

February 3, 2016

**TO:** Board of Directors

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

Charles Yi   
General Counsel  
Legal Division

**SUBJECT:** Notice of Proposed Rulemaking regarding  
Recordkeeping for Timely Deposit Insurance Determination

**RECOMMENDATION**

Staff recommends that the Board approve for publication in the Federal Register a notice of proposed rulemaking (“NPR” or “proposed rule”) regarding enhanced deposit recordkeeping requirements for insured depository institutions that have more than two million deposit accounts (“covered institutions”). The proposed rule would require a covered institution to (1) maintain complete and accurate data on each depositor’s ownership interest by right and capacity for all of the bank’s deposit accounts, and (2) ensure that its information technology system (“IT system”) is capable of calculating within 24 hours after failure the deposit insurance available to each owner of funds on deposit in accordance with the deposit insurance rules set forth in 12 CFR part 330. The NPR would solicit comments for a period of 90 days.

**DISCUSSION**

*1. Background*

Under the Federal Deposit Insurance Act (“FDI Act”), the FDIC is responsible for paying deposit insurance “as soon as possible” following the failure of an insured depository institution

(“IDI”).<sup>1</sup> While the statutory provision does not impose a specific time period for payment, the FDIC strives to pay insurance promptly, in most cases by making most insured deposits available to depositors by the next business day after a bank fails. Prompt payment of deposit insurance maintains public confidence in the banking system and permits depositors prompt access to their insured funds in order to meet their financial needs and obligations. Delayed payment of deposit insurance could reduce the franchise value of the failed bank and thus increase the cost to the Deposit Insurance Fund. In the case of the failure of one of the largest IDIs (as measured by number of deposit accounts), delayed payment of deposit insurance could lead to a substantial volume of returned items, bank runs or other systemic consequences and harm the national economy.

Staff believes that prompt payment of deposit insurance in connection with the failure of an IDI with a large number of deposit accounts could be problematic in certain circumstances. Continued growth in the number of deposit accounts at larger banks and the number and complexity of deposit systems or platforms in many of these banks would exacerbate the difficulty of making prompt deposit insurance determinations. Using the FDIC’s information technology (“IT”) system to make deposit insurance determinations for a failed bank with a large number of deposit accounts would require the transmission and processing of massive amounts of deposit data from the bank’s IT system, and the time required would present a significant impediment to making an insurance determination in the timely manner that the public has grown to expect. Further, if a large bank were to fail due to liquidity problems, the FDIC’s opportunity to prepare for the bank’s closing would be limited, thus further compounding the problem of making a prompt deposit insurance determination. Staff believes that requiring the

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<sup>1</sup> 12 U.S.C. § 1821(f)(1).

covered institutions to enhance their deposit account information and upgrade their IT systems to facilitate the FDIC's deposit insurance determination could address these issues.

On April 28, 2015, the FDIC published in the Federal Register an Advance Notice of Proposed Rulemaking ("ANPR") seeking comment on whether IDIs that have a large number of deposit accounts, such as more than two million accounts, should be required to maintain more accurate and complete data on each depositor's ownership interest by right and capacity and to develop the capability to calculate the insured and uninsured amounts for each depositor at the end of any business day. The comment period ended on July 27, 2015. The FDIC received ten comment letters from trade associations, banks, a law firm, companies which provide related bank services, and individuals. Staff also participated in meetings and conference calls with financial services industry representatives.

## *2. Comments on the ANPR*

The ANPR sought comments on all aspects of the proposal, including potential challenges that a covered institution might face when trying to comply with the requirements, the appropriate timeframe for implementation, and costs and burden. Staff has considered all the comments in developing the proposed rule and has addressed in the preamble the various concerns raised.

Commenters identified as one of the most significant challenges to complying with the proposed requirements the collection of information necessary to determine deposit insurance for deposit accounts that are insured on a "pass-through" basis. Some commenters remarked that IDIs would have significant legal or practical impediments to obtaining this information, while one commenter doubted the FDIC's statutory authority to require an IDI to maintain identifying information for the principal owners of brokered deposits in the IDI's own records.

