MEMORANDUM TO:	Board of Directors Federal Deposit Insurance Corporation
FROM:	Maureen E. Sweeney Director, Division of Resolutions and Receiverships
DATE:	July 10, 2019
SUBJECT:	Final Rule to amend "Recordkeeping for Timely Deposit Insurance Determination"

RECOMMENDATION

Staff recommends that the FDIC's Board of Directors (the "Board") adopt and approve for publication in the *Federal Register* a final rule (the "final rule") to amend and restate 12 C.F.R. part 370, "Recordkeeping for Timely Deposit Insurance Determination" ("Part 370," or the "Rule"). The final rule would make certain substantive revisions to Part 370 to better align benefits and burden, clarify the Rule's requirements, and make technical corrections.

DISCUSSION

1. *Background*

The Board originally adopted Part 370 in 2016 to facilitate prompt payment of FDIC-insured deposits in the event that a large insured depository institution ("IDI") fails. Part 370 requires each IDI with two million or more deposit accounts (each a "covered institution" or "CI") to (1) configure its information technology ("IT") system to be capable of calculating the insured and uninsured amount in each deposit account by ownership right and capacity, for use by the FDIC in making deposit insurance determinations in the event of the institution's failure, and (2) maintain complete and accurate information needed by the FDIC to determine deposit insurance coverage with respect to each deposit account, except as otherwise provided.[1]

[1] 81 Fed. Reg. 87734 (Dec. 5, 2016).

On April 11, 2019, the FDIC published in the *Federal Register* a notice of proposed rulemaking ("NPR") seeking comment on proposed amendments to the Rule to better balance the benefits of the Rule with the burdens, provide limited relief where appropriate, and improve clarity ("proposed rule").[2] The FDIC proposed, among other things, to include an optional one-year extension of compliance upon notification to the FDIC; to provide clarification regarding the certification of compliance under § 370.10 and the effect of a change in law or a merger on a CI's compliance; to provide for voluntary compliance; to revise actions that must be taken under § 370.5(a) with respect to deposit accounts with transactional features that are insured on a pass-through basis; to amend the recordkeeping requirements set forth in § 370.4 for certain types of deposit relationships; and to revise the process for exceptions requested pursuant to § 370.8(b).

The NPR's comment period ended on May 13, 2019, and the FDIC received five comment letters in total: three comment letters from CIs, one joint comment letter from three trade associations, and one comment letter from a financial intermediary that functions as a deposit broker.

2. *The Final Rule*

A. Elective Extension of the Initial Compliance Date

CIs must implement the IT system and recordkeeping capabilities set forth in Part 370 before their compliance date, which is the date that is three years after the later of the effective date or the date on which an IDI becomes a CI.[3] Part 370 took effect on April 1, 2017, with a compliance date of April 1, 2020 for IDIs that became CIs on the effective date.[4] In the NPR, the FDIC proposed to amend Part 370 to provide these CIs with an option to extend their April 1,

[2] 84 Fed. Reg. 14814 (Apr. 11, 2019).
[3] 12 C.F.R. §§ 370.6(a), 370.2(d).
[4] *Id.*; 12 C.F.R. § 370.2(d).

2020 compliance date by up to one year (to as late as April 1, 2021) upon notification to the FDIC. The notification must be provided to the FDIC prior to the original April 1, 2020 compliance date and state the total number and dollar amount of deposits in deposit accounts for which the CI expects its IT system would not be able to calculate deposit insurance coverage as of the original compliance date.

The commenters voiced support for the FDIC's proposal and found one year to be an appropriate length of time for an extension. While two commenters suggested the optional extension should be available to all CIs, staff believes that extending this three-year implementation period for a CI that became a CI after the effective date of April 1, 2017 is unnecessary. IDIs are accustomed to anticipating and meeting increased regulatory requirements as their size increases, and Part 370 already provides these CIs the ability to request an extension pursuant to § 370.6(b)(1) should they need it. One commenter recommended an "automatic" extension, but staff believes that some CIs may not need an extension. Additionally, the information in the notice will help the FDIC understand the extent to which the CI's capabilities could be utilized should those capabilities be needed. The final rule amends Part 370 as proposed.

B. Compliance

Certification of compliance and deposit insurance summary report. The Rule currently requires the chief executive officer or the chief operating officer of the CI to certify that the institution is fully compliant with the requirements of Part 370 by the compliance date and annually thereafter. In the NPR, the FDIC proposed to clarify that this certification is made to the best of the executive's "knowledge and belief after due inquiry." Many commenters believed that the § 370.10(a) compliance certification is unnecessary and should be eliminated from the

Rule; and two commenters recommended that the Rule be revised to allow a qualified compliance certification in which areas of noncompliance that require remediation are acknowledged. Staff believes that the compliance certification is necessary and that this revision clarifies that the executive certify that it is his or her informed opinion that the certification is accurate. Thus, the final rule amends Part 370 as proposed.

