PART 1201—PRACTICES AND PROCEDURES

The MSPB has determined that this is not a significant regulatory action under E.O. 12866. Therefore, no regulatory impact analysis is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). As discussed above, the 2015 Act does not require agencies to first publish a proposed rule when adjusting CMPs within their jurisdiction. Thus, the RFA does not apply to this final rule.

D. Paperwork Reduction Act

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. Chapter 35).

E. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq.), the Office of Information and Regulatory Affairs designated this rule as not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

For the reasons set forth above, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

§ 1201.126 [Amended]

2. Section 1201.126 is amended in paragraph (a) by removing “$1,093” and adding in its place “$1,112.”

Jennifer Everling,
Acting Clerk of the Board.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360
RIN 3064–AF09

Securitization Safe Harbor Rule

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending its securitization safe harbor rule, which relates to the treatment of financial assets transferred in connection with a securitization transaction, in order to eliminate a requirement that the securitization documents require compliance with Regulation AB of the Securities and Exchange Commission in circumstances where Regulation AB by its terms would not apply to the issuance of obligations backed by such financial assets.


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SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objective of this final rule (final rule) is to remove an unnecessary barrier to securitization transactions, in particular the securitization of residential mortgages, without adverse effects on the safety and soundness of insured depository institutions (IDIs).

The FDIC is revising the Securitization Safe Harbor Rule by removing a disclosure requirement that was established by the Securitization Safe Harbor Rule when it was amended and restated in 2010. As used in this final rule, “Securitization Safe Harbor Rule” refers to the FDIC’s securitization safe harbor rule titled “Treatment of financial assets transferred in connection with a securitization or participation” and codified at 12 CFR 360.6.

The Securitization Safe Harbor Rule addresses circumstances that may arise if the FDIC is appointed receiver or conservator for an IDI that has sponsored one or more securitizations or other securitizations that could pose risks to IDIs. In the ensuing years, a number of other regulatory changes have been implemented that have also contributed to the same objective. As a result, it is no longer clear that compliance with the public disclosure requirements of Regulation AB in a private placement or in an issuance not otherwise required to be registered is needed to achieve the same objective.

II. Background

The Securitization Safe Harbor Rule, which the Securitization Safe Harbor Rule amended and restated, was adopted in 2000. The Securitization Safe Harbor Rule also addresses transfers of assets in connection with participation transactions. Since the revision one of the sets of conditions established by the Securitization Safe Harbor Rule, the Rule provides that, depending on which set of conditions is satisfied, either (i) in the exercise of its authority to repudiate or disclaim contracts, the FDIC shall not reclaim, recover or recharacterize as property of the institution or receivership the financial assets transferred as part of the securitization transaction, or (ii) if the FDIC repudiates the securitization agreement pursuant to which financial assets were transferred and does not pay damages within a specified period, or if the FDIC is in monetary default under a securitization for a specified period due to its failure to pay or apply collections received by it under the securitization documents, certain remedies will be available to investors on an expedited basis.

The FDIC is removing the requirement of the Securitization Safe Harbor Rule that the documents governing a securitization transaction require compliance with Regulation AB of the Securities and Exchange Commission, 17 CFR part 229, subpart 229.1100 (Regulation AB) in circumstances where, under the terms of Regulation AB itself, Regulation AB is not applicable to the transaction. As discussed below, Regulation AB imposes significant asset-level disclosure requirements in connection with registered securitization issuances. While the SEC has not applied the Regulation AB disclosure requirements to private placement transactions, the Securitization Safe Harbor Rule has required (except for certain grandfathered transactions) that these disclosures be required as a condition for eligibility for the Securitization Safe Harbor Rule’s benefits. The net effect appears to have been a disincentive for IDIs to sponsor securitizations of residential mortgages that are compliant with the Rule.

