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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.

DATES: Effective [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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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 2010.¹ 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 securitization transactions.² If a securitization satisfies one of the sets of conditions

¹ The prior version of the Securitization Safe Harbor Rule, which the Securitization Safe Harbor Rule amended and restated, was adopted in 2000.

² The Securitization Safe Harbor Rule also addresses transfers of assets in connection with

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.

participation transactions. Since the revision included in the Rule does not address participations, this release does not include further reference to participations.

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 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 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

³ 75 FR 60287, 60291 (Sept. 30, 2010).

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 issuance. 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 condition 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 that regulation to the transactions. Since the adoption of the Securitization Safe Harbor Rule, there have been numerous regulatory developments that

⁴ *Id.* at 60291.

⁵ *Id.* at 60289.

have the effect of limiting or precluding poorly underwritten, risky securitizations, particularly securitizations of residential mortgages.⁶

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 preventing opaque and poorly underwritten 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)(i)(B), which requires that the securitization

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 2014 (12 CFR part 324, 12 CFR Part 271, 12 CFR Part 3); (iii) the ability to repay rule 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 1032(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 2013 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 Section 129H of TILA (15 U.S.C. 1639h); (vii) the requirements for residential mortgage loan servicers adopted by the CFPB in 2013 pursuant to title XIV of the Dodd-Frank Act, which amended Regulation X (implementing RESPA) and Regulation Z (implementing TILA); and (viii) the interim final rule establishing new requirements for appraisal independence adopted by the FRB in 2010 pursuant to section 129E of TILA (15 U.S.C. 1639e).

Other provisions of the Securitization Safe Harbor Rule and regulatory developments also reduce the risks of risky mortgage securitizations and complex opaque structures. For example, securitization credit risk retention requirements, compliance with which is a condition set forth in a different section of the Rule, have been adopted and become effective. The Securitization Safe Harbor Rule also includes a specific disclosure requirement relating to re-securitizations.

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)(i)(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)(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)(i)(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)(i)(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)(i)(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)(i)(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”, a “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.”

⁷ As noted below, National Credit Union Administration Rules also require compliance with Regulation AB in private transactions.

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 commenter 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 weaning 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

⁸ www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

⁹ <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf>.

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/crisis/>)) 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.

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 so-

called 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

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.

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 regulatory developments mentioned in *II. Background*, which (among other items) strongly motivate lenders to ascertain a borrower’s ability to pay, require that sponsors retain a portion of the risk of mortgages that they securitize, imposed new appraisal requirements and mandated more easily understandable disclosures, address these problems and other objections from commenters cited above, and have made it very unlikely that substantial growth of similar types of RMBS securitized in risky transactions will re-occur.¹⁴

The FDIC agrees with the comment that the NPR did not offer an analysis of whether the amendment to the Securitization Safe Harbor Rule could increase activity in other “potentially risky asset classes.” The discussion in the NPR, as well as the

¹³ See footnote 10, *supra*.

¹⁴ Several of these regulatory developments (the ability to pay regulation and the capital and liquidity regulations) are presumably well-recognized by investors, as they are discussed in two of the comment letters that were critical of the NPR.

discussion in this final rule, has focused on RMBS because FDIC staff found no evidence that the Regulation AB compliance requirement of the Securitization Safe Harbor Rule had prevented would-be IDI sponsors from sponsoring securitizations of other asset classes that are subject to Regulation AB.

The comment letters reinforced the FDIC's understanding that RMBS market participants have found it difficult or impossible to comply with several requirements of Regulation AB, with the result that the Securitization Safe Harbor Rule requirement for compliance with Regulation AB in private transactions has posed an obstacle to IDI sponsorship of RMBS. The Regulation AB disclosure requirements identified in the comment letters as difficult or impossible to comply with include the back-end debt-to-equity income ratio disclosure requirement, the requirements for disclosure of appraisals, automated valuation model results and credit scores obtained by any credit party or credit party affiliate, and the inconsistency of data elements with the standards set forth in the Mortgage Industry Standards Maintenance Organization. In addition, according to one of the trade association letters, some of the required Regulation AB disclosure fields cannot be included in publicly accessible securities filings without creating "unacceptable and reputational risks for RMBS sponsors and privacy risks to borrowers."

Comment letters that criticized the change to the Regulation AB provision of the Securitization Safe Harbor Rule 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.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 Regulation AB requirement 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

¹⁵ As noted above, one letter critical of the amendment referred to the analysis in the NPR that the amendment would reduce costs for IDIs and stated that reduction of compliance costs should not be considered an element of the FDIC's mission. The NPR cited, and this Supplementary Information cites, the reduction in costs as part of its analysis of expected effects. While a policy to remove unnecessary regulatory requirements is indeed reflected in the NPR (and in this Supplementary Information), it is not the case (and the NPR and this Supplementary Information do not suggest) that the FDIC's mission is to generally reduce compliance costs, without regard to the substance of the regulation necessitating such compliance costs.

activity, then the proposed rule “*could* (emphasis added) result in an increase in the dollar volume of privately issued RMBS ...”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 (DIF) and that, in not applying Regulation AB to transactions to which Regulation AB does not otherwise

