

SUPPORTING STATEMENT
“Recordkeeping for Timely Deposit Insurance Determination”
(OMB Control No. 3064-0202)

INTRODUCTION

The Federal Deposit Insurance Corporation (FDIC) is submitting for Office of Management and Budget (OMB) review a revision of its information collection entitled “Recordkeeping for Timely Deposit Insurance Determination” stemming from a final rule that revises the FDIC’s regulation on “Recordkeeping for Timely Deposit Insurance Determination”¹ (the “final rule”). The final rule is intended to reduce recordkeeping and reporting burden by modifying information technology system and recordkeeping requirements in 12 CFR Part 370, which applies to insured depository institutions with two million or more deposit accounts (“covered institutions”).

Under Part 370, covered institutions are required to develop recordkeeping and information technology systems to facilitate the FDIC’s determination of deposit insurance coverage for depositors in the event of the covered institution’s failure. Covered institutions can obtain relief from certain of the final rule’s requirements under specific circumstances set forth in Part 370. Beginning April 1, 2020, covered institutions will need to certify annually that they satisfy the final rule’s recordkeeping and information technology requirements unless they elect to extend the compliance date to April 1, 2021. Along with that certification, they will need to provide a summary report detailing the extent to which the covered institution’s information technology system can calculate deposit insurance coverage available in connection with each deposit account.

Under the final rule, Part 370 is amended to: provide for elective extension of the compliance date; revise the treatment of deposits created by credit balances on debt accounts; modify the requirements relating to accounts with transactional features; change the procedures regarding exceptions; and clarify matters relating to certification requirements. The amendments also make certain technical changes to Part 370 and correct typographical errors.

A. JUSTIFICATION

1. Circumstances that make the collection necessary:

Under the FDI Act, the FDIC is responsible for paying deposit insurance “as soon as possible” following the failure of an insured depository institution (“IDI”).² It must also implement the resolution of a failed IDI at the least cost to the Deposit Insurance Fund.³ To pay deposit insurance, the FDIC uses a failed IDI’s records to aggregate the amounts of all deposits that are maintained by a depositor in the same right and capacity and then

¹ 12 C.F.R. part 370 (“Part 370”).

² 12 U.S.C. 1821(f)(1).

³ 12 U.S.C. 1823(c)(4).

applies the standard maximum deposit insurance amount (“SMDIA”) of \$250,000.⁴ As authorized by law, the FDIC generally relies on the failed institution’s deposit account records to identify deposit owners and the right and capacity in which deposits are maintained.⁵ The FDIC has a right and a duty under section 7(a)(9) of the FDI Act to “take such action as may be necessary to ensure that each IDI maintains, and the [FDIC] receives on a regular basis from such institution, information on the total amount of all insured deposits, preferred deposits and uninsured deposits at the institution.”⁶

Deposits have become more concentrated in large IDIs. From 2008 through 2014, the largest number of deposit accounts held at a single IDI increased 42 per cent, and the number of deposit accounts at the ten IDIs having the most deposit accounts increased 25 percent. The increased concentration of deposits is partly a function of the IDIs’ internal growth, but it is also attributable to acquisitions during this time period. As a result of this concentration, many IDIs are even more complex than before, resulting in greater potential for significant internal IT systems disparities as well as data accuracy and completeness problems. Larger institutions are generally more complex, have more deposit accounts, greater geographic dispersion, more diverse systems, and more data quality issues. Because the public’s perception that the FDIC could be delayed in making deposit insurance determinations in the event of the failure of an IDI could lead to bank runs or other systemic problems, the FDIC implemented improved strategies to ensure prompt deposit insurance determinations upon the failure of an IDI with a large number of deposit accounts. Part 370 requires covered institutions to enhance their deposit account data and upgrade their IT systems to allow the FDIC to perform the deposit insurance determination on all or a significant subset of those covered institutions’ deposit accounts without the significant delay that could be occasioned by transferring data to an FDIC IT system.

Current Action:

The final rule, among other things: provides an optional one-year extension of the Part 370 compliance date upon notification to the FDIC; provides clarifications regarding certification of compliance under § 370.10, and the effect of a change in law or a merger on compliance; provides for voluntary compliance with Part 370; revises the 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; amends the recordkeeping requirements set forth in § 370.4 for certain types of deposit relationships; clarifies the process for exceptions requested pursuant to § 370.8(b), provides for published notice of the FDIC’s responses, and provides that certain similar exceptions may be deemed granted; and makes corrections and technical and conforming changes to Part 370.

4 12 U.S.C. 1821(a)(1)(C), 12 U.S.C. 1821(a)(1)(E).

5 12 U.S.C. 1822(c); 12 CFR 330.5.

6 12 U.S.C. 1817(a)(9).

2. Use of the Information:

The recordkeeping requirements imposed by part 370 are intended to allow the FDIC to determine the amount of deposit insurance available to each depositor for each of its deposit accounts in the event of a covered institution's failure. Much of this information is already collected by all IDIs under existing statutory or regulatory requirements. Part 370 imposed a new information collection requirement to the extent that covered institutions must maintain in their deposit account records the information that is needed by the FDIC to make a deposit insurance determination, and to the extent that covered institutions would need to keep their deposit account records in a format that is accessible by the FDIC, using a covered institution's IT system, in the event of a covered institution's failure.

Under Part 370, the FDIC will also collect from each covered institution, on an annual basis, a certification that the covered institution is in compliance with the rule's requirements as well as a summary deposit insurance coverage report that demonstrates the extent to which the covered institutions IT system can be used to calculate deposit insurance coverage for the institution's deposit accounts. The FDIC will collect requests for relief from covered institutions, which will include information that substantiates the covered institution's inability to comply with the final rule's requirements.

The FDIC expects that the final rule will reduce the burden associated with these recordkeeping and reporting requirements.

3. Consideration of the use of improved information technology:

The final rule is premised upon covered institutions' use of technology to make the required reports and to maintain the required records.

4. Efforts to identify duplication:

The information that the FDIC collects from covered institutions to verify compliance with part 370's requirements, or that substantiates a covered institution's request for relief, is not available by other means. The reporting and recordkeeping requirements in Part 370 are unique and are not unnecessarily duplicative.

5. Methods used to minimize burden if the collection has a significant impact on a substantial number of small entities:

The final rule is not expected to have a significant impact on a substantial number of small entities as no small insured depository institutions are "covered institutions."

6. Consequences to the Federal program if the collection were conducted less frequently:

Less frequent collection of this information could result in a lesser degree of compliance with Part 370's requirements and would hinder the FDIC's ability to make a prompt deposit insurance determination in the event of a covered institution's failure. If this information were collected less frequently, the FDIC would have a lower level of confidence that a covered institution maintains accurate and complete deposit records and has an IT system that would facilitate the FDIC's timely deposit insurance determination process upon the covered institution's failure. The public's perception that FDIC could be delayed in making deposit insurance determinations in the event of the failure of an IDI could lead to bank runs or other systemic problems.

7. Special circumstances necessitating collection inconsistent with 5 CFR Part 1320.5(d)(2):

There are no special circumstances. This information collection is conducted in accordance with the guidelines in 5 CFR 1320.5(d)(2).