The FDIC’s rationale for establishing the disclosure requirements in 2010 was to reduce the likelihood of structurally opaque and potentially risky mortgage securitizations or other securitizations that could pose risks to IDIs. In the ensuing years, a number of other regulatory changes have been included in the Rule that does not address participations, this release does not include further reference to participations.
The policy objective of preventing a buildup of opaque and potentially risky securitizations such as occurred during the pre-crisis years, particularly where the imposition of such a requirement may serve to restrict overall liquidity.

II. Background

The Securitization Safe Harbor Rule sets forth criteria under which, in its capacity as receiver or conservator of an IDI, the FDIC will not, in the exercise of its authority to repudiate contracts, recover or reclaim financial assets transferred in connection with securitization transactions. Asset transfers that, under the Securitization Safe Harbor Rule, are not subject to recovery or reclamation through the exercise of the FDIC's repudiation authority include those that pertain to certain grandfathered transactions, such as, for example, asset transfers made on or prior to December 31, 2010, that satisfied the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule as then in effect) for sale accounting treatment under generally accepted accounting principles (GAAP) in effect for reporting periods prior to November 15, 2009, and that satisfied certain other requirements. In addition, the Securitization Safe Harbor Rule provides that asset transfers that are not grandfathered, but that satisfy the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009, and that pertain to a securitization transaction that satisfies all other conditions of the Securitization Safe Harbor Rule (such asset transfers, together with grandfathered asset transfers, are referred to collectively as Safe Harbor Transfers) will not be subject to FDIC recovery or reclamation actions through the exercise of the FDIC's repudiation authority. For any securitization transaction in respect of which transfers of financial assets do not qualify as Safe Harbor Transfers but which transaction satisfies all of its other requirements, the Securitization Safe Harbor Rule provides that, in the event the FDIC as receiver or conservator remains in monetary default for a specified period under a securitization due to its failure to pay or apply collections, or repudiates the securitization asset transfer agreement and does not pay damages within a specified period, certain remedies can be exercised by investors on an expedited basis.

In adopting the amended and restated Securitization Safe Harbor Rule in 2010, the FDIC stated that the conditions of the Rule were designed to "provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the DIF from opaque securitization structures and the poorly underwritten loans that led to onset of the financial crisis." 3 As part of its effort to achieve this goal, the FDIC included paragraph (b)(2) in the Securitization Safe Harbor Rule, which imposes extensive disclosure requirements relating to securitizations. These requirements include paragraph (b)(2)(i)(A) which, prior to the effectiveness of this final rule, mandates that the documents governing a securitization require disclosure of information as to the securitized financial assets on a financial asset or pool level and on a security level that, at a minimum, complies with the requirements of Regulation AB, whether or not the transaction is a registered issuance otherwise subject to Regulation AB.

The SEC first adopted Regulation AB in 2004 as a new, principles-based set of disclosure items specifically tailored to asset-backed securities. The regulation was intended to form the basis of disclosure for both Securities Act registration statements and Exchange Act reports relating to asset-backed securities. In April 2010, the SEC proposed significant revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities. Among such revisions were the adoption of specified asset-level disclosures for particular asset classes and the extension of the Regulation AB disclosure requirements to exempt offerings and exempt resale transactions for asset-backed securities (ABS). As adopted in 2014, Regulation AB retained the majority of the proposed asset-specific disclosure requirements but did not apply the disclosure requirements to exempt offerings. The disclosure requirements of Regulation AB vary, depending on the type of securitization structure. The most extensive disclosure requirements relate to residential mortgage-backed securitizations (RMBS). These requirements became effective in November 2016.