Effect of changes to law. In the NPR, the FDIC proposed to add a new paragraph (d) to § 370.10 to provide CIs with a grace period for deficiencies in compliance that result from a change in law that alters the availability or calculation of deposit insurance. The FDIC would specify the grace period following the change in law. While several commenters suggested that the FDIC include an 18-month or 12-month minimum time frame, staff believes that the amount of time needed will depend upon the scope of a change to law impacting a CI's part 370's recordkeeping and IT capabilities. Therefore, the final rule amends Part 370 as proposed.

Merger. Part 370 does not expressly address mergers. In the NPR, the FDIC proposed to add a new paragraph (e) to § 370.10 to provide a one-year grace period to remedy deficiencies in compliance resulting directly from a merger involving a CI. Several commenters supported the proposed rule but requested a 24-month grace period based on the expectation that a CI would need more than one year to merge systems and fully integrate records and operations as a result of a merger. One commenter also suggested that this provision should be amended to address deposit assumption transactions. Staff agrees with these commenters. The final rule provides a 24-month grace period following the effective date of a merger transaction for deficiencies in compliance that are a direct result of a "merger transaction." For purposes of § 370.10(e),

"merger transaction" has the same meaning as provided in section 18(c)(3) of the FDI Act and includes deposit assumption transactions.[5]

C. Voluntary Compliance

In the NPR, the FDIC proposed to amend Part 370 to enable an IDI outside the scope of Part 370 to become a covered institution by delivering written notice to the FDIC. The compliance date for an IDI that makes this election would be the date on which it submits its first certification of compliance and deposit insurance coverage summary report pursuant to § 370.10(a). The FDIC proposed this revision to enable banking organizations with one part 370 covered institution and one § 360.9 institution to develop a single unified deposit recordkeeping and IT system that would be compliant with part 370 and no longer have to maintain a separate, parallel system to satisfy the requirements of § 360.9.[6] One commenter supported this proposal recognizing that an IDI may voluntarily comply with Part 370 for efficiency when the IDI has an affiliated CI and their holding company would prefer to comply with the Rule across its organization. The final rule amends Part 370 as proposed.

D. Deposit accounts with "transactional features"

Purpose for identifying deposit accounts with "transactional features." In the NPR, the FDIC proposed to revise the definition of "transactional features" in order to identify accounts primarily by reference to the third parties who can receive funds directly from the account by methods that are not reflected in the close-of-business account balance on the day of initiation of such transfer. Some commenters supported the FDIC's proposed revision but requested further modification to clarify that deposit accounts utilized in certain business arrangements would not be considered to have "transactional features." Other commenters expressed opposition to the

[5] See 12 U.S.C. §1828(c).
[6] 84 FR 14814, 14817.

revisions, but staff believes that retaining the definition properly places the focus on those alternative recordkeeping accounts that are most likely to require a deposit insurance determination immediately upon failure. Retaining the definition also provides each CI with the option to comply with § 370.5(a) by taking the required actions for all alternative recordkeeping accounts, or only those that have transactional features. The final rule substantially adopts the definition of transactional features as proposed by retaining the term "transactional features" and narrowing the definition to focus on accounts capable of making transfers directly from the CI to third parties by methods that would necessitate a prompt insurance determination to avoid disruptions to payment processing.

Actions required for certain accounts under § 370.5(a). In the NPR, the FDIC proposed to revise the actions that a CI must take with regard to accounts with "transactional features" for which a CI applies the alternative recordkeeping treatment set forth in § 370.4(b)(1). Part 370 currently requires that a CI certify to the FDIC that the holder of one of these accounts will provide to the FDIC the information needed for deposit insurance calculation within 24 hours after failure. The FDIC proposed removing the certification requirement and instead requiring a CI to take "steps reasonably calculated" to ensure that the account holder will provide to the FDIC the information needed for a CI's Part 370-compliant information technology system to accurately calculate deposit insurance within 24 hours after the failure of the CI. Under the proposed rule, these steps would include: (1) entering into a contractual arrangement with the account holder that obligates the account holder to provide the information needed immediately upon the covered institution's failure; and (2) disclosing to the account holder that delay in providing this information could result in delayed access to deposits in the event of the CI's failure.