8. Efforts to consult with persons outside the agency:

A notice of proposed rulemaking was published in the Federal Register on April 11, 2019 (84 FR 14814) which included a request or comments on the Paperwork Reduction Act implications of the proposed rule. The FDIC received five comment letters in total: three comment letters from three covered institutions, one joint comment letter from three trade associations, and one comment letter from a financial intermediary that functions as a deposit broker. The following is a summary of the comments received and FDIC's responses thereto:

- ***Elective extension of the compliance date.***

The FDIC proposed to amend § 370.6 of the rule by adding a new paragraph (b)(2) to provide covered institutions that became covered institutions on the effective date with the option to extend their April 1, 2020 compliance date by up to one year (to a date no later than April 1, 2021) upon notification to the FDIC. The notification would need to 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 covered institution expected its IT system would not be able to calculate deposit insurance coverage as of the original April 1, 2020, compliance date. The FDIC recognizes that some of these covered institutions may need additional time to implement new capabilities in their IT systems and to achieve a new level of regularity in their recordkeeping. The FDIC believed that an extension of up to one year would help these covered institutions more efficiently focus their efforts on complying with part 370 rather than on seeking exceptions to compliance with part 370. In connection with this

amendment, the FDIC also proposed to revise the definition of compliance date in § 370.2(d) to reference § 370.6(b).

The commenters voiced support for the FDIC's proposal and found one year to be an appropriate length of time for an extension. One commenter stated that the one year will allow additional time for data clean up, client outreach, and internal testing. This commenter believed that this operational extension will result in improved and enhanced deposit records, fewer items in the pending file, fewer requests for relief or extensions, reduction in potential miscalculations, and enhancements to front-end account opening systems. Two commenters suggested that the optional extension should be available to all covered institutions because all covered institutions encountered many issues, including interpretive issues and system challenges, that have hindered progress in implementing the rule. One commenter stated that by providing this optional extension to all covered institutions, it would avoid potential arguments that the FDIC was more lenient with certain covered institutions. Another commenter appreciated the option for the one-year extension but suggested that the extension be automatic without the need to request an extension. This commenter explained that covered institutions did not have three years to comply with the rule because the FDIC provided guidance over a year after the effective date of April 1, 2017. The commenter further argued that a covered institution may be competitively disadvantaged regarding pass-through deposit insurance requirements if a covered institution does not elect the one-year extension because a covered institution's customers may move their business to a covered institution that has not yet imposed the requirements of the rule. Finally, this commenter stated that the majority of covered institutions will request an extension and resources would be better allocated on compliance efforts than on a notification.

In the final rule the FDIC has amended the rule as proposed. Part 370 became effective on April 1, 2017, so all IDIs that became covered institutions on that date are subject to a compliance date of April 1, 2020. Part 370 requires covered institutions to achieve a new set of capabilities in their IT systems, and a new level of regularity in their recordkeeping, in some cases requiring the collection of new information from depositors. The nature of these requirements was understood prior to the effective date of the rule, but the amount of time required to achieve compliance could only be estimated at the time the FDIC issued part 370. The FDIC's experience in dealing with covered institutions to date indicates that, despite significant and timely efforts, many covered institutions would be unable to meet part 370's requirements by the compliance date without expending significant resources to complete required IT and recordkeeping tasks on an expedited basis. Each covered institution so situated would need to produce an extension request, adding to its burden, and the FDIC would have to process such requests. Feedback to date has enabled the FDIC to determine that a one-year extension for a covered institution that became a covered institution on the effective date of April 1, 2017, is unlikely to significantly impact the FDIC's ability to achieve its objectives. Accordingly, the final rule provides for an elective one-year extension for such covered institutions upon notification to the FDIC. To be certain, the final rule does not require that an eligible covered institution request the extension, but rather requires that the covered institution notify the FDIC that it has elected to extend its compliance date. This

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 covered institution expects its IT system would not be able to calculate deposit insurance coverage as of the original compliance date. The FDIC does not believe that this elective extension should be automatic because some covered institutions may not need it. Further, the FDIC will need to know which covered institutions have elected to take the extension so that it can appropriately stage its compliance testing program. The information provided by each covered institution in its notification will help the FDIC understand the extent to which the covered institution's capabilities could be utilized prior to the extended compliance date should those capabilities be needed. This informational requirement will not affect the ability of a covered institution to extend its compliance date. In connection with this amendment, the final rule also amends the definition of compliance date in § 370.2(d) to reference § 370.6(b).

The final rule does not change the compliance date for IDIs that became covered institutions after the effective date of April 1, 2017. For these covered institutions, the compliance date will be the date that is three years after the date that such IDI became a covered institution. Extending this three-year implementation period for such covered institutions is unnecessary; IDIs are accustomed to anticipating and meeting increased regulatory requirements as their size increases. Further, as part 370's recordkeeping and IT system capabilities become more commonplace in the banking industry, the FDIC expects covered institutions and their advisors to experience less difficulty in implementing these capabilities. That being said, these covered institutions may request an extension under § 370.6(b)(1) should they need it. The final rule also left undisturbed the ability of the FDIC under § 370.7 to accelerate the implementation of part 370 requirements for a particular covered institution under certain circumstances. Retention of these requirements provides additional assurance that the optional one-year extension of the initial compliance date for all IDIs that were covered institutions as of the effective date of April 1, 2017 may be made without jeopardizing the objectives of part 370.

The FDIC does not share one commenter's view that a covered institution may be competitively disadvantaged regarding pass-through deposit insurance requirements if a covered institution does not elect the one-year extension because a covered institution's customer may move its business to a covered institution that has not yet imposed the requirements of the rule. The FDIC does not believe it likely that a customer will move its business to another covered institution solely based on a covered institution's decision to elect a one-year extension of its compliance date.

- ***Part 370 compliance certification and deposit insurance summary report***

The FDIC proposed to revise § 370.10(a)(1) to address the requirements for the certification of compliance that a covered institution must submit to the FDIC upon its initial compliance date and annually thereafter. The FDIC proposed to clarify that the time frame within which a covered institution must implement the capabilities needed to comply with part 370 and test its IT system is the "preceding twelve months" rather than during the "preceding calendar year." The FDIC proposed to revise the testing standard

for the certification from confirmation that a covered institution has “successfully tested” its IT system to confirmation that “testing indicates that the covered institution is in compliance.” The FDIC also proposed to clarify the standard by which the § 370.10(a)(1) compliance certification is made by revising this paragraph to state that the certification must be signed by the chief executive officer or chief operating officer and made to the best of his or her “knowledge and belief after due inquiry.” This proposal clarified that the executive’s essential duty is to take reasonable steps to ensure and verify that the certification is accurate and complete to the best of his or her knowledge after due inquiry.

Many commenters believed that the § 370.10(a) compliance certification is unnecessary and should be eliminated from the rule. These commenters believed that such a certification does not add assurance of compliance but adds more cost and complexity for the covered institution. Additionally, these commenters stated that existing oversight by regulatory authorities and compliance testing by the FDIC would assure part 370 compliance. One commenter stated that compliance with laws and regulations is a priority for every banking organization and senior executives are held responsible for compliance. Two commenters submitted that, if the FDIC requires this compliance certification, then the FDIC should make the proposed “knowledge and belief after due inquiry” change.

Two commenters recommended that the rule be revised to allow a qualified compliance certification in which areas of noncompliance that require remediation are acknowledged. One commenter recommended that § 370.10(a) be amended by adding “such testing indicated that the covered institution is in substantial compliance with this part.” This commenter also recommended that the certification be provided “subject to” identified issues found in testing or otherwise by the covered institution, the FDIC, or other party. Another commenter believed that there is a risk of exposure to liability for the certifying executives if there are acknowledged deficiencies. This commenter also stated that “CIs have been assured repeatedly by FDIC managers that, when a CI is making a good faith effort to implement part 370, they will be patient with elements of that implementation that have been identified and accepted by them as under construction.”