While the Securitization Safe Harbor Rule requirement for compliance with Regulation AB applies to all securitizations, the preamble to the amended and restated Securitization Safe Harbor Rule in 2010 makes clear that the FDIC was focused mostly on RMBS. The preamble states that "securitization as a viable liquidity tool in mortgage finance will not return without greater transparency and clarity because investors have experienced the difficulties provided by the existing model of securitization. However, greater transparency is not solely for investors, but will serve to more closely tie the origination of loans to their long-term performance by requiring disclosures of performance." 4 In a different paragraph, the preamble states that "[t]he evident defects in many subprime and other mortgages originated and sold into securitizations requires attention by the FDIC to fulfill its responsibilities as deposit insurer . . . . The defects and misalignment of incentives in the securitization process for residential mortgages were a significant contributor to the erosion of underwriting standards throughout the mortgage finance system." 5

When the FDIC adopted the Securitization Safe Harbor Rule in 2010, none of the regulatory reforms listed below had been adopted. In the absence of the protection afforded by those and other regulations adopted since 2010, the FDIC believed it was appropriate to include a disclosure that would inhibit the proliferation of risky securitizations, and thus required that, as a condition to safe harbor protection, privately placed transactions comply with Regulation AB disclosure requirements whether or not the SEC applied regulation to the transactions. Since the adoption of the Securitization Safe Harbor Rule, there have been numerous regulatory developments that have the effect of limiting or precluding poorly underwritten, risky securitizations, particularly securitizations of residential mortgages. 6

4 Id. at 60291.
5 Id. at 60289.
6 These include, among others, (i) liquidity regulations adopted in 2014 by the FDIC, the Board of Governors of the Federal Reserve System (FRB) and the Office of Comptroller of the Currency (OCC) (12 CFR part 329, 12 CFR part 249, 12 CFR part 50); (ii) capital rules adopted by the FDIC, the FRB and the OCC that became effective in 2015 (12 CFR part 324, 12 CFR part 271, 12 CFR part 3); (iii) the ability to repudiate rules adopted by the Bureau of Consumer Financial Protection (CFPB) pursuant to section 129c of the Truth in Lending Act (TILA) (15 U.S.C. 1639c); (iv) the Integrated Mortgage Disclosures Rules adopted by the CFPB in 2013 pursuant to the Truth in Lending Act, the Real Estate Settlement Procedures Act (RESPA), and sections 102(f), 1098, and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act); (v) the loan originator compensation regulation adopted in 2016 by the CFPB pursuant to sections 129B and 129C of TILA (15 U.S.C. 1639B & 1639C); (vi) the appraisal rule adopted by the FDIC and other regulators in 2013 pursuant to

Continued
The other disclosure requirements of paragraph (b)(2) of the Securitization Safe Harbor Rule are unaffected by the final rule and continue to strongly promote the Rule’s goal of preventingopaque and poorlyunderwritten securitizations. Among these are § 360.6(b)(2)(ii)(A), which is applicable to RMBS and requires that prior to issuance of the RMBS obligations, the sponsor must disclose loan level information about the underlying mortgages including, but not limited to, loan type, loan structure, interest rate, maturity and location of property; § 360.6(b)(2)(ii)(B), which requires that the securitization documents mandate that on or prior to issuance of obligations there is disclosure of numerous matters, including the credit and payment performance of the obligations and the structure of the securitization, the capital or tranche structure of the securitization, priority of payments and subordination features, representations and warranties made with respect to the financial assets, the remedies and time permitted for breach of the representations and warranties, liquidity facilities and any credit enhancements permitted by the Securitization Safe Harbor Rule, any waterfall triggers or priority of payment reversal features, and policies governing delinquencies, servicer advances loss mitigation and write-offs of financial assets; § 360.6(b)(2)(ii)(D), which requires, in connection with the issuance of the securitization obligations, that the documents require disclosure of the nature and amount of compensation paid to originators, the sponsor, rating agencies, and certain other parties, and the extent to which any risk of loss on the underlying assets is retained by any of them; § 360.6(b)(2)(ii)(B), which requires that prior to issuance of the securitization obligations in an RMBS transaction, the sponsors affirm compliance with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages are underwritten at the fully indexed rate relying on documented income, and that sponsors disclose a third party due diligence report on compliance with the representations and warranties made with respect to the financial assets; Section 360.6(b)(ii)(C), which requires that the documents governing RMBS transactions require that prior to the issuance of obligations (and while the obligations are outstanding), servicers disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool; and § 360.6(b)(ii)(C), which requires ongoing provision of information relating to the credit performance of the financial assets. Other provisions of the Securitization Safe Harbor Rule limit the capital structure of RMBS to six credit tranches; prohibit most forms of external credit enhancement of obligations issued in an RMBS; in the case of RMBS, require that servicing and other agreements provide servicers with authority, subject to oversight, to mitigate losses on the financial assets and to modify assets and take other action to maximize the value and minimize losses on the securitized mortgage loans, and in general require that servicers take action to mitigate losses not later than 90 days after an asset first becomes delinquent; require that RMBS documents include incentives for servicing, including loan restructuring and loss mitigation activities that maximize the net present value of the financial assets; in the case of RMBS, require that the securitization documents mandate that fees and other compensation to rating agencies are payable over the five-year period after first issuance of the securitization obligations based on the performance of surveillance services, with no more than 60 percent of the total estimated compensation due at closing; and in the case of RMBS, require that the documents require the sponsor to establish a reserve fund, for one year, equal to five percent of cash proceeds of the securitization payable to the sponsor, to cover repurchases of financial assets required due to the breach of representations and warranties.

