
FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

Records of Failed Insured Depository Institutions

RIN 3064 – AD73

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final Rule.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) is adopting a final rule that implements section 11(d)(15)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(15)(D)). This statutory provision provides time frames for the retention of records of a failed insured depository institution. The final rule incorporates the statutory time frames and defines the term “records.”

DATES: This final rule is effective ____ __, 2013. [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

When acting as receiver of a failed insured depository institution, the FDIC succeeds to the books and records of the institution.¹ Section 11(d)(15)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(15)(D), hereafter “Section 1821(d)(15)(D)” and “FDI Act”) 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 term “records” is not defined in the FDI Act and the legislative history does not provide any guidance on how the term should be interpreted. A broad interpretation would encompass not only all documentary material that clearly relates to the business of the institution but also material that has no relevance to its business, or which lacks evidentiary value and would not ordinarily be considered “records.” In addition, advances in information technology and data storage capabilities have substantially increased the volume of material generated by financial institutions. To illustrate, a “terabyte” of electronically stored information (“ESI”) is the equivalent of 77 million printed pages. A typical failed insured depository institution has on its systems between 3 and 9 terabytes of ESI, or the equivalent of between 231 million and 693 million pages of material. Currently, the FDIC is housing on its recordkeeping systems 775 terabytes of data from failed insured depository institutions for which the FDIC has been appointed receiver since 2007 – the equivalent of 59.675 billion pages. In addition, the FDIC is

¹ 12 U.S.C. 1821(d)(2)(A).

storing 133,707 boxes of paper from failed insured depository institutions, as well as 500 boxes of computer hard drives and 171 boxes of microfilm and microfiche. If the term “records” were interpreted to encompass all documentary material that the FDIC as receiver obtains from failed insured depository institutions regardless of its significance or evidentiary value then the capture, processing, and maintenance of ever-increasing amounts of such material would pose significant unnecessary burdens and inefficiencies both currently and in the future. Accordingly, this final rule defines the term “records” in order to designate more specifically the material that is subject to Section 1821(d)(15)(D), thereby enabling the FDIC to manage the records of insured depository institutions in receivership more efficiently and in a legally appropriate manner.

Authority

The FDI Act gives the FDIC broad authority to carry out its statutory responsibilities. Section 11(d)(1) of the FDI Act² authorizes the FDIC to “prescribe such regulations as [it] determines to be appropriate regarding the conduct of conservatorships or receiverships.” Additionally, section 10(g) of the FDI Act³ authorizes the FDIC to prescribe regulations, including the defining of terms, as necessary to carry out the FDI Act.

Notice of Proposed Rulemaking

On January 15, 2013, the Board of Directors approved a notice of proposed rulemaking entitled “Records of Failed Insured Depository Institutions”⁴ which was published in the Federal Register on January 22, 2013, with a 60-day comment period

² 12 U.S.C. 1821(d)(1).

³ 12 U.S.C. 1820(g).

⁴ 78 FR 4349 (January 22, 2013).

that ended on March 25, 2013. Two comment letters were received. The contents of the comments, the FDIC's responses thereto, as well as the differences between the text of the proposed rule and the final rule are addressed below.

II. Explanation of the Final Rule

Under the final rule, documentary material will be characterized as records for purposes of Section 1821(d)(15)(D) by meeting a formal definition (paragraph (a)) and a functional test (paragraph (b)). The FDIC believes that this two-tiered approach will have the effect of excluding extraneous material that is not related in any way to the insured depository institution's business prior to its failure nor necessary to the conduct of the FDIC's receivership function.

Paragraph (a)(3) defines the term "records" as "any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, and computer or electronically-created documents that were generated or maintained by an insured depository institution in the course of and necessary to its transaction of business." The definition is modeled on Section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"),⁵ which sets forth records retention requirements for covered financial company receiverships. The definition in the Dodd-Frank Act has been modified to adapt to FDIC's role as receiver for insured depository institutions.

The phrase "reasonably accessible" has been used in the definition of records in order to relieve the FDIC from incurring burdensome and unnecessary expenses associated with accessing, restoring or maintaining legacy systems of failed insured

⁵ 12 U.S.C. 5390(a)(16)(D).

depository institutions. The FDIC often encounters proprietary non-standard computer systems at failed insured depository institutions running software that is obsolete or that would be prohibitively expensive to upgrade and maintain. The information stored on these systems is usually not of sufficient value to justify the effort and expense that would be required to maintain the systems for continued use. The phrase “reasonably accessible” is also consistent with Federal Rule of Civil Procedure 26(b)(2)(B) which relieves a party from whom discovery is sought from having to produce ESI from sources that are not reasonably accessible due to undue burden or cost.