The final rule adopts the amendment as proposed. The FDIC did not revise the rule to provide a qualified compliance certification as recommended by certain commenters because covered institutions may request an exception for known deficiencies in compliance. This is important because the FDIC needs to know about the shortcomings of a covered institution’s part 370 capabilities in order to make best use of those capabilities in the event of the covered institution’s failure. The FDIC believes that the revision to the relief provisions in the rule will facilitate the processing of exception requests. Additionally, the FDIC addressed the strict liability concern raised by covered institutions by adding “to the best of his or her knowledge and belief after due inquiry” to § 370.10(a). The FDIC will not informally grant a covered institution’s request for relief. All covered institutions seeking relief must formally request such relief according to the requirements of the rule.

- *Effect of changes to law*

The FDIC recognizes that future changes to law could impact a covered institution's compliance with the requirements of part 370 by, among other things, changing deposit insurance coverage and related recordkeeping and calculation requirements. The FDIC proposed to add a new paragraph (d) to § 370.10 to address the effect of changes to law that alter the availability or calculation of deposit insurance. The proposed rule provided that a covered institution would not be in violation of part 370 as a result of such change in law for such period as specified by the FDIC following the effective date of such change in law.

One commenter appreciated FDIC's acknowledgment of the impact on covered institutions of future changes to law that alter the availability or calculation of deposit insurance. This commenter recognized that the scope of future changes to law would impact the part 370 implementation time frame for covered institutions. Several commenters suggested that at least 18 months would be required to update data records and make system changes following such changes to law in order to bring a covered institution's system into compliance with part 370. One commenter incorrectly suggested that § 360.9 provides for at least 18 months to achieve compliance following a legislative change; therefore part 370 should be revised to allow at least as long an adjustment period.⁷ Another commenter stated that 12 months is a realistic minimum time frame. This commenter suggested that the FDIC retain discretion to increase the minimum time period depending on the nature and impact of the change to law. The commenter also suggested that the FDIC seek feedback from covered institutions and rely on industry associations to provide guidance for realistic time frames for covered institutions to comply with such changes to law.

The FDIC has amended the rule in this respect as proposed in the NPR. A covered institution will not be considered to be in violation of part 370 as a result of a change in law that alters the availability or calculation of deposit insurance for such period as specified by the FDIC following the effective date of such change. The FDIC will publish notice of the specified period of time in the *Federal Register*.

Although commenters suggested a 12-month or 18-month minimum time frame for a covered institution to re-establish compliance with part 370, these commenters also recognized that the amount of time needed will depend upon the scope of a change to law impacting a covered institution's part 370's recordkeeping and IT capabilities. The FDIC does not believe that it is appropriate to set a minimum time period for a covered institution to resolve compliance deficiencies resulting from a change to law without knowing what the change to law is. The FDIC acknowledges that changes in law may be made with immediate effect, yet the covered institutions may reasonably require time to collect necessary records and reconfigure their IT systems to calculate deposit insurance under the changed laws. The final rule allows the FDIC to provide covered institutions

⁷ Section 360.9 neither expressly addresses effects of changes to law nor provides any minimum time period for such changes to law.

with a time frame to re-establish compliance that is appropriate given the specific change to law.

- ***Effect of merger transaction by a covered institution***

Original part 370 did not expressly address merger transactions. In the NPR, the FDIC proposed adding a provision to the rule to provide a covered institution with a one-year period following the effective date of a merger with another IDI to provide the covered institution with time after a merger to ensure that new deposit accounts and IT systems are in compliance with the requirements of part 370.

Several commenters supported the FDIC's proposal to provide covered institutions with a grace period for compliance violations that occur as the direct result of a merger. These commenters requested a 24-month grace period, however, based on the expectation that a covered institution 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.

The FDIC considered these comments and made two revisions to the proposal. First, the final rule replaces "merger" with "merger transaction." For the purposes of this paragraph, "merger transaction" has the same meaning as provided in section 18(c)(3) of the FDI Act.⁸ This revision clarifies that a "merger transaction" is broader than a merger and can include deposit assumption transactions and other merger transactions by a covered institution. Second, the final rule provides a 24-month grace period rather than a one-year grace period following the effective date of a merger transaction. This 24-month grace period does not extend a covered institution's preexisting compliance date; rather, it provides a 24-month grace period to remedy compliance deficiencies that occur as the direct result of a merger transaction. In cases where this 24-month grace period is not sufficient, a covered institution may request a time-limited exception pursuant to § 370.8(b) for additional time to integrate deposit accounts or IT systems.

- ***Voluntary compliance with part 370***

In the NPR, the FDIC proposed to enable an IDI that is not a covered institution to voluntarily become a covered institution. Such IDI would need to notify the FDIC of its election and would be considered a covered institution as of the date on which such notice is delivered to the FDIC. Its compliance date 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 concerning provisional hold capabilities and standard data format for deposit account and customer data.⁹

⁸ See 12 U.S.C. 1828(c).

⁹ 84 FR 14814, 14817.

One commenter supported this proposal recognizing that an IDI may voluntarily comply with part 370 for efficiency when the IDI has an affiliated covered institution and their holding company would prefer to comply with the rule across its organization.

The FDIC has amended the definition of “covered institution” in § 370.2(c) as proposed. An IDI may voluntarily comply with part 370 by delivering written notice to the FDIC stating that it will voluntarily comply with the requirements of part 370. Such an IDI would be considered a covered institution as of the date on which the notification is delivered to the FDIC. The compliance date for such an IDI would be the date on which the covered institution submits its first certification of compliance and deposit insurance coverage summary report pursuant to § 370.10(a). An IDI subject to § 360.9 must continue to comply with § 360.9 until it meets the conditions for release from § 360.9 requirements set forth in § 370.8(d).

- ***Deposit accounts with “transactional features”***

Part 370 applies a bifurcated approach to recordkeeping requirements, generally requiring that a covered institution itself maintain all information needed to calculate deposit insurance coverage for many types of deposit accounts while allowing covered institutions to maintain less information for other accounts because there are impediments to bringing that information into the covered institution’s records. Among these “alternative recordkeeping” accounts are those that meet the requirements of §§ 330.5 (Recognition of deposit ownership and fiduciary relationship) and 330.7 (Accounts held by agent, nominee, guardian, custodian or conservator) and certain trust accounts. Part 370 uses the “transactional features” definition to identify those alternative recordkeeping accounts that may support depositors’ routine financial needs and therefore require a prompt deposit insurance determination to avoid delays in payment processing should the covered institution’s deposit operations be continued by a successor IDI. The original part 370 required covered institutions to certify that, for alternative recordkeeping accounts with transactional features, the account holder would submit to the FDIC the information necessary to complete a deposit insurance calculation with regard to the account within 24 hours following the appointment of the FDIC as receiver. It also provided exceptions to this certification requirement for certain types of accounts.

The NPR described the FDIC’s efforts to create appropriate recordkeeping requirements for those types of deposit accounts for which depositors need daily access to funds but for which the covered institution is not required to maintain all information needed to complete a deposit insurance determination. In the NPR, the FDIC proposed to retain the bifurcated approach to recordkeeping requirements but change the definition used to classify accounts with transactional features.