As noted in the NPR (as defined below) and discussed in more detail under III. Discussion of Comments, FDIC staff has been told that potential IDI sponsors of RMBS have found that it is difficult to provide certain information required by Regulation AB, either because the information is not readily available to them or because there is uncertainty as to the information requested to be disclosed and, thus, uncertainty as to whether the disclosure would be deemed accurate. FDIC staff was also advised that due to the provision of § 360.6(b)(2)(ii)(A) that requires that the securitization documents require compliance with Regulation AB in private transactions, private offerings of RMBS obligations that are compliant with the Securitization Safe Harbor Rule are similarly challenging for sponsors, and that the net effect has been to discourage IDIs from participating in the securitization of residential mortgages, apart from selling the mortgages to, or with a guarantee from, the government-sponsored housing enterprises.

On August 22, 2019, the FDIC published in the Federal Register a notice of proposed rulemaking (NPR) in which it proposed to amend § 360.6(b)(2)(ii)(A) by removing, in circumstances where under the terms of Regulation AB itself, Regulation AB is not applicable to the transaction, the requirement that the documents governing securitization transactions require disclosure of information as to the securitized financial assets on a financial asset or pool level and on a security level that, at a minimum, complies with Regulation AB. As amended, such disclosure is required under § 360.6(b)(2)(ii)(A) only for an issuance of obligations that, pursuant to Regulation AB itself, is subject to Regulation AB.

The comment period under the NPR ended on October 21, 2019. The FDIC received ten comment letters in total: Five from trade organizations; one from an IDI; two from individuals; one from a financial reform advocacy group; and one from a financial market public interest group. These comment letters are available on the FDIC’s website. The FDIC considered all of the comments it received when developing the final rule, which is unchanged from the rule proposed in the NPR.

III. Discussion of Comments

A majority of the comment letters support the amendment to the Securitization Safe Harbor Rule. All of the trade group and IDI letters support removing the requirement to impose Regulation AB compliance on transactions where Regulation AB is not otherwise applicable. This requirement was characterized by the letters as “an insurmountable obstacle”, “an insurmountable barrier”, “a regulatory impediment”, a “disincentive” to IDI sponsorship of RMBS, and a “roadblock” to increased
RMBS issuance by IDIs. In addition, three of the letters observed that aligning the Regulation AB disclosure requirement contained in the Securitization Safe Harbor Rule with the SEC rule as to the scope of transactions to which Regulation AB disclosure applies would level the playing field for sponsorship of securitizations between IDIs, which prior to the final rule are required by the Securitization Safe Harbor Rule to comply with Regulation AB in private transactions, and securitization sponsors not subject to the Securitization Safe Harbor Rule, which are not required to comply with Regulation AB in connection with private transactions.7 Indeed, the lack of alignment of the disclosure rules governing private IDI securitization sponsors and non-IDI securitization sponsors was viewed as so significant that one trade organization indicated that although its investor members would prefer obtaining Regulation AB disclosure in private transactions, the investor members generally joined with its other members in supporting the amendment “based on the principle that the regulations applicable to industry participants should be consistent.”