Commenters had concerns regarding challenges that amendment of bilateral deposit agreements presents to CIs, and the final rule has adjusted the requirement accordingly. Comments demonstrated that this provision could not be accommodated by some account holders and highlighted the burden that this imposed on CIs to re-negotiate agreements with account holders who may ultimately not accept such terms. Staff has considered the comments and made further revisions to the proposed amendments. The final rule amends § 370.5(a) in a manner similar to that proposed in the NPR regarding the minimum requirements for "steps reasonably calculated." The final rule enables a CI to make "a good faith effort" to enter into contractual arrangements with the respective account holders. By requiring that CIs make a good faith effort, the final rule provides flexibility to CIs whose account holders are unable or unwilling to execute new deposit agreements addressing part 370-related information production capabilities. The final rule also requires that a covered institution provide a disclosure to these account holders substantially similar to the disclosure set forth in the proposed rule and provide these account holders with an opportunity to validate their capability to deliver information needed for calculation of deposit insurance coverage in the format required by the covered institution's information technology system.

Exceptions to § 370.5(a) requirements. Section 370.5(b) provides an enumerated list of accounts that a CI need not address in the actions required pursuant to § 370.5(a). The FDIC proposed two substantive revisions to this list in the NPR: to expand the exception for mortgage servicing accounts under § 370.5(b)(1) to include all deposits in such an account, and to except deposit accounts maintained for the benefit of others to the extent that the account contains deposits that would be insured in one of three deposit insurance categories related to trusts (i.e. formal revocable trusts insured as described in 12 C.F.R. 330.10, irrevocable trusts insured as

described in 12 C.F.R. 330.12, or irrevocable trusts insured as described in 12 C.F.R. 330.13). Commenters largely agreed with the FDIC's proposed revisions to § 370.5(b). The final rule amends § 370.5(b), which lists account types for which a CI need not take these actions, as proposed in the NPR.

E. Recordkeeping Requirements

Alternative Recordkeeping Requirements for Certain Trust Accounts. Part 370 currently provides CIs the option of meeting the alternative recordkeeping requirements set forth in § 370.4(b)(2) rather than the general recordkeeping requirements set forth in § 370.4(a) for certain types of trust deposit accounts insured in two of the three deposit insurance categories for trust deposits (specifically, formal revocable trust deposit accounts insured as described in 12 C.F.R. § 330.10 and irrevocable trust deposit accounts insured as described in 12 C.F.R. § 330.13). CIs must meet the general recordkeeping requirements with respect to trust deposit accounts insured in the deposit insurance category for irrevocable trust deposit accounts for which the CI is trustee that are insured as described in 12 C.F.R. § 330.12 ("DIT accounts"). In the NPR, the FDIC proposed to revise § 370.4(b)(2) to include DIT accounts as deposit accounts eligible for the alternative recordkeeping requirements. Nearly all of the commenters were supportive of the FDIC's proposal to permit CIs to meet the alternative recordkeeping requirements for DIT accounts, and none objected. The final rule amends Part 370 as proposed in this respect.

The FDIC also proposed to revise § 370.4(b)(2)(iii) by replacing the requirement that a CI maintain in its deposit account records for certain trust deposit accounts the corresponding "pending reason" code from data field 2 of the pending file format set forth in Appendix B with a requirement that a CI maintain in the respective deposit account records the corresponding "right and capacity code" from data field 4 of the pending file format set forth in Appendix B. Several

commenters disagreed with the proposal to require a right and capacity code rather than a pending reason code. The final rule amends Part 370 to require a covered institution to maintain the corresponding "right and capacity code" if the correct code can be identified, otherwise it may instead maintain the corresponding "pending reason" code.

Pursuant to § 370.4(b)(2)(ii), a CI is required to maintain the unique identifier of the grantor of a trust in its deposit account records for formal REV accounts and IRR accounts. The FDIC solicited comment on this requirement in the NPR, asking for which types of trust accounts CIs do not maintain identification of the grantor. The FDIC also asked whether it would be difficult for CIs to obtain the grantor's identity in order to assign a unique identifier if identifying information is not maintained in the deposit account records for certain types of trust accounts. Commenters were generally not supportive of the requirement to identify trust grantors for formal REV accounts and IRR accounts. Staff considered these comments and believes the requirement to maintain grantor identification for formal REV accounts and IRR accounts should be retained. The final rule does not remove the requirement that grantor identity be maintained in the deposit account records for formal REV accounts and IRR accounts with transactional features because, without that information, the FDIC cannot begin to calculate the minimum amount of deposit insurance that would be available for those accounts. Having the identity of the grantor upon failure is expected to enable the FDIC, using the covered institution's IT system, to aggregate formal REV accounts that have the same grantor and provide access to combined balances up to the amount of the SMDIA (currently $250,000) in each category so that payment instructions presented against these accounts can be processed after failure. The same capability is expected for IRR accounts having a common grantor. This capability will facilitate the FDIC's resolution efforts by enabling a successor IDI to continue payments processing

uninterrupted, and will also mitigate adverse effects of the covered institution's failure on these account holders.