The FDIC proposed narrowing the definition of transactional features to focus on accounts capable of making transfers directly from the covered institution to third parties by methods that would necessitate a prompt insurance determination to avoid disruptions to payment processing. As stated in the NPR, the FDIC intends that the transactional features definition identify only the subset of alternative recordkeeping accounts for which an insurance determination within 24 hours following its appointment as receiver

is essential to fulfillment of its policy objectives.¹⁰ The FDIC proposed to revise § 370.2(j) to define transactional features primarily by reference to the parties who could receive funds directly from the account by methods that may not be reflected in the close-of-business account balance on the day of initiation of such transfer. Under the proposed revision, an alternative recordkeeping account would have transactional features if it could be used to make transfers to anyone other than the account holder, the beneficial owner of the deposits, or the covered institution itself, by a method that would result in the transfer not being reflected in the close-of-business ledger balance for the account on the day the transfer was initiated. Transfers that are included in the close-of-business account balance for an account on the day of failure generally will be completed under FDIC rules,¹¹ with funds transferred out of the account not being included in the deposit insurance determination for the account. Since such transfers would not be affected by the deposit insurance determination, any delay in completing the deposit insurance determination for such account would not create delays in processing payments. The proposed definition also included linked accounts that support accounts with transactional features. In the NPR, the FDIC solicited comment on whether it would be better to eliminate the definition of transactional features and instead provide that any special requirements for alternative recordkeeping accounts be applicable without regard to whether the accounts do or do not have “transactional features.”

Some commenters supported the FDIC’s proposed revisions to the definition. One commenter concluded that the revised definition better supports the FDIC’s ability to determine deposit insurance coverage promptly than the original definition, and another commenter noted that the revised definition aids in identifying pass-through accounts that support depositors’ routine financial needs in a reasonable, burden-reducing manner. Another commenter made similar comments. All supportive commenters requested some modifications to the proposed definition for the purpose of clarifying that deposit accounts utilized in certain business arrangements would not be considered to have “transactional features.”

Other commenters expressed opposition to the revisions to the definition. One stated that the revised definition failed to add clarity or improve the description of the accounts that required prompt processing. This commenter requested that the FDIC develop a more customer-friendly definition and suggested that the FDIC simply use the term “checking accounts.” Another commenter expressed concern that the definition was still unclear and proposed that the FDIC use the “transaction account” definition used in other regulations, such as Regulation D¹² or Regulation CC.¹³

Finally, commenters expressed a variety of responses to the FDIC’s question regarding removal of the definition of transactional features and application of the related requirements to all alternative recordkeeping accounts. One supported the proposal, expressing that it appropriately places the onus on the depositors to submit data quickly to obtain a prompt deposit insurance determination. Another supported retaining the

10 84 FR 14814, 14818.

11 See 12 CFR 360.8.

12 12 CFR part 204.

13 12 CFR part 229.

definition so that covered institutions could have the flexibility to use the definition to distinguish between accounts on that basis if they so desired, rather than being obligated to comply with the related requirements as to all alternative recordkeeping accounts. Another wrote that maintaining the definition and the option to treat all § 370.4(b)(1) alternative recordkeeping accounts as accounts with transactional features was a benefit of the proposed rule. Finally, one commenter expressed opposition to elimination of the definition and application of the requirements to all alternative recordkeeping accounts on the grounds that some of the requirements would impose a significant burden as certain account holders would be unable to meet these requirements with regard to certain alternative recordkeeping accounts such as trust accounts.

The final rule reflects the FDIC's continuing effort to establish a framework for providing prompt payment of deposit insurance for deposits maintained in accounts subject to the alternative recordkeeping requirements of § 370.4(b)(1) through capabilities that are least burdensome to covered institutions and account holders. The final rule retains the term "transactional features," with clarifying changes to the definition, and alters the required actions that a covered institution must take with respect to deposit accounts with transactional features for which the covered institution maintains its deposit account records in accordance with the alternative recordkeeping requirements set forth in § 370.4(b)(1). The final rule amends § 370.5(b), which lists account types for which a covered institution need not take these actions, as proposed in the NPR.

The proposed definition of transactional features is adopted in the final rule substantially as proposed. Retaining the definition allows the FDIC to focus on those alternative recordkeeping accounts that are most likely to require a deposit insurance determination immediately upon failure. It provides the covered institution with options to comply by taking the actions specified in § 370.5(a) with regard to: only those alternative recordkeeping accounts described in the definition, a larger subset of alternative recordkeeping accounts, or all alternative recordkeeping accounts other than those described in § 370.5(b). Revising the definition to adopt the "transaction account" definitions of Regulation D or Regulation CC, or to limit it to checking accounts, would result in an unacceptably narrow definition that would exclude some accounts for which ready access to funds remains important to depositors and their payees. Use of a narrower definition would also increase the likelihood that some in-process transactions involving the account would be disrupted, should a deposit insurance determination be delayed due to a lack of information regarding deposit ownership.

In response to the comments, the definition is revised from the proposed rule by replacing "transfers" with "transfer," "parties" with "party," "methods" with "method," to make clear the FDIC's intention that the ability to make one or more transfers to any one or more parties other than the account holder, beneficial owner of the deposits, or the covered institution is sufficient for an account to have transactional features, if such transfer or transfers is made by a method or methods that may result in such transfer being reflected in the end-of-day ledger balance for such deposit account on a day that is later than the day that such transfer is initiated, even if initiated prior to the institution's normal cutoff time for such transaction. When interpreting this definition, the FDIC will

consider transfers to custodians and trustees acting on behalf of the beneficial owner of the deposits to be transfers to the beneficial owner of the deposits, such that the ability to transfer from the deposit account to a custodian or trustee of the beneficial owner of the deposits, pursuant to a method described in the definition, will not itself result in the account having transactional features. In such circumstances, a custodian or trustee acting on behalf of the beneficial owner of the deposits is not a third party transferee of the type that indicates that the account is being used by the beneficial owner of the deposits to meet its “day-to-day financial obligations,” a central motivation for the requirements of § 370.5(a).¹⁴ Rather, as the comment described above indicates, it is merely a transfer between accounts maintained for the beneficial owner of deposits and should be treated accordingly.

- ***Actions required for certain deposit accounts with transactional features under § 370.5(a)***

Original part 370 required the covered institution to certify to the FDIC that, for alternative recordkeeping accounts with transactional features, the account holder “will provide to the FDIC the information needed . . . to calculate deposit insurance coverage . . . within 24 hours after” failure. In the NPR, the FDIC proposed replacing the certification requirement with a requirement that covered institutions instead take “steps reasonably calculated” to ensure that the account holder would provide to the FDIC the information needed for the FDIC to use a covered institution’s part 370-compliant IT system to accurately calculate deposit insurance available for the relevant deposit accounts within 24 hours after the failure of the covered institution. Under the proposed rule, “steps reasonably calculated” included, at a minimum, contractual arrangements with the account holder that obligated the account holder to deliver information needed for deposit insurance calculation to the FDIC in a format compatible with the covered institution’s IT system immediately upon the covered institution’s failure and a disclosure to account holders to inform them that delay in delivery of information to the FDIC, or submission in a format that is not compatible with the covered institution’s IT system, could result in delayed access to deposits should the covered institution fail and the FDIC need to conduct a deposit insurance determination. The FDIC proposed to revise the actions of the covered institution required with respect to alternative recordkeeping accounts with transactional features and also amended the list of accounts excepted from those requirements.

One commenter expressed support for removing the certification requirement and replacing it with an obligation to take steps reasonably calculated to ensure the required depositor information is timely delivered for alternative recordkeeping accounts with transactional features. This commenter and another remarked favorably on the required contractual arrangements called for in the proposed rule, noting that account holders play a role in a deposit insurance determination for accounts with transactional features and that the proposed language appropriately makes them part of a solution that allows for timely processing.

¹⁴ 81 FR 87734, 87751.