Several of the letters expressed the view that removal of this Regulation AB requirement would help promote an increase in credit available to the mortgage market. Some of the letters also maintained that this amendment to the Securitization Safe Harbor Rule would increase liquidity for mortgage and other asset classes and lower costs and improve choices for consumers.

One of the letters stated that the proposal was consistent with principles regarding the need for increased private securitization set forth in a Treasury Department September 2019 report on capital markets8 and in a separate Treasury Department paper on housing finance reform.9 This letter also stated that the proposal would provide benefits to the economy by meansing the mortgage market off of its significant dependency on government backed securitization programs and thus reduce the risk to taxpayers.

The letters from the individuals, the financial reform advocacy group and the public interest group were critical of the rule change. One of the letters asserted that an expected result of the change, an increase in RMBS, was not an appropriate goal since, according to the letters, RMBS was a primary cause of the 2008 financial crisis.10 The letter stated the FDIC should include a finding that adequate safeguards protecting investors and the financial system remain in place, and demonstrate a dire shortage of residential mortgage credit sufficient to justify the need for the amendment. Another letter argued that while the NPR identified certain risks that could arise from the amendment to the Securitization Safe Harbor Rule, it did not adequately explain why these risks (reduced information flow to investors, a less efficient allocation of credit, increased risk of potential losses to investors, and, if private placements increased and became more risky, an increase in vulnerability of the mortgage market to a period of financial stress) were minimized by reference to post-financial crisis regulatory changes that were not specifically identified in the NPR. This letter also criticized the NPR for not explaining how such regulatory changes would prevent the amendment to the Securitization Safe Harbor Rule from leading to the conditions that led to the financial crisis.

The FDIC did note that a possible effect of removing an unnecessary barrier to IDI sponsorship of RMBS was an increase in RMBS issuance, but it does not follow that the FDIC is attempting with the final rule to cure a deficiency of mortgage credit. The FDIC believes that the reasons articulated in support of the rule are sound, and do not require a further demonstration of a shortage of mortgage credit. In addition, as for the claim that the NPR did not address the risks identified in the NPR, such as a possible increase in the vulnerability of the mortgage market to a period of financial stress in the event that the amendment results in an increase in risky, privately placed securitizations, the NPR explained that “[i]n this respect, a significant part of the problems experienced with RMBS during the crisis were attributable to the proliferation of subprime and alternative mortgages as underlying assets for those RMBS. The FDIC believes that a number of post-crisis regulatory changes make it unlikely that substantial growth of similar types of RMBS would occur again.” 11 This analysis applies equally to the other potential risks cited in the preceding paragraph that were noted in the NPR.

One of these letters also asserted that the proposal did not address the danger that the amendment could increase activity in other potentially risky asset classes and did not adequately quantify the effects of the proposed rule. This letter also stated that the FDIC’s suggestion that the amendment would increase the willingness of IDIs to sponsor securitizations was speculative, that any reduction of burden is irrelevant because it is not the FDIC’s mission to reduce burden, and that the likely impact of the proposal included in the NPR must be evaluated in light of the other current deregulatory efforts.12