One commenter appears to suggest that limiting the definition of “records” to reasonably accessible documents and to those generated or maintained by an insured depository institution in the course of and necessary to its transaction of business is intended to conceal evidence of the wrongdoing of individuals responsible for the recent financial crisis that began in 2008 and prevent appropriate civil and criminal actions. This definition, however, is expected to encompass the types of information that would be needed in the course of a criminal or civil investigation; moreover, the rule would expressly prevent destruction when contrary to the direction of a court or governmental agency, prohibited by law, or subject to a legal hold imposed by the FDIC. As noted above, the standards used in the proposed rule also are consistent with the Federal Rules of Civil Procedure and subsequent statutory language enacted by Congress for similar circumstances. While the FDIC does not itself generally have authority to impose criminal sanctions, it routinely works with its Office of Inspector General and the U.S. Department of Justice on criminal investigations and supports their prosecution.

In addition, for those institutions for which it is the primary Federal regulator, the FDIC uses its civil enforcement authority under the FDI Act to address unsafe or unsound acts or practices or violations of law at insured depository institutions and, when the FDIC is not the primary Federal regulator, may also coordinate on actions with the appropriate Federal banking agency. Once an insured institution fails, the FDIC also has authority to pursue civil sanctions against directors, officers, and others determined to have caused a loss to the institution. Interested members of the public may access information about the FDIC's enforcement and professional liability efforts on its website at: www.fdic.gov/bank/individual/failed/pls/; www.fdic.gov/regulations/compliance/manual/pdf/II-8.1.pdf.

The “reasonably accessible” limitation permits the FDIC to forego collection of documentary material that is unrelated to the core business of the institution and that has no informational or evidentiary value, such as the terabytes of technical data files that allow a computer system to operate but that have no other connection to the institution's business need not be retained or characterized as records. In addition, the limitation to reasonably accessible documents is neutral as to the content of what is considered inaccessible.

Paragraph (a)(3)(i) provides a list of examples of documents that constitute records: board or committee meeting minutes, contracts to which the institution was a party, deposit account information, employee and employee benefits information, general ledger and financial reports, litigation files and loan documents. A commenter suggested that social media and cell phones should be included in the list of examples of records. In

fact, the list is non-exclusive and would not exclude those or other types or formats of information or document collection.

Paragraph (a)(3)(ii) sets forth two exclusions from records. The first exclusion is for “multiple copies of records.” This exclusion is meant to clarify that redundant multiple copies of the same record need not be retained as records. The second exclusion is for “[e]xamination, 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.” This exclusion is consistent with the FDIC’s long-standing position that reports of examination or other confidential supervisory correspondence or information prepared by FDIC examiners or other regulators with respect to an insured depository institution belong exclusively to the FDIC or to such regulators and not to the institution, even though institutions may retain copies.

In determining whether particular material obtained from a failed insured depository institution constitutes a record, the FDIC will consider the four factors set forth in paragraph (b). In the proposed rule, the FDIC was to determine “...whether one or more of the following factors weigh[ed] in favor of classifying the material as a record....” The FDIC has changed the wording of the opening phrase of paragraph (b) to clarify that the factors are to be considered together. The final rule uses the phrase “...the FDIC in its discretion will consider the following factors....” to avoid the designation of documentary material as records that should not be so classified. For example, a published set of banking regulations kept at an insured depository institution would meet one factor (*i.e.*, it is related to the institution’s business) even though such a set of regulations would not be needed for the receiver’s functions or as evidence for purposes

of Section 1821(d)(15)(D) and the final rule. The final rule clarifies that if the FDIC determines that considered together these factors weigh in favor of classifying material as a record, it will be classified as a record.

The first factor is whether the documentary material relates to the business of the failed insured depository institution. This factor is modeled after section 210(a)(16)(D)(iii) of the Dodd-Frank Act⁶ defining “records” as material generated or maintained “in the course of and necessary to [a covered financial company’s] transaction of business.”

The second factor is whether the documentary material was generated or maintained in accordance with the insured depository institution’s own recordkeeping practices and procedures or pursuant to standards established by the failed insured depository institution’s regulators. Thus, the FDIC will consider whether documentary material was retained pursuant to the insured depository institution’s recordkeeping practices when determining whether specific documentary material is a record for purposes of Section 1821(d)(15)(D) and the final rule. Likewise, the FDIC will consider whether documentary material was retained pursuant to standards imposed by state or federal regulators when determining whether specific documentary material is a record for purposes of Section 1821(d)(15)(D) and the final rule.