Two commenters objected to the contractual requirement. One emphasized the bilateral nature of its deposit agreements and expressed concern that account holders may not agree to the required contract terms as doing so could be burdensome, and that these account holders may instead move their deposits to banks that are not covered institutions. It requested that the proposed requirement be limited to an obligation to make a good faith “attempt to enter into contractual arrangements that obligate the account holder to deliver all the information needed...”, and to only be required to make the disclosure described in the proposed rule if the account holder did not agree to such terms. This commenter also suggested that the contractual language require the account holder to deliver the information within 24 hours of the covered institution’s failure, rather than immediately upon failure. The other commenter objecting to the FDIC’s proposal did so in the event that the definition of transactional features was removed from the final rule, and consequently, the requirement would apply to all alternative recordkeeping accounts. It noted the significant difficulties that some account holders would have in meeting both the timing and formatting delivery requirements and suggested limiting the requirement to pass-through accounts that named all beneficial owners and account participants in the account title.

The final rule furthers the focus of the covered institution’s obligations upon its own actions, rather than those of the account holder. To be sure, the FDIC expects that a covered institution will configure its information technology system to calculate deposit insurance coverage for the accounts within 24 hours following delivery of properly formatted depositor information by account holders. The FDIC’s proposal to require that the covered institution take “steps reasonably calculated” to ensure that certain account holders make a timely delivery of properly formatted information is adopted, with further revision to the specific actions that “steps reasonably calculated” must include at a minimum. With respect to the first specific action, the FDIC acknowledges the comments regarding challenges that amendment of bilateral deposit agreements presents to covered institutions and has adjusted the final rule accordingly. Comments demonstrated that this provision could not be accommodated by some account holders for reasons of impossibility. Other commenters highlighted the burden that this imposed on covered institutions to re-negotiate agreements with account holders who may ultimately not accept such terms. The final rule amends § 370.5(a) by adding a new paragraph similar to that proposed in the NPR, but with the requirement that a covered institution make “a good faith effort to enter into contractual arrangements with the account holder...” By requiring that covered institutions make a good faith effort, the final rule provides flexibility to covered institutions whose account holders are unable or unwilling to execute new deposit agreements addressing part 370-related information production capabilities.

The second specific action to be included among “steps reasonably calculated” is comprised of two parts. A covered institution must provide a disclosure to account holders substantially similar to the disclosure set forth in the proposed rule to inform these account holders that their ability to access deposits in a timely manner after the covered institution’s failure is dependent on meeting the information production requirements. A covered institution must also 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. These specific actions are expected to ensure that account holders are aware of the need to make a prompt submission of properly formatted deposit ownership information in order to have timely access to insured deposits, and that the account holder knows the manner in which it must make that submission. The account holder is the party best positioned to collect, maintain, format, and submit the depositor information, and has the greatest incentive to do so should the covered institution fail. The FDIC intends to include a review of a covered institution's efforts to take "steps reasonably calculated," including those minimum requirements, as part of its compliance testing described in § 370.10(b).

- *Exceptions from the requirements of § 370.5(a) for certain types of deposit accounts*

Original part 370 provided an enumerated list of accounts that a covered institution did not need to address when making the certification required pursuant to § 370.5(a). The FDIC proposed retaining this list of deposit account types in the NPR, but broadened the exception for mortgage servicing accounts under § 370.5(b)(1) to include all deposits in such an account and expanded the list by adding deposit accounts maintained by an account holder for the benefit of others to the extent that the deposits in the custodial account are held for: a formal revocable trust that would be insured as described in 12 CFR 330.10; an irrevocable trust that would be insured as described in 12 CFR 330.12; or an irrevocable trust that would be insured as described in 12 CFR 330.13. The proposed rule also made a technical amendment to § 370.5(b)(4) to correct an incorrect cross reference.

Four commenters were supportive of the proposed changes. One suggested that the list be expanded to include custodial accounts, agency accounts, and fiduciary accounts not used for day to day transactions.

Section 370.5(b) of the final rule provides an enumerated list of accounts for which a covered institution need not take the actions prescribed under § 370.5(a). In the NPR, the FDIC proposed to make three revisions to the list set forth in § 370.5(b) of the original part 370. First, the FDIC proposed to expand the exception for mortgage servicing accounts under § 370.5(b)(1) to include all deposits in such an account and not limit the exception to the extent that those accounts are comprised of principal, interest, taxes, and insurance. Second, the FDIC proposed a technical amendment to § 370.5(b)(4) to correct an incorrect cross reference to the applicable section of the FDIC's regulations governing deposit insurance coverage for deposit accounts held in connection with an employee benefit plan. Third, the FDIC proposed to add to this list deposit accounts maintained by an account holder for the benefit of others to the extent that the deposits in the custodial account are held for: a formal revocable trust that would be insured as described in 12 CFR § 330.10; an irrevocable trust that would be insured as described in 12 CFR § 330.12; or an irrevocable trust that would be insured as described in 12 CFR § 330.13.

Commenters largely agreed with the FDIC's proposed revisions to § 370.5(b). One suggested that "additional custodial accounts, agency accounts and fiduciary accounts

that are not used for day-to-day transactions should be included in the list of exceptions in addition to the employee benefit accounts currently included in the list of excepted accounts. These should include other types of retirement accounts and employee benefit plans, public bond accounts and other types of custody and agency accounts, including those maintained within trust departments of the CIs or trust departments of affiliates of the CIs. Due to the nature and structure of the custodial, agency and other fiduciary relationships, the large majority of these accounts do not require immediate access to funds on deposit.” The FDIC believes these suggestions are not specific enough to include in the enumerated list under § 370.5(b) and would be more appropriately addressed with a tailored exception request pursuant to § 370.8(b). The FDIC notes, however, that the final rule’s revision of § 370.5(a) to focus the covered institution’s actions on enabling account holders to best position themselves to take the actions that need to be taken after failure to obtain deposit insurance should provide sufficient flexibility for a covered institution to meet its obligations with respect to these additional custodial accounts, agency accounts and fiduciary accounts that are not used for day-to-day transactions. In all respects, the final rule amends § 370.5(b) as proposed for the reasons discussed in the NPR.

- ***Alternative recordkeeping requirements for certain trust accounts***

Section 370.4(b)(2) of the original part 370 provides covered institutions with 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 deposit accounts held in connection with a trust. Specifically, formal revocable trust deposit accounts that are insured as described in 12 CFR § 330.10 (“formal REV accounts,” for which the corresponding right and capacity code is “REV” as set forth in Appendix A) and irrevocable trust deposit accounts that are insured as described in 12 CFR § 330.13 (“IRR accounts,” for which the corresponding right and capacity code is “IRR” as set forth in Appendix A) are eligible for alternative recordkeeping under § 370.4(b)(2). (The alternative recordkeeping requirements for these trust deposit accounts are different from the alternative recordkeeping requirements set forth in § 370.4(b)(1), which generally applies to deposit accounts that would be entitled to additional deposit insurance on a pass-through basis).