Commenters gave a range between two years and four years for implementation of the proposed requirements, and most commenters endorsed a phased approach to implementation. Many commenters expected that significant resources would be needed to implement the deposit insurance determination capabilities contemplated by the proposals. Commenters did not, however, estimate how much compliance would cost or how burdensome compliance would be because the proposal was too nascent for comment on cost/benefit and burden estimates.

Several commenters recommended that the FDIC be flexible in its approach to the examination and testing of a covered bank's compliance with the proposed requirements and suggested that the FDIC should assess each covered IDI on an individual basis and grant accommodations where application of the proposed requirements would be impracticable. One commenter expressed the need for the FDIC to provide clear direction on the timing, requirements, parameters, and expectations of testing and reporting.

A commenter was concerned that in the future, the FDIC might extend the recordkeeping requirements to IDIs currently subject to section 360.9 of the FDIC's regulations. Other commenters objected to the proposal that IDIs be required to disclose the insured and uninsured amounts of deposit accounts to their customers on the grounds that this would be impracticable and any benefit would be questionable and dwarfed by the cost and effort required. Another commenter argued that requiring such disclosure might place community banks at a competitive disadvantage if they were unable to provide comparable information to their depositors.

Out of concern for the needs of many depositors to have immediate access to their funds, the ANPR also solicited comments on the kinds of deposit accounts for which deposit insurance could be determined on closing night and which kinds would need to have a determination made at a later date. Commenters generally agreed that individual, joint, and business accounts could

be designated for closing night deposit insurance determinations, and that these kinds of accounts would represent a substantial subset of deposit accounts. One commenter recommended that closing night deposit insurance determinations be limited to transaction, savings, and money market accounts where clients are accustomed to immediate liquidity, such as brokered MMDAs, payable-on-death accounts, and prepaid cards such as payroll cards and General Purpose Reloadable cards. Most of the commenters stated that closing night deposit insurance determinations should not be necessary for formal trust accounts, brokered deposits, time deposits, foreign deposits, and prepaid cards and other omnibus accounts entitled to pass-through deposit insurance coverage where immediate liquidity should be less of a concern.

### *3. The Proposed Rule*

Presently, 36 IDIs would be covered institutions under the proposed rule. Staff believes that the two million deposit account threshold is appropriate and seeks comment on whether it should be adjusted. Whether an insured depository institution meets this threshold would be determined by reference to that institution's Call Reports. If it reported two million or more deposit accounts for the two consecutive quarters preceding the effective date of the final rule, or for two consecutive quarters thereafter, it would be a covered institution.

Because a covered institution would need to ensure that it has all of the information about its deposit owners that is needed to calculate the amount of deposit insurance available for each of a depositor's accounts, it may need to collect additional information in connection with certain types of accounts and maintain that information in its deposit account recordkeeping system. Staff recognizes that covered institutions may face real impediments to collecting the required information for certain types of accounts. For example, obtaining information needed to calculate the amount of deposit insurance available on brokered deposits or trust accounts may in

some cases be impracticable. Therefore, the proposed rule provides means for a covered institution to obtain relief from the recordkeeping requirements under those circumstances.

A covered institution would also need to develop the capability for its IT system to calculate deposit insurance coverage for each deposit account based on the ownership right and capacity in which the deposit is held. The FDIC would use the covered institution's IT system to facilitate the deposit insurance determination should the covered institution fail. Within 24 hours after a covered institution's failure, the IT system would need to produce a record reflecting the amount of deposit insurance available for each of a depositor's accounts and debit the uninsured amount from deposit accounts with a balance in excess of the deposit insurance coverage limit.