The third factor is whether the documentary material is needed by the FDIC to carry out its functions as receiver. This inquiry will permit the classification of documents as records when they are used by the FDIC to carry out its function as receiver to, for example, transfer the failed insured depository institution’s assets or liabilities,

⁶ 12 U.S.C. 5390(a)(16)(D)(iii).

assume or repudiate the institution's contracts, determine claims, and collect obligations owed to the institution.

The fourth factor used to determine whether documentary material should be classified as records is the expected evidentiary needs of the FDIC. Records generated and maintained by the failed insured depository institution are used to support enforcement actions and litigation. In addition, records of the insured depository institution may be required to respond to requests filed under the Freedom of Information Act. This factor is modeled on section 210(a)(16)(D)(i)(II) of the Dodd-Frank Act⁷ which requires the FDIC to prescribe records retention regulations with due regard for “the expected evidentiary needs of the Corporation as receiver of a covered financial company and the public regarding the records of covered financial companies.”

Paragraph (c) of the Final Rule explains that the FDIC's designation of material as records is solely for the purpose of identifying records that are subject to the retention requirements of Section 1821(d)(15)(D). The designation has no bearing on the 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, the Privacy Act or other law.

Paragraph (d) sets forth the time frames for permissible destruction of a failed insured depository institution's records as provided in Section 1821(d)(15)(D). After the end of the six-year period beginning on the day 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 to maintain, unless directed not to do so by a

⁷ 12 U.S.C. 5390(a)(16)(D)(i)(II).

court of competent jurisdiction or governmental agency or prohibited by law. The FDIC may also destroy any records that are at least 10 years old as of the date of appointment of the receiver. This paragraph further provides that the FDIC will not destroy records subject to a legal hold⁸ imposed by the FDIC. By including legal holds, the Final Rule implements the policy to preserve information (both ESI and paper) that the FDIC may be required to produce in litigation or when it is otherwise subject to a legal requirement to produce information.

Both commenters objected to the proposed rule's time frames for record destruction, asserting that records should be maintained indefinitely. All records have a time period beyond which they are no longer useful or necessary. By providing that records of an institution may be destroyed within the time frames set forth in Section 1821(d)(15)(D), Congress recognized that records retention has limits and that destruction of old records is the basis for an effective and appropriate records retention policy.⁹ Using these records as evidence, the FDIC has a finite period after its appointment as receiver or conservator to bring actions against those directors, officers, and other professionals allegedly responsible for the failure of an insured depository institution using these records as evidence. Unless the time periods are expanded under state law, the FDIC has three years to bring tort claims and six years to bring breach-of-contract claims against such individuals from the date of the appointment of the FDIC as

⁸ 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.

⁹ As a point of comparison, Federal law requires open insured depository institutions to maintain their records for six years. 12 U.S.C. 1829b(g).

receiver for a failed insured depository institution.¹⁰ Separately, the FDIC must bring or participate in an enforcement action against such an individual for debarment from involvement with financial institutions or for civil money penalties within five years of a culpable action or six years from the individual's separation from the insured depository institution, which depending on the timing also may involve reliance on failed bank records.¹¹

Paragraph (e) includes within the statutory records retention requirement records that are in the custody of an acquiring institution or other purchaser of a failed institution's assets. It provides that the FDIC's transfer of records to a third party in connection with that party's purchase of assets or assumption of liabilities satisfies the records retention obligations of Section 1821(d)(15)(D) so long as the transfer is made in connection with a transaction involving the purchase and assumption of assets and liabilities 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 of the failed insured depository institution unless otherwise notified in writing by the FDIC. In the proposed rule, the wording of paragraph (e) was slightly different; the reference to a purchase and assumption was preceded by "an agreement for..." This phrase was changed in the final rule to "...in connection with a transaction involving the purchase and assumption of assets and liabilities..." in order to clarify that such record transfers can be accomplished through vehicles other than formal purchase and assumption agreements, including all contracts with third parties for the sale, transfer or assignment of the assets and liabilities of failed insured depository institutions, such as loan sale

¹⁰ 12 U.S.C. 1821(d)(14).

¹¹ 28 U.S.C. 2462; 12 U.S.C. 1818(i)(3).

agreements, securitizations, structured transactions, contribution agreements, and formal purchase and assumption agreements. In addition, the phrase “at least” was placed in the final rule preceding “six years” in order to clarify that in order to fulfill the requirements of Section 1821(d)(15)(D) such transferred records must be retained for six years or longer pursuant to an asset sales agreement as provided under many such existing agreements.

Paragraph (f) provides that the FDIC may establish policies and procedures with respect to the retention and destruction of records. These policies and procedures will address specific matters related to the capture, processing and storage of failed institution records, such as collecting computer hard drives, email databases, and backup and disaster recovery tapes.