In the preamble to the original part 370, the FDIC explained that the recordkeeping requirements for formal REV accounts and IRR accounts were intended to ensure that covered institutions maintain enough information to allow for the calculation of an initial minimum amount of deposit insurance that would be available for these deposit accounts. The FDIC stated that “[f]or deposit accounts held in connection with formal trusts for which the covered institution is not trustee, the covered institution will need to maintain in its deposit account records the unique identifier of the account holder, and the unique identifier of the grantor (if the grantor is not the account holder) if the account has transactional features. *The unique identifier of the grantor is needed in order to begin calculating how much deposit insurance would be available, at a minimum, on deposit accounts held in connection with a formal trust.* The covered institution will also need to maintain in its deposit account records information sufficient to populate the ‘pending reason’ field of the pending file set forth in Appendix B, which is to be generated by the

covered institution’s IT system pursuant to § 370.3(b) of the final rule.”¹⁵ The FDIC explained further that “many consumers now open formal trust accounts and use them to handle their daily financial transactions. Compliance with this requirement regarding the grantor will permit the FDIC to begin the deposit insurance determination process and, during that delay, allow access to some portion of that deposit account and process outstanding checks.”¹⁶

The FDIC expects that a covered institution’s IT systems will be able to calculate an initial minimum amount of deposit insurance that would be available for formal REV accounts and IRR accounts based on the information that is maintained in the covered institution’s deposit account records, even if that information is not all of the information that would be needed to calculate the full and final amount of deposit insurance that would be available for the deposits in those accounts. Ideally, this could be done within 24 hours after failure, but in any event by the next business day after a covered institution’s failure to enable fulfillment of payment instructions presented on one of those accounts. Section 370.4(b)(2)(ii) of the original part 370 requires that a covered institution maintain “the unique identifier of the grantor” in its deposit account records for formal REV accounts and IRR accounts if those accounts have transactional features because, without that data element, even an initial amount of deposit insurance cannot be made available. The capability to provide some insurance coverage and enable the depositor to access a portion of the deposit shortly after a covered institution’s failure should mitigate the adverse effects that could be caused by restricting access to all deposits in such accounts until the full extent of coverage can be calculated based on additional information delivered by the account holder at some later point in time after the covered institution’s failure.

Since the adoption of part 370 in 2016, the FDIC has learned about specific challenges that covered institutions face with respect to certain types of deposit accounts held in connection with a trust. In the NPR, the FDIC proposed two amendments to § 370.4(b)(2) to clarify the rule’s requirements and to more closely align part 370’s burdens with its benefits. These two amendments are discussed in sections F.1.a. “DIT accounts” and F.1.b. “Right and capacity code for certain trust accounts” below. Three commenters discussed challenges to identification of trust grantors; while the FDIC has not eliminated this requirement, the final rule clarifies that this requirement will be satisfied upon identification of one grantor notwithstanding the fact that multiple grantors may exist. The FDIC believes that the changes made by this final rule balance its objectives with respect to certain trust accounts in a manner that is appropriate given challenges faced by covered institutions.

15 81 FR 87734, 87739. Emphasis added.

16 Id. at 87752.

o DIT accounts

In the NPR, the FDIC proposed to amend § 370.4(b)(2) to include irrevocable trust deposit accounts that are insured as described in 12 CFR 330.12 (“DIT accounts,” for which the corresponding right and capacity code is “DIT” as set forth in Appendix A) as deposit accounts eligible for the alternative recordkeeping requirements. The FDIC recognized in the NPR that, although a covered institution as trustee for an irrevocable trust should be able to gather and verify the information needed to calculate the amount of deposit insurance coverage for such trust’s deposit account(s) at any given time (such information being, among other things, the identities of trust beneficiaries and their respective interests), requiring continuous update of deposit account records could be overly burdensome. Additionally, there may be a significant lag between the time at which a change occurs and when the covered institution as trustee becomes aware of it and is able to update the respective deposit account records accordingly for purposes of part 370. Because of these issues, the FDIC believed it would be appropriate to enable covered institutions to maintain their deposit account records for DIT accounts in accordance with the alternative recordkeeping requirements.

Nearly all of the commenters were supportive of the FDIC’s proposal to permit covered institutions to meet the alternative recordkeeping requirements for DIT accounts, and none objected. In light of the challenges associated with maintaining accurate information continuously in deposit account records for these accounts, the final rule amends § 370.4(b)(2) as proposed. DIT accounts are now an additional category of trust deposit accounts for which a covered institution may meet the alternative recordkeeping requirements rather than the general recordkeeping requirements. This amendment may result in a deposit insurance determination for DIT accounts not being made within 24 hours after a covered institution’s failure; as discussed below, however, an initial minimum amount of deposit insurance available for these accounts could be calculated within that time frame using information that covered institutions regularly maintain for these accounts. To conform with this amendment, § 370.4 has been revised by removing paragraph (a)(1)(iv), which previously required a covered institution to maintain in its deposit account records for each DIT account the unique identifier for the trust’s grantor and each trust beneficiary.

o Right and capacity code for certain trust accounts

In the NPR, the FDIC proposed to amend § 370.4(b)(2)(iii) by replacing the requirement that a covered institution 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 covered institution 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. The FDIC explained in the NPR preamble its expectation that covered institutions should be able to identify which of the right and capacity codes apply for deposit accounts that fall into this recordkeeping category based on the titling of the deposit account or documentation maintained in a covered institution’s deposit account records concerning the relationship between the

covered institution and the named account holder. As a threshold matter, for a deposit account held in connection with a trust to be eligible for alternative recordkeeping under § 370.4(b)(2), a covered institution must be able to determine that the deposit account would be insured as a REV account, an IRR account, or a DIT account. The FDIC expects that a covered institution should be able to identify the applicable right and capacity code using information that the covered institution already maintains. In most cases, titling of the deposit account, tax reporting information, or documentation generated and maintained by a covered institution to ensure compliance with Bank Secrecy Act and anti-money laundering standards, taken individually or collectively, should be sufficient for a covered institution to determine whether a deposit account is a formal REV account or an IRR account. Where a covered institution is the trustee for an irrevocable trust, then the covered institution should know whether the deposit account it maintains as trustee on behalf of the trust is a DIT account.

Several commenters disagreed with the proposal to require a right and capacity code rather than a pending reason code. One argued that “provisions in the trust agreement may alter the ‘right and capacity’ of a trust without the bank’s knowledge... For example, the bank may not be informed that a revocable trust has turned irrevocable.” Another commenter reiterated this point. The FDIC does not, however, share this concern. While formal revocable trusts could become irrevocable trusts upon the occurrence of specific events or satisfaction of certain conditions, this change in status alone does not alter the insurability of the deposits in the account. Section 330.10(h) of the FDIC’s deposit insurance regulation states that “if a revocable trust account converts in part or entirely to an irrevocable trust upon the death of one or more of the trust’s owners, the trust account shall continue to be insured under the provisions of this section.”¹⁷ Further, it provides that “this section shall apply to all existing and future revocable trust accounts and all existing and future irrevocable trust accounts resulting from formal revocable trust accounts.”¹⁸ Accordingly, a deposit account established in connection with a formal revocable trust continues to be insured as an REV account even after the trust becomes irrevocable. The applicable category of deposit insurance for REV accounts does not change unless or until the deposit account is restructured.

A different commenter submitted that “because these accounts would be placed in the pending file initially regardless of assignment of the ownership right and capacity, assigning a pending [reason] code indicating the nature of the account (i.e., trust) similar to the treatment of all other accounts placed in the pending file seems more appropriate.” This comment does not seem to consider the FDIC’s objective of providing an initial minimum amount of deposit insurance available for certain trust deposits held in an account with transactional features. However, the FDIC believes that a solution exists that furthers its objectives without frustrating covered institutions’ efforts to meet part 370’s recordkeeping requirements.

Specifically, the final rule amends § 370.4(b)(2)(iii) to require covered institutions to maintain the corresponding “right and capacity code” from data field 4 of the pending file

¹⁷ 12 CFR 330.10(h).

¹⁸ *Id.*

format set forth in Appendix B *if it can be identified*. If a covered institution makes a reasonable effort to identify the applicable “right and capacity code” but cannot be certain that it is correct, then the covered institution may instead maintain the corresponding “pending reason” code from data field 2 of the pending file format set forth in Appendix B. The FDIC expects that covered institutions should, for a vast majority of trust accounts, be able to identify the applicable “right and capacity” code.

