 (September 4, 2013).
[6] 12 U.S.C. 1821(d)(15)(D).

retained for not less than six years following the date of the appointment of the receiver. In addition, records created by the FDIC in connection with its appointment as receiver for a covered financial company and in connection with the exercise of its orderly liquidation authority as receiver for a covered financial company were required to be maintained for not less than six years following the termination of the receivership, regardless of when they were created. As more fully discussed below, the proposed rule has been revised to eliminate this set retention period for these receivership records. The Final Rule requires the FDIC to retain receivership records indefinitely to the extent that there is a present or reasonably foreseeable future evidentiary 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.

II. Comments on the Proposed Rule

The FDIC received two comments in response to the proposed rule, both from individuals. 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[7]. Thus, as noted in the preamble to the proposed rule, the FDIC prescribed minimum retention periods in the proposed rule while 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. As the

[7] 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.

commenters point out, the failure of a financial company that resulted in the appointment of the FDIC as receiver under Title II likely would be a significant financial and historical event. As a result, there would be great interest in the records of the failed financial company and the records created by the FDIC in connection with its appointment as receiver and in connection with the exercise of its Title II authorities for historical and evidentiary purposes The Final Rule makes adjustments to the retention periods for both types of records to make it clear that such records may be maintained longer than the minimum retention period in certain circumstances, including where there is a present or reasonably foreseeable historic or evidentiary need for such records. With the changes more fully discussed below, Staff believes that the minimum retention periods provided in the Final Rule properly fulfill the intent of Section 210(a)(16)(D) of the Dodd-Frank Act and comport with prudent record retention principles.

One of the commenters objected to the use of "reasonably accessible" in the definition of "documentary material," which forms the basis for the types of materials that could constitute a record for the purpose 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. To comply with the commenter's suggestion, all records systems, no matter how out-of-date or incompatible with the FDIC's systems, would need to be indefinitely maintained as accessible, together with the technological and staffing capacity to use the systems to retrieve obsolete records. The cost to indefinitely maintain entire legacy systems 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. Moreover, the use

of the phrase "reasonably accessible" aligns the concept of material subject to the Final Rule with discovery standards contained in the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 26(b)(2)(B) 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. Accordingly the term "reasonably accessible" is included in the definition of "documentary material" in the Final Rule.

One of the commenters objected to the exclusion from retained records of documentary material generated or maintained by a bridge financial company or by a subsidiary or affiliate of a covered financial company under paragraph (d)(2)(ii) of the proposed rule. Section 210(a)(16)(D) of the Dodd-Frank Act only addresses 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 (unless they were provided to the covered financial company or the FDIC as receiver) is beyond the scope of the requirements of the statute. 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.

III. Changes to the Proposed Rule

In response to the comment letters and pursuant to internal agency consideration, the FDIC made certain changes to the proposed rule in the text of the Final Rule.

Definitions of inherited records, receivership records, and documentary material.

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

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.

The proposed rule contained a defined term, *documentary material*. The definition followed closely the text of section 210(a)(16)(D) and described the universe of forms and formats in which material subject to the proposed rule could appear. The definition of *documentary material* 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.

Transfer of inherited records.

Another change in the Final Rule involves the transfer of inherited records. 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 records retention requirements of the Final Rule and section 210(a)(16)(D) of the Dodd-Frank Act the transferee must not only agree 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.

Retention period for records generated by the FDIC in connection with its appointment as receiver and its exercise of its Title II authorities-receivership records.

As mentioned above, the proposed rule has been revised to eliminate the set retention period for receivership records- those 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. 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[8] ...and the public" as required by section 210(a)(16)(D). In addition, the paragraph clarifies that in the case of receivership records that are subject to a litigation hold, 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.

In addition to the changes described above, the paragraphs of the proposed rule were reordered in the Final Rule to improve the clarity and readability of the Final Rule. Other

[8] The Dodd-Frank Act uses the term "Corporation" to refer to the FDIC.

changes were required to support the inclusion of the new defined terms, eliminate duplication, and conform statutory references.

Retention period for inherited records.

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, which applies to inherited records of a failed insured depositary institution. Under the Final Rule, the FDIC must 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.

CONCLUSION: The Final Rule meets the statutory requirement contained in section 210(a)(16)(D) of the Dodd-Frank Act that the FDIC adopt regulations and establish retention schedules that are necessary to maintain the documents and records of the FDIC generated in exercising its authorities under Title II of the Dodd-Frank Act and the records of a covered financial company for which the FDIC is appointed receiver. Having considered the comments received to the proposed rule, staff recommends adoption of the Final Rule in the form attached

to this Board Case with an effective date on the thirtieth day following publication of the Final Rule in the *Federal Register*.

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ATTACHMENTS

A – Resolution