While the FDIC appreciates the concerns as to the effect of the final rule expressed in these letters, it does not believe that the concerns are justified. In adopting the final rule, the FDIC evaluated the numerous other significant disclosure requirements identified in II. Background and has concluded that the Securitization Safe Harbor Rule continues to require robust and adequate disclosure to investors. As noted in the NPR, a significant part of the problems experienced with RMBS during the financial crisis was attributable to the proliferation of subprime and alternative mortgages (sometimes referred to as “nontraditional mortgages”). As further noted in the NPR, a major part of the problems with RMBS that surfaced during the financial crisis arose from poorly underwritten loans and a significant portion of these problems was attributable to relaxed lending standards and the making of mortgages to persons who were unable to repay the loans. As also noted in the FDIC study referenced in one of the letters,13 the originate to distribute model, under which sponsoring institutions retained limited or no exposure to the mortgages that they sold to securitization vehicles, was a major source of the proliferation of poorly underwritten mortgage loans and risky RMBS issuances. The

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7 As noted below, National Credit Union Administration Rules also require compliance with Regulation AB in private transactions.
10 One of the letters cited two chapters of an FDIC publication (FDIC, Crisis and Response: An FDIC History, 2008–2013, Chapters 1 and 4 (2017) (avail. at https://www.fdic.gov/bank/historical/crisis3/)) as support for the view that excessive RMBS issuance was a leading cause of the 2008 financial crisis. In fact, while noting that increased RMBS issuance was one of several causes of the financial crisis, the applicable parts of the chapters focused on subprime and other high-risk alternative type mortgages, as well as relaxed lending standards, as significant contributors to the problems it discussed.
11 84 FR 43732, 43735.
12 A letter also stated the amendment would result in an inconsistency with regulations of the National Credit Union Administration (NCUA), which adopted a securitization safe harbor in 2017 which includes the Regulation AB requirement. The FDIC was pleased that the NCUA adopted a securitization safe harbor rule that was consistent with the Securitization Safe Harbor Rule, and notes, in response to this letter, that the NCUA is free to maintain that consistency, if it chooses to do so, by adopting an amendment similar to the final rule.
13 See footnote 10, supra.
suggested that the amendment to the Securitization Safe Harbor Rule was intended to enhance proliferation of RMBS. It is important to note that by removing a regulatory requirement that poses an obstacle to IDI access to a segment of the capital markets, and acknowledging that such removal can be expected to increase RMBS sponsorship (and possibly other asset class sponsorship) by IDIs, the FDIC should not be interpreted as enunciating a policy goal to increase such IDI participation. The amendment should be viewed as clearing or leveling the field from unnecessary regulatory interference, rather than as an action whose goal is the increase of such activity.\textsuperscript{15} If such an increase occurs, it will occur due to individual decisions of market participants, and all such issuances will be subject to the suite of post-2010 regulations mentioned in II. Background. The FDIC believes that if such market decisions result in increased RMBS activity, the remaining disclosure requirements of the Securitization Safe Harbor Rule together with the other requirements of the Rule, when coupled with the other post-crisis regulatory developments, will promote sustainable, prudent securitization sponsorship by IDIs to at least the same extent as such goals were promoted by the Securitization Safe Harbor Rule when it was adopted in 2010.

As noted, one commenter asserted that the analysis that the amendment will increase private RMBS is speculative. The FDIC notes that the NPR did not predict an increase in RMBS. The NPR stated that if market participants’ perceptions are correct that the rule could increase insured banks’ willingness to participate in private RMBS activity, then the proposed rule “could (emphasis added) result in an increase in the dollar volume of privately issued RMBS . . .”\textsuperscript{16} One of the comment letters also asserted that the statement that some associated increase in U.S. economic input would be expected to accompany an increased volume of mortgage credit is a “bold assertion apparently based on speculation for which the FDIC offers no support”. In fact, the NPR states that the possibility of increased economic activity is, in part, because “the imputed value of credit services banks provides is a component of measured GDP. The purchase of a new home also may be accompanied by the purchase of other household goods and services that contribute to an increase in overall economic activity.” 84 FR 43732, 43735. This comment letter also states that the FDIC must consider the impact of the proposal “in light of the deregulatory environment that currently prevails.” As noted in the NPR and as discussed in this Supplementary Information, an array of important regulatory safeguards now exist that should minimize the likelihood of a recurrence of a substantial volume of risky securitizations backed by poorly underwritten mortgages.