The proposed rule would set a two year timeframe for covered institutions to ensure that they have the deposit ownership information needed and the IT systems capabilities implemented to meet the proposed rule's requirements. This timeframe could be accelerated if a covered institution were to receive a CAMELS rating of 3, 4, or 5; become undercapitalized, as defined in the prompt corrective action provisions of 12 CFR Part 325; or experience a significant deterioration of capital or significant funding difficulties or liquidity stress.

The proposed rule also provides a process to request relief from certain aspects of its requirements. First, a covered institution could apply for an exemption from the rule if it will not take any deposits from an account holder which, when aggregated across all ownership rights and capacities, would exceed the SMDIA.<sup>2</sup> At this time, staff expects that one covered institution may be eligible for this exemption. Second, a covered institution could apply to the FDIC for extension of the two-year implementation time frame if it has been unable to collect depositor information or complete development of its IT system's capabilities within that time

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<sup>2</sup> The "standard maximum deposit insurance amount," or "SMDIA," is defined in section 11(a)(1)(F) of the FDI Act, as well as in the FDIC's regulations, and is currently \$250,000.

frame. Staff expects that these applications would be submitted by covered institutions within the first two years after the effective date. Third, a covered institution could apply for an exception from the proposed rule's recordkeeping requirements for certain accounts if it cannot obtain the information needed from an account holder to calculate deposit insurance coverage for a particular account or type of account. Fourth, to the extent that a covered institution complies with the proposed rule's requirements, it could apply for a release from the provisional hold and standard data format requirements set forth in 12 CFR 360.9. Finally, a covered institution could apply for a release from the proposed rule if it were to report fewer than two million deposit accounts on its Call Report for three consecutive quarters after the effective date.

The FDIC would determine, in its sole discretion, whether a covered institution's application for relief should be granted. If an application for exception or extension were granted, the covered institution would still need to ensure that its IT system can, in the event of its failure, impose a persistent hold on all deposit accounts that the application concerns, generate a report that the FDIC could use in its efforts to obtain missing information from account holders, and perform successive iterations of the deposit insurance calculation process. A covered institution would also need to disclose to each holder of an account that is the subject of a granted request for exception that, if the covered institution were to fail, access to funds in one or more accounts may be delayed and items might be returned unpaid.

The proposed rule sets forth a two part approach for compliance testing. Under the first part, a covered institution would certify compliance annually by submitting an attestation letter signed by its board of directors along with a summary deposit insurance coverage report. The attestation letter would confirm successful testing of the IT system's ability to accurately determine deposit insurance coverage, and the summary deposit insurance coverage report would

list key metrics for deposit insurance risk to the FDIC and coverage available to a covered institution's depositors. Under the second part, the FDIC would conduct periodic on-site inspection and testing of a covered institution's IT system beginning two years after the effective date. Staff anticipates that after a covered institution's IT system demonstrates the capability to accurately calculate deposit insurance coverage, on-site inspection and testing would occur less frequently than annually. More frequent testing would be prompted by a material change to the covered institution's IT system, deposit-taking operations, or financial condition. Staff will provide guidance and outreach to covered institutions to facilitate their implementation and testing efforts.

Any violation of the requirements set forth in the proposed rule would be grounds for enforcement action pursuant to section 8 of the FDI Act. The appropriate federal banking agency, or the FDIC through exercise of its back-up enforcement authority, could compel compliance through enforcement action, such as a cease-and-desist order or an order for a civil money penalty. The proposed rule would provide a safe harbor from an enforcement action during the pendency of a covered institution's application for extension, exception, exemption or release because an enforcement action for noncompliance during that time would be unlikely to promote the covered institution's level of compliance or improve the FDIC's preparedness for the covered institution's failure.

## **CONCLUSION**

Staff recommends that the Board of Directors approve the proposed rule and authorize publication of the attached Federal Register notice.<sup>3</sup>

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<sup>3</sup> See Attachment A for model resolution and Attachment B for proposed Federal Register notice.

## **Staff Contacts**

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## **ATTACHMENTS**

A – Resolution

B – Notice of Proposed Rulemaking for Publication in the *Federal Register*