¹⁶ 84 FR 43732, 43735.

apply, the FDIC lost sight of the fact that it has a different mandate than the SEC. The FDIC does not agree with these assertions. In adopting the final rule, the FDIC carefully considered the risks to IDIs and to the DIF, and also reviewed the array of disclosure requirements that will remain part of the Securitization Safe Harbor Rule as well as the regulatory safeguards described in *II. Background*. The FDIC also notes that the final rule will enable IDIs to diversify their sources of funding and enhance options for obtaining liquidity for mortgage loans. Comment letters support this analysis. According to one letter, the amendment would benefit “IDIs, who would see additional risk management paths that would allow them to maintain lending through a variety of economic circumstances.” Indeed, another letter evaluated the amendment to the Regulation AB provision as “an appropriate balance of protection of 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

¹⁷ The amendment to this provision also includes certain technical revisions required by the *Federal Register*, including a revised form of citation to Regulation AB, and deletion of the specification that the requirement for Regulation AB compliance refers to Regulation AB as in effect at the relevant time and that the requirement applies to successor public issuance requirements to Regulation AB.

¹⁸ *Inside Mortgage Finance, 2019 Mortgage Market Statistical Annual*.

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-IDI sponsors of RMBS could affect the volume of RMBS sponsorship activities for IDIs, particularly if non-IDI 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 IDI sponsors of private placements of securitizations of asset classes subject to Regulation AB in 2017 and 2018.

¹⁹ *See id.* Annual non-agency single family RMBS issuance reached a high of about \$1.2 trillion in 2005.

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 reduced 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 to be 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 such

transactions. In this connection, the FDIC notes that in the section titled “*V. Request for Comment*”, the NPR requested comments as to whether the results intended to be achieved by the proposed rule should be achieved as set forth in the proposed rule or by way of different modifications to the Securitization Safe Harbor Rule, but received no comments in response to this inquiry.

VI. Administrative Law Matters

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) (PRA) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

As discussed above, the final rule 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 would revise an existing collection of information (3064-0177). The information collection requirements contained in this proposed rulemaking will be submitted by the FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and § 1320.11 of the OMB’s implementing regulations (5 CFR 1320.11).

The FDIC revises this information collection as follows:

Title of Information Collection: Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection with a Securitization or Participation After September 30, 2010.

OMB Control Number: 3064-0177

Affected Public: Insured Depository Institutions.

Burden Estimate:

Information Collection (IC) Description	Type of Burden	Estimated Number of Respondents	Number of Responses per Respondent	Estimated Time per Response (Hrs)	Estimated Annual Burden (Hrs)
§ 360.6(b)(2)(i)(D)	Disclosure	14	6	3	252
§ 360.6(b)(2)(ii)(B)	Disclosure	3	2	1	6
§ 360.6(b)(2)(ii)(C)	Disclosure	3	2	1	6
§ 360.6(c)(7)	Recordkeeping	14	6	1	84
Total Estimated Annual Burden (Hrs)					348

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the rulemaking on small entities.²⁰ A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The

²⁰ 5 U.S.C. 601 *et seq.*

Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets less than or equal to \$600 million.²¹ Generally, the FDIC considers a significant effect to be a quantified effect in excess of five percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-insured institutions. For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that this rule will not have a significant economic effect on a substantial number of small entities.

The FDIC insures 5,256 depository institutions, of which 3,891 are considered small entities for the purposes of RFA.²² The final rule will only affect institutions currently engaged in arranging, issuing or acting as servicer for privately-placed securitizations of asset-backed securities, or likely to do so as a result of the final rule. The FDIC knows of no small, FDIC-insured institution that is currently acting in this capacity. The FDIC believes that acting as arranger, issuer or servicer for privately placed ABS requires a level of resources and capital markets expertise that would preclude a substantial number of small, FDIC-insured institutions from becoming involved in these activities.

Accordingly, the FDIC concludes that the final rule will not have a significant impact on a substantial number of small entities. For the reasons described above and pursuant to

²¹ The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201. In its determination, the “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

²² FDIC Call Report, September 30, 2019.

5 U.S.C. 605(b), the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. The Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major rule.”²³ If a rule is deemed a “major rule” by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.²⁴

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in – (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.²⁵ 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.

²³ 5 U.S.C. 801 *et seq.*

²⁴ 5 U.S.C. 801(a)(3).

²⁵ 5 U.S.C. § 804(2).

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act²⁶ requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner.

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 benefits of such regulations.²⁷ 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.²⁸

²⁶ Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (1999).

²⁷ 12 U.S.C. 4802(a).

²⁸ 12 U.S.C. 4802(b).

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.

E. Treasury and General Government Appropriations Act, 1999 —Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L.105-277, 112 Stat. 2681).

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:

Authority: 12 U.S.C. 1821(d)(1),1821(d)(10)(C), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

2. 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.
Dated at Washington, DC, on January 30, 2020.

Annmarie H. Boyd,

Assistant Executive Secretary.

[FR Doc. 2020-02936 Filed: 3/3/2020 8:45 am; Publication Date: 3/4/2020]