The comment letters that criticized the amendment also asserted that if the FDIC adopts the amendment to the Securitization Safe Harbor Rule, the FDIC will be acting contrary to its mandate to protect the Deposit Insurance Fund and facilitation of insured institutions’ prudent participation in the private securitization markets.”

IV. The Final Rule

The final rule amends §360.6(b)(2)(i)(A) of the Securitization Safe Harbor Rule by removing the requirement that the documents governing securitization transactions
require disclosure of information as to the securitized financial assets on a financial asset or pool level and on a security level that, at a minimum, complies with Regulation AB in circumstances where under the terms of Regulation AB itself, Regulation AB is not applicable to the transaction. As amended, such disclosure is required under §360.6(b)(2)(i)(A) only in the case of an issuance of obligations that is subject to Regulation AB. 17

V. Expected Effects

A. Effects of the Final Rule

The final rule could increase the willingness of IDIs to sponsor the issuance of ABS that are exempt from registration with the SEC. Feedback from market participants suggests that the final rule may be most likely to affect incentives to issue private RMBS, since the disclosure requirements of Regulation AB are most extensive for residential mortgages. If these market perceptions are correct, the final rule could result in an increase in the dollar volume of privately issued RMBS, presumably increasing the total flow of credit available to finance residential mortgages in the United States. For context, total issuance of RMBS secured by 1–4 family residential mortgages was approximately $1.3 trillion in 2018. 18

About $1.2 trillion of this total were agency issuances, issued through the government sponsored housing enterprises, or GSEs: The Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae). About $100 billion of RMBS were non-agency issuances, which includes both securities registered with the SEC (public issuances), if any, and private issuances. This level of private-label activity is low compared to pre-financial crisis levels. 19 The FDIC does not currently have a basis for quantifying the amount of any increase in RMBS issuance by IDIs that might result from the final rule, because additional factors affect the demand and supply for private-label RMBS. For example, the current level of private-label RMBS issuance volume may suggest that demand for non-agency RMBS is still weak in the aftermath of the financial crisis. In addition, the scope of participation of non-IDIs sponsors of RMBS could affect the volume of RMBS sponsorship activities for IDIs, particularly if non-IDIs institutions not currently involved in sponsoring private-label RMBS begin to do so.

The FDIC cannot definitively identify the set of FDIC-insured banks that have sponsored private-label RMBS. Moreover, for any bank that has sponsored private RMBS, some may have chosen to make the Regulation AB disclosures necessary for the safe harbor, and some may have chosen not to make such disclosures, but instead may have chosen to disclose to investors the risks associated with the exercise of the FDIC’s receivership authorities. Information about such disclosure choices made by private RMBS issuers also is not readily available to the FDIC. Based on the information available to it, the FDIC believes that the number of IDIs directly affected by the final rule is extremely small. The FDIC identified fewer than ten IDIs sponsors of private placements of securitizations of asset classes subject to Regulation AB in 2017 and 2018.

Increased issuance sponsored by insured banks of private RMBS, to the extent it is not offset by corresponding reductions in the amount of mortgages they hold in portfolio, would result in an increase in the supply of credit available to fund residential mortgages. An increase in the supply of mortgage credit would be expected to benefit borrowers by increasing mortgage availability and decreasing mortgage costs. While problematic or predatory mortgage practices can harm borrowers, a significant body of new regulations exists to prevent such practices, as described in II. Background. Given this, it is more likely that any increase in mortgage credit resulting from the final rule would be beneficial to borrowers.