Although § 370.4(b)(2)(iii) has been amended differently than proposed, the FDIC reiterates the notion that only deposit accounts held in connection with a trust that would be insured as either formal REV accounts, IRR accounts, or DIT accounts are eligible for alternative recordkeeping treatment under § 370.4(b)(2). Covered institutions must sufficiently investigate deposit accounts to make this determination in order to avoid treating deposit accounts of trusts that are insured as described in 12 CFR § 330.11(a)(2), or any other provision, as deposit accounts that are eligible for alternative recordkeeping. If a covered institution cannot be sure that a deposit account held in connection with a trust would be insured as either a formal REV account, an IRR account, or a DIT account, then it should seek an exception pursuant to § 370.8(b).

For trust accounts with transactional features that would be insured as either a formal REV account, an IRR account, or a DIT account, but for which the covered institution cannot identify which corresponding “right and capacity” code is applicable and therefore instead maintains a “pending reason” code, the covered institution will need to maintain the identity of at least one of the trust’s grantors in order to meet the requirement set forth in § 370.4(b)(2)(ii), even if the account is a DIT account. If the “right and capacity” code is not maintained in the deposit account records for a trust account that has transactional features, then the covered institution has no basis to not maintain the identity of a grantor of the trust, unless the covered institution has sought an exception for the respective account(s) pursuant to § 370.8(b). Additionally, any initial minimum amount of deposit insurance available for the account based on aggregation by grantor may be limited if the applicable right and capacity has not been identified prior to a covered institution’s failure.

o Grantor identification

Pursuant to § 370.4(b)(2)(ii), a covered institution 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 covered institutions do not maintain identification of the grantor. The FDIC also asked whether it would be difficult for covered institutions 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.

Three commenters provided substantive responses to these questions. One explained that “[a]lthough the grantor’s name may have been recorded in the trust certification or other documentation when the account was opened, a unique identifier, such as a Social Security number, may not have been required or obtained.” This commenter further

explained that any “identifying information for the grantor [that] was obtained is likely recorded on a records system other than that for deposits, such as a paper file.” The second commenter shared a substantially similar response, adding that “the ability to provide a unique identifier and grantor information is limited, as this information is often unknown unless the trust agreements are accessed.” The third commenter stated that “assigning the unique identifier of the grantor will be difficult since this information is not always maintained in the bank’s systems.” This commenter added that a “manual review of trust documents would be needed to determine the grantor named on each trust account, with additional coding required to assign the grantor a unique identifier on the bank’s systems.”

Each of these commenters suggested that the FDIC eliminate the requirement to maintain unique identifiers for grantors of trusts under § 370.4(b)(2)(ii). The first commenter provided two alternative bases. First, the commenter contended that “deposit insurance calculations for trust deposit accounts cannot be completed without both grantor and beneficiary information. However, banks do not need to store this information, as it is obtained during resolution of a bank along with the beneficiary information required for deposit insurance calculations.” Second, this commenter argued that “because CIs are not required to maintain beneficiary information under ‘alternative recordkeeping,’ the recording of grantor information alone is of no benefit.” This commenter further explained that “[r]equiring CIs to obtain and input grantor information that they do not and are not otherwise required to maintain would essentially duplicate much of the post-closing process of contacting trustees to identify beneficiaries, yet still would not allow CIs to achieve the part 370 goal of being able to complete deposit insurance calculations.” The second commenter shared this view, adding that “[t]here is no benefit to accessing this information prior to bank failure and these accounts should be in the pending file with a process to update that information at bank failure.” The third commenter reasoned that “[a]s these accounts would all be placed in the pending file initially, regardless of assignment of the unique identifier for the grantor, it may be more practical to remove this very cumbersome and timely task from the requirements of part 370.”

The FDIC has considered these comments and determined that this requirement should not be eliminated. Part 370 was adopted with the expectation that a covered institution would need to engage in new recordkeeping efforts, to include conversion of information to a format that can be used by its information technology system to calculate deposit insurance coverage in an automated fashion, as well as correction of recordkeeping deficiencies through engagement with depositors or by leveraging other sources of information associated with tax reporting or compliance with Bank Secrecy Act and anti-money laundering requirements. The FDIC believes that covered institutions will generally be able to identify grantors, particularly those associated with formal REV accounts. In instances where satisfying this recordkeeping requirement is just not possible, § 370.8(b) provides covered institutions with the opportunity to request an exception.

It does not appear that the commenters have considered the FDIC's objective to provide an initial minimum amount of deposit insurance coverage for formal REV accounts and IRR accounts that have transactional features. The FDIC expects that covered institutions will recognize the benefits afforded to depositors should the FDIC be in a position to meet this objective because sufficient information is maintained in a covered institution's deposit account records. Moreover, the FDIC expects that the costs that covered institutions may bear in fulfilling this informational requirement are justified.

The final rule retains 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. When the covered institution identifies a deposit account as a trust account but cannot designate the account as either a formal REV account or as an IRR account, then the covered institution will maintain the "pending reason" code in its deposit account records instead of the "right and capacity" code. Under those circumstances, the FDIC will not be able to provide access to an initial amount of deposits in each category but rather will need to limit initial coverage to the SMDIA as though all such accounts were insured in the same category.

The FDIC has made a minor revision to § 370.4(b)(2)(ii) in the final rule to clarify that a covered institution must maintain in its deposit account records the unique identifier of "a" grantor, rather than "the" grantor, if the account has transactional features. For trusts that have multiple grantors, covered institutions do not need to maintain the identification of all grantors. While the FDIC would need to know the identity of all grantors to calculate the total amount of deposit insurance coverage for one of these trusts, it believes that having the identity of one grantor will be sufficient to calculate the minimum amount of deposit insurance coverage so that some deposits can be made available immediately after a covered institution's failure. Any additional deposit insurance coverage would be calculated by the FDIC using the covered institution's IT system as the account holder delivers information substantiating the additional coverage to the FDIC.

The requirement that grantor identity be maintained in the deposit account records for formal REV accounts and IRR accounts does not apply with respect to DIT accounts. Deposits held in DIT accounts are insured per trust without regard to the rule for aggregation by grantor that is applicable in the IRR and REV categories. In the DIT category, each "trust estate" is insured to the SMDIA.¹⁹ All DIT accounts held for the

¹⁹ 12 U.S.C. 1817(i) and 12 CFR 330.12. Section 330.1(p) defines "trust estate" as the determinable and

same trust are added together and insured, at a minimum, to the SMDIA. The FDIC expects to be able to use a covered institution's part 370-compliant IT system to make the minimum amount of deposit insurance available on DIT accounts within the first 24 hours after the covered institution's failure, with the remainder to be made available as information substantiating the right to additional deposit insurance coverage is delivered to and reviewed by the FDIC. The FDIC would then remove the remaining restriction on access to deposits in such accounts or debit uninsured deposits from such accounts accordingly.

- ***Recordkeeping requirements for a deposit resulting from a credit balance on an account for debt owed to the covered institution.***

During the FDIC outreach calls and meetings with many covered institutions, the covered institutions described many functional and operational impediments to their ability to comply with the various recordkeeping requirements of § 370.4. Generally, when the covered institution maintains the requisite depositor information in its own records to perform the deposit insurance calculation, the FDIC would expect the covered institution to comply with § 370.4(a). Other types of accounts, like agent or fiduciary accounts (based on pass-through deposit insurance principles), certain trust accounts, and official items, have already been addressed in §§ 370.4(b) and –(c). However, another recordkeeping problem raised by the covered institutions occurs when a borrower of a covered institution has a credit balance on a debt owed to a covered institution. For example, if a bank customer/credit cardholder has a positive balance on a credit card account after returning merchandise and receiving a credit to the account, then that credit amount would be recognized as the customer's "deposit" at the covered institution. In accordance with § 3(l)(3) of the FDI Act, such an overpayment on a debt owed to a covered institution would constitute a deposit.²⁰ The FDIC must include (and aggregate, if necessary) such a deposit in order to perform a deposit insurance determination in the event of a covered institution's failure.