It is the policy of the FDIC to evaluate the benefits and costs of its regulations in order to minimize any burden on the public or on the banking industry. The final rule consists of internal guidelines and criteria for the collection and management of records of failed insured depository institutions. The final rule’s definition of the term “records” will obviate the need for overly broad and duplicative collection of the documentary material the FDIC encounters at failed insured depository institutions. Consequently, the final rule will result in cost savings over the near and long term consistent with the statutory mandate in Section 1821(d)(15)(D) to retain the records of failed insured depository institutions for the specified periods.

III. 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 this final rule, as it addresses only the FDIC's obligation to maintain records in existence at the time the FDIC is appointed receiver and thereafter.

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 final rule will not 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 \$500 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 will not have a significant economic impact on a substantial number of small entities. The final rule defines the term “records” under section 1821(d)(15)(D) for purposes of the FDIC's own internal operations and recordkeeping, enabling it to more efficiently manage the records of an insured depository institution in receivership. Accordingly, there will be no significant economic impact on a substantial number of small entities as a result of this final rule.

***C. 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 (Pub. L.105-277, 112 Stat. 2681).

D. 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”) (Pub. L. 104–121, 110 Stat.857) which provides for agencies to report rules to Congress and for Congress to review such rules. The reporting requirement is triggered in instances where the FDIC issues a final rule as defined by the APA (5 U.S.C. 551 *et seq.*). Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by the SBREFA.

E. 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 final rule in a simple and straightforward manner.

List of Subjects in 12 CFR 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and record keeping requirements, Savings associations, Securitizations.

PART 360 – RESOLUTION AND RECEIVERSHIP RULES

- 1. The authority citation for part 360 is revised to read as follows:

Authority: 12 U.S.C. 1817(b), 1818(a)(2), 1818(t), 1819(a) Seventh, Ninth and Tenth, 1820(b)(3), (4), 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(d)(15)(D), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

- 2. Add new § 360.11 to read as follows:

§ 360.11 Records of failed insured depository institutions.

(a) *Definitions.* For purposes of this section, the following definitions apply—

(1) *Failed insured depository institution* is an insured depository institution for which the FDIC has been appointed receiver pursuant to 12 U.S.C. 1821(c)(1).

(2) *Insured depository institution* has the same meaning as provided by 12 U.S.C. 1813(c)(2).

(3) *Records* means 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.

(i) Examples of records include, without limitation, board or committee meeting minutes, contracts to which the insured depository institution was a party, deposit account information, employee and employee benefits information, general ledger and financial reports or data, litigation files, and loan documents.

(ii) Records do not include:

(A) Multiple copies of records; or

(B) 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.

(b) *Determination of records.* In determining whether particular documentary material obtained from a failed insured depository institution is a record for purposes of 12 U.S.C. 1821(d)(15)(D), the FDIC in its discretion will consider the following factors:

- (1) Whether the documentary material related to the business of the insured depository institution,
- (2) Whether the documentary material was generated or maintained as records in the regular course of the business of the insured depository institution in accordance with its own recordkeeping practices and procedures or pursuant to standards established by its regulators,
- (3) Whether the documentary material is needed by the FDIC to carry out its receivership function, and
- (4) The expected evidentiary needs of the FDIC.

(c) The FDIC's determination that documentary material from a failed insured depository institution constitutes records is solely for the purpose of identifying that documentary material that must be maintained pursuant to 12 U.S.C. 1821(d)(15)(D) and 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.

(d) *Destruction of records.*

- (1) Except as provided in paragraph (d)(2) of this section, after the end of the six-year period beginning on the date the FDIC is appointed as receiver of a failed insured depository institution, the FDIC may destroy any records of an institution which the FDIC, in its discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, prohibited by law, or subject to a legal hold imposed by the FDIC.
- (2) Notwithstanding paragraph (d)(1) of this section, the FDIC may destroy records of a failed insured depository institution which are at least 10 years old as

of the date on which the FDIC is appointed as the receiver of such institution in accordance with paragraph (d)(1) of this section at any time after such appointment is final, without regard to the six-year period of limitation contained in paragraph (d)(1) of this section.

(e) *Transfer of records.* If the FDIC transfers records to a third party in connection with a transaction involving the purchase and assumption of assets and liabilities of an insured depository institution, the recordkeeping requirements of 12 U.S.C. 1821(d)(15)(D), and paragraph (d) of this section shall be satisfied if the transferee agrees that it will not destroy such records for at least six years from the date the FDIC was appointed as receiver of such failed insured depository institution unless otherwise notified in writing by the FDIC.

(f) *Policies and procedures.* The FDIC 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 ____ day of ____ 2013.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.