Some associated increase in measured U.S. economic output would be expected to accompany an increased volume of mortgage credit. This is in part because the imputed value of the credit services that banks provide is a component of measured GDP. The purchase of a new home also may be accompanied by the purchase of other household goods and services that contribute to an increase in overall economic activity.

Institutions affected by the final rule will incur additional compliance costs as a result of not having to make the otherwise required disclosures. Based on the methodology used in its most recent Information Collection Resubmission request for part 360.6 of the FDIC regulations, the FDIC estimates that the reduction in compliance costs associated with the final rule for the IDIs identified as having been involved in private ABS issuances in 2017 and 2018 would have been about $4.9 million annually.

To the extent private-label ABS is being issued now in conformance with the disclosure requirements that are being removed under the final rule, a potential cost of the final rule is that the information available to investors about the credit quality of the assets underlying these ABS could be reduced. As a general matter, a reduction in information available to investors can result in a less efficient allocation of credit and increased risk of potential losses to investors, including banks. A related potential cost is that if privately placed securitization products were to become more widespread and risky as a result of the final rule, the vulnerability of the mortgage market to a period of financial stress could increase. In this respect, a significant part of the problems experienced with RMBS during the crisis were attributable to the proliferation of subprime and so-called alternative mortgages as underlying assets for those RMBS. As previously discussed, the FDIC believes that a number of post-crisis regulatory changes make it unlikely that substantial growth of similar types of RMBS would occur again.

B. Alternatives Considered

The FDIC considered alternatives to the final rule, and has concluded that the amendment set forth in the final rule represents the most appropriate option for achieving the policy goal of removing an unnecessary barrier to sponsorship of securitizations by IDIs. One alternative considered was to try to isolate particular disclosure fields in Regulation AB that posed obstacles to compliance and to remove those fields. However, the FDIC determined that it was not the proper agency to edit and rewrite a securities law disclosure regulation. Such an exercise was also determined to be unnecessary based on the FDIC’s analysis that other provisions of the Securitization Safe Harbor Rule, together with regulatory initiatives adopted since the Rule was adopted in 2010, made the continued application of paragraph (b)(2)(i)(A) to privately placed securitization transactions unnecessary for so long as Regulation AB is not otherwise applicable to those transactions. In this connection, the FDIC notes that in the section titled “V.
The SBA defines a small banking organization as having $600 million or less in assets.

...the FDIC revises certain provisions of the Securitization Safe Harbor Rule, which relates to the treatment of financial assets transferred in connection with a securitization or participation transaction, in order to eliminate a requirement that the securitization documents require compliance with Regulation AB of the Securities and Exchange Commission in circumstances where Regulation AB by its terms would not apply to the issuance of obligations backed by such financial assets.

The FDIC has determined that the final rule will affect an existing collection of information (3064–0177). The information collection requirements...
import markets. The OMB has determined that this final rule is a major rule for purposes of the Congressional Review Act. As required by the Congressional Review Act, the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in the preamble to proposed and final rules. The FDIC has sought to present the final rule in a simple and straightforward manner.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on IDIs, including small depository institutions, and customers of IDIs, as well as the effects of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The FDIC has determined that the final rule will not impose additional reporting, disclosure, or other requirements; therefore, the requirements of RCDRIA do not apply.


The FDIC has determined that the final rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental

List of Subjects in 12 CFR Part 360

Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

1. The authority citation for part 360 continues to read as follows:


2. In § 360.6, revise paragraph (b)(2)(i)(A) to read as follows:

§ 360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(b) * * * *(2) * * *(i) * * *

(A) In the case of an issuance of obligations that is subject to 17 CFR part 229, subpart 229.1100 (Regulation AB of the Securities and Exchange Commission (Regulation AB)), the documents shall require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the requirements of Regulation AB. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

* * * * * * Federal Deposit Insurance Corporation.

By order of the Board of Directors.