



October 2, 2014

TO: Board of Directors

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

Richard J. Osterman, Jr. 
Acting General Counsel
Legal Division

SUBJECT: Notice of Proposed Rulemaking Regarding the Retention of Records of a Covered Financial Company and of the FDIC as Receiver pursuant to the Dodd-Frank Act

RECOMMENDATION

It is recommended that the Board of Directors approve the publication in the *Federal Register* a proposed rule with a 60-day notice-and-comment period that would address a provision of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) that requires the establishment of a retention period for the retention of records of the FDIC in connection with its authorities for the orderly liquidation of a covered financial company under Title II of the Dodd-Frank Act as well as the records of a financial company that are inherited by the FDIC at the time of appointment as its receiver. The proposed rule would identify the factors the FDIC would use to determine which documentary material constitutes the records it would be required to retain and would set the minimum retention periods for those records.

DISCUSSION

Statutory requirement

Section 210(a)(16)(D) of the Dodd-Frank Act (12 U.S.C. §5390(a)(16)(D)) directs the FDIC to prescribe regulations and retention schedules for inherited records of a covered financial company and the records of the FDIC as its receiver. This statutory provision includes some parameters for the exercise of the FDIC's discretion as well as a definition of records. It provides as follows:

(D) RECORDKEEPING REQUIREMENT.—

(i) IN GENERAL.—The Corporation shall prescribe such regulations and establish such retention schedules as are necessary to maintain the documents and records of the Corporation generated in exercising the authorities of this title and the records of a covered financial company for which the Corporation is appointed receiver, with due regard for—

(I) the avoidance of duplicative record retention; and

(II) the expected evidentiary needs of the Corporation as receiver for a covered financial company and the public regarding the records of covered financial companies.

(ii) RETENTION OF RECORDS.—Unless otherwise required by applicable Federal law or court order, the Corporation may not, at any time, destroy any records that are subject to clause (i).

(iii) RECORDS DEFINED.—As used in this subparagraph, the terms “records” and “records of a covered financial company” mean any document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record generated or maintained by the covered financial company in the course of and necessary to its transaction of business.

Six year retention periods recommended

With respect to the records inherited from a covered financial company, the proposed rule would require retention for six years *from the date of appointment of the FDIC as receiver*, except that records that are ten years old or older as of the appointment date need not be retained

at all. Records generated or maintained by the FDIC in connection with the exercise of its Title II authorities are subject to a six-year retention requirement *measured from the date of the termination of the receivership*.

The proposed six-year retention schedules for the two different categories of records commence at different points but are based on similar rationales. In the case of inherited records generated or maintained by the failed financial company, the retention period of six years measured from the date of the appointment of the receiver is modeled after the Federal Deposit Insurance Act's ("FDIA") six-year minimum record retention period in 12 U.S.C.

§1821(d)(15)(D) for the records of a failed insured depository institution and its recently promulgated implementing regulation, 12 C.F.R. §360.11.¹ That regulation is more limited than this proposed rule because records of a failed insured depository institution are the sole focus of the applicable FDIA provision, and there is no mention in the FDIA provision of the records generated by the FDIC. Nevertheless, this proposed rule builds upon the concepts developed in the FDIA regulation, including the discretionary factors for determining which documentary material constitute records subject to the rule and the express exclusions from records.

For records generated or maintained by the FDIC in connection with the exercise of its Title II authorities, the proposed rule reflects the current practice of the FDIC that measures minimum retention periods for the receiver's records from the date of termination of the receivership. Currently, the FDIC's record retention policies require receivership records generated by FDIC staff to be maintained for various periods of time after the receivership termination date. These policies change from time to time and are currently being re-examined. Rather than attempting to set different retention periods for different types of receivership records, a six-year period from the Title II receivership termination date is proposed for all

¹ Promulgated on September 4, 2013. 78 Fed.Reg. 54373.

records. The six-year retention requirement applicable to records inherited from a failed insured depository institution has proven to be a reasonable and workable timeframe since the enactment of FIRREA.² That six-year period is measured from the time of the appointment of the receiver which is the termination of an insured depository institution as an operating entity. Thus, as with inherited records, the term of record retention is measured from the last date on which new applicable records can be generated.

The proposed rule expressly provides that the FDIC may establish policies and procedures for record retention that are consistent with the regulation. Such policies and procedures could establish longer retention periods for certain categories of records such as material that the FDIC may wish to retain for evidentiary or historical purposes. The FDIC has, in many cases, retained records for longer than the minimum retention period for these and other reasons.

Records “generated or maintained”

The proposed regulation would apply to records *generated or maintained* by the FDIC rather than solely those created by the FDIC. In the statutory provision there are two references to “generated” records. One of them is in 12 U.S.C. § 5390(a)(16)(D)(i), and it refers to the requirement that the FDIC prescribe regulations and establish retention schedules with regard to the records “...of the Corporation *generated* in exercising the authorities of this title...” The second use of the word “generated” with respect to records appears in 12 U.S.C. § 5390(a)(16)(D)(iii) and refers to the records of a covered financial company as those “...*generated or maintained* by the covered financial company in the course of or necessary to its transaction of business.” (Emphasis added). These two sentences can be read to create a

² 12 U.S.C. §1821(d)(15)(D) was added to the FDI Act by section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act in 1989.

different retention requirement between the records of the FDIC and the records of a covered financial company such that only the records in the possession of the covered financial company at the time of the appointment of the receiver, either generated or received by such covered financial company, and not records both received and in the possession of the Corporation as receiver need be maintained. Arguably, if the statute were interpreted to address only records “generated” by the FDIC, there would be no duty to retain relevant information obtained in the course of the FDIC’s exercise of its Title II authority, such as third party reports, letters or comments from the public, financial or other reports from subsidiaries or affiliates of the covered financial company or information obtained in discovery in litigation, among other documents. Staff believes, however, that the better reading is to apply the phrase “generated or maintained” to inherited records as well as to the FDIC’s Title II records and not to infer two different retention standards. This concept is consistent with the Federal Records Act which defines the records of federal agencies as “...documentary materials, regardless of physical form or characteristics, *made or received by* an agency of the United States Government ...in connection with the transaction of public business...”³ (Emphasis added.) Accordingly, the proposed rule applies the “generated or maintained” description to both inherited records and the records of the FDIC.

Discretionary approach to determination of records; general provisions

The proposed rule identifies discretionary factors to be applied by the receiver in deciding which documentary material must be retained. These factors include the degree to which the information is related to the business purpose of the covered financial company or of the FDIC’s Title II functions, whether it was generated or maintained in accordance with applicable recordkeeping policies and practices, and expected evidentiary need for the material.

³ 44 U.S.C. §3301.

Material expressly excluded from the record retention requirements include information that is duplicative or transitory in nature, as well as information concerning subsidiaries or affiliates of the failed company or of a bridge financial company that was not officially provided to the FDIC. There is an express provision in the proposed rule for compliance with court orders, litigation holds or internal policies and procedures that may require longer retention periods for some records.

CONCLUSION

When finalized, the proposed regulation will meet the statutory requirement that the FDIC promulgate a regulation and prescribe schedules for the retention of records relating to its orderly liquidation authorities under Title II of the Dodd-Frank Act. The proposed regulation builds upon, and is consistent with the recently adopted regulation addressing the retention of records of a failed insured depository institution under the FDIA.

Staff Contacts

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ATTACHMENTS

A – Resolution