Recordkeeping Requirements for Deposits Resulting from a Credit Balance on an Account for Debt Owed to the Covered Institution. In the NPR, the FDIC proposed to add a new subsection to § 370.4 to provide a different recordkeeping option for a particular type of deposit. During the FDIC's outreach calls with several CIs, the CIs described many functional and operational impediments to their ability to comply with the various recordkeeping requirements of § 370.4. In order to address the CIs' concerns, the FDIC proposed to add a new paragraph (d), which would require that immediately upon a CI's failure, the CI's IT system(s) be capable of restricting access to (i) any credit balance reflected on a customer's account associated with a debt obligation to the CI or (ii) an equal amount in the customer's deposit account at the CI. Section 370.4(d)(2)(i) would require the CI to be able to generate a file within 24 hours of failure for all credit balances related to open-end loans (revolving credit lines) such as credit card accounts and HELOCs. The 24-hour requirement would only apply to consumer loan accounts where the customer or borrower has the ability to draw on the credit line without the prior approval or intervention of the CI. With respect to closed-end loan accounts with overpayments, § 370.4(d)(2)(ii) would require the CI to be able to generate a file *promptly* after the CI's failure. The credit balance on a closed-end loan account would not be readily available to the customer prior to the final deposit insurance calculation; consequently, there would not be as much urgency to receive and process the file in order to complete the deposit insurance determination.

One commenter supported the FDIC's recognition that deposit platforms and loan systems should not have to be integrated for this purpose. Another commenter stated that access to neither the open-end nor closed-end loan systems should be restricted after a CI's failure. One

commenter asserted that the closed-end loan systems should not be restricted, and two other commenters expressed their opposition to restricting access to credit card accounts during the closing weekend after a CI's failure, citing inconvenience to the credit card holders. They suggested that credit balances on credit card accounts should only be restricted when the credit balance was near or above the SMDIA. A majority of the commenters were not in favor of the requirement that the file of credit balances be prepared in the Appendix C format. One commenter stated that the credit balance file for closed-end accounts should not have to be prepared using the Appendix C format; other commenters asserted that a credit balance file should only be required when the credit balance was above a specified threshold or when the aggregation of a credit balance and the deposit account balance were above the SMDIA. Many of the commenters recommended that the file of credit balances be allowed to be prepared manually.

Under the final rule, the recordkeeping requirements for credit balances on a CI's open-end and closed-end loan account systems would be subject to different standards. For open-end accounts and close-end accounts, the CIs must be able to generate the data file in the Appendix C format. The data file for open-end account credit balances must be produced immediately upon the CI's failure in order for the CI's IT system to calculate deposit insurance within 24 hours after failure. The data file for closed-end account credit balances could be produced at a later time. The CI's systems would not have to restrict access to credit balances associated with either the closed-end accounts or open-end accounts. Access to all of the CI's deposit systems would be restricted at failure, and insured funds would only be released upon the completion of the deposit insurance determination – including the aggregation of any credit balances.

F. Relief

In the NPR, the FDIC proposed to amend §370.8(b) to expressly allow submission of a joint exception request by more than one CI. The FDIC also proposed to a new paragraph, § 370.8(b)(2), to provide that the FDIC will publish in the Federal Register a notice of its response to each exception request in order to facilitate transparency and enable CIs to better understand the types of requests that the FDIC would grant or deny and the reasons therefor. Several commenters requested that certain data be removed from the FDIC response to exception requests before publication in the *Federal Register*. The FDIC's notice of exception, however, would not disclose either the identity of the requesting CI(s) or any confidential or material nonpublic information. Additionally, the proposed rule added a new paragraph, § 370.8(b)(3), that would allow a CI to notify the FDIC that, based on substantially similar facts and the same circumstances as presented in the notice published by the FDIC of relief granted to another CI, the CI is electing to use the same exception. Such exception would be considered granted subject to the same conditions stated in the FDIC's published notice unless the FDIC informs the CI to the contrary within 120 days after receipt of the CI's complete notification letter. One commenter suggested that the standard should be that an invoked exception is based on "substantially similar facts and circumstances." The final rule amends Part 370 substantially as proposed, with one further revision to modify the standard as proposed by the commenter. The FDIC will still make the determination of whether a CI's facts and circumstances are substantially similar to the facts and circumstances in the FDIC's published notice and retains the ability to deny a CI's invocation of relief pursuant to § 370.8(b)(3). While several commenters recommended the FDIC shorten its proposed 120-day timeframe for disallowing a CI's invoked

exception, staff believes that the 120-day time frame for a response to a request under this process is appropriate.

G. Technical Modifications

Finally, the final rule makes the technical amendments to certain provisions of Part 370 as proposed in the NPR to clarify the Rule's requirements, make technical corrections, and ensure consistency with the changes.

CONCLUSION

Staff recommends that the Board approve the final rule and authorize its publication in the *Federal Register*.

CONCUR:

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ATTACHMENTS

A – Proposed Board Resolution

B – Final Rule for Publication in the *Federal Register*