Upon initial review, it would appear that a covered institution should be able to comply with the requirements of § 370.4(a) because the covered institution will presumably have in its IT system(s) all of the relevant information regarding the depositor (created by making an overpayment on his or her outstanding debt with the covered institution). The problem, as described to the FDIC by various covered institutions, is that the requisite information regarding the ownership of the deposit, the amount of the deposit as well as other relevant information such as a unique identifier, would be maintained on a covered institution's loan platform rather than on any of its deposit systems. Moreover, the deposit platforms are not usually linked or integrated in any way with a covered institution's various loan platforms. The covered institutions informed the FDIC that it would be unduly expensive for them to integrate or link the various loan platforms with their deposit systems based on their assertions that not many of the credit balances are very high; i.e., much lower than the SMDIA. Therefore, they questioned the need to incur the cost to integrate the loan platforms with the deposit systems.

beneficial interest of a beneficiary or principal.

²⁰ 12 U.S.C. 1813(l)(3).

In order to address the covered institutions' concerns, the FDIC proposed adding a new paragraph (d) to § 370.4. Covered institutions would not be required to comply with the recordkeeping requirements of § 370.4(a) even though they maintained the depositor information necessary to perform a deposit insurance determination on their internal IT systems – just not their deposit platforms. In lieu of integrating their various loan platforms with their deposit systems, the covered institutions would be required to address the issue of credit balances existing on their loan platforms in another manner. Proposed § 370.4(d)(1) required that immediately upon a covered institution's failure, its IT system(s) must be capable of restricting access to (i) any credit balance reflected on a customer's account associated with a debt obligation to the covered institution or (ii) an equal amount in the customer's deposit account at the covered institution.

Section 370.4(d)(2)(i) required the covered institution to be able to generate a file in the format set forth in Appendix C within 24 hours after failure for all credit balances related to open-end loans (revolving credit lines) such as credit card accounts and HELOCs. In other words, the 24-hour requirement applied to any type of consumer loan account where the customer or borrower has the ability to draw on the credit line without the prior approval or intervention of the covered institution. This time frame would be necessary to ensure that the FDIC would have sufficient time, after the covered institution's failure, to identify the loan customers with credit balances, match them to their corresponding deposit accounts, and restrict access to an amount equal to the overpayment in the customer's deposit account before the next business day. With respect to all other types of loan accounts with overpayments, proposed § 370.4(d)(2)(ii) would have required the covered institution to be able to generate a file in the format set forth in Appendix C promptly after the covered institution's failure. For closed-end loan accounts, where the borrower has paid more than the balance owed or the outstanding principal balance, the credit balances would not be available or accessible to the customer without the covered institution's authorization or initiation of the payment.

Four of the five commenters commented on the proposed rule's treatment of credit balances in the event of a covered institution's failure; none of the comments expressed approval of the proposed rule's approach in its entirety. One of the commenters expressly supported the FDIC's decision not to require covered institutions to integrate their loan and deposit systems. Another commenter, however, stated that the proposal required effort which would be "significant, costly, and provides minimal benefit to the bank or customer."

The commenters addressed both the "restricting access" requirement as well as the requirement to prepare a file of the credit balances in the Appendix C format. One comment letter stated that the covered institutions should not be required to restrict access to the credit balances on open-end or closed-end credit accounts or to amounts equivalent to the credit balance on a borrower's deposit account. Two other commenters believed that access to credit balances on loan systems should not be restricted – particularly on closed-end loan accounts. Several of the commenters also opposed restricting access to the credit balances on credit card accounts; one stated that freezing access to credit card accounts "would potentially negatively impact customers who rely

on credit card transactions for daily purchases such as food and transportation.”

Commenters suggested that the requirement to restrict access to credit balances on credit card accounts should only apply when the credit balance is near or above the SMDIA. Moreover, any accounts above the specified threshold would have access restricted through a manual process. Finally, one commenter asserted that freezing an amount equivalent to the credit balance on the borrower’s loan account on the bank’s deposit system would require a matching process “which is not currently within bank capabilities.”

The other major area of concern discussed in the comments was the requirement to prepare a file of the credit balances in the Appendix C format. Generally, the commenters were not in favor of the Appendix C file format. One commenter stated that to require data in the Appendix C format would be a significant challenge. Another requested that the automated report in the Appendix C format be deleted; this commenter asserted that only a manual review of credit balances would be necessary, and the focus should be limited to the larger credit balances. One commenter suggested that the requisite data regarding closed-end loan credit balances should not have to be prepared in the Appendix C file format. This commenter believed, like several others, that the credit balances file could be processed manually after a covered institution’s failure. Finally, one commenter offered two alternatives for preparing the credit balances file. First, the covered institutions would only have to match customer information and create a file of credit balances for those accounts with large credit balances; this list would be prepared manually. Another option would require covered institutions to prepare a credit balance file only for credit balances on open-end loan accounts that exceed a specified dollar threshold; the commenter suggested a dollar threshold of \$ 200,000. In other words, if a covered institution has a customer with a credit balance on its credit card account which is \$ 200,000 or less, then the preparation of a file with the credit balance information would not be required.

As structured in the proposal, the approach to identifying and including the credit balances in the deposit insurance calculation would require two steps. The first step would restrict access to either the credit balance on the covered institution’s loan system or an amount equivalent to the credit balance on the customer’s deposit account. The second step would generate the data file in the Appendix C format. In the development of the second step, the FDIC distinguished between closed-end and open-end loan accounts. Production of the data file consisting of the credit balances on open-end credit accounts would be needed immediately to complete the deposit insurance determination within 24 hours of the covered institution’s failure. On the other hand, the data file for the closed-end credit accounts could be prepared on a different, less urgent, time frame for use in the deposit insurance calculation.

After due consideration of the comments received, the FDIC has revised the proposed rule to address many of the commenters’ concerns. In response to some of the commenters, the FDIC has decided to modify the two step approach – particularly with respect to the requirement to restrict access to accounts on the relevant loan platforms. In

the final rule, a covered institution's IT system will not be required to restrict access to the credit balances on its borrowers' credit accounts. This modification applies to both open-end and closed-end loan accounts. The FDIC recognizes that borrowers such as mortgagors cannot access any credit balance existing on a covered institution's mortgage loan system without the authorization and/or participation of the covered institution. Therefore, one of the FDIC's chief concerns is eliminated; i.e., the borrower cannot spend down the credit balance during the pendency of the deposit insurance determination process and potentially receive payment of uninsured funds. As structured, closed-end loan systems already restrict the borrower/customer's ability to access the credit balance autonomously. The covered institutions do not have to implement new procedures or modify their existing systems in order to restrict access to credit balances on the closed-end loan systems.

With respect to credit balances resulting from overpayments on open-end credit accounts, the FDIC has also eliminated the requirement that a failed covered institution's IT system must be able to restrict access to the credit balances on the customers' credit accounts housed on the loan platforms. This means at failure, the covered institution's credit card account systems would remain accessible to its credit cardholders. The credit cardholders would be able to continue to charge the cost of goods and services over closing weekend against any credit balance outstanding on their accounts at the time of the covered institution's failure. Although the final rule would not require the covered institution's IT system to automatically restrict access to an open-end loan system on a system-wide basis, the FDIC expects that after the covered institution's failure, FDIC staff would be able to manually restrict open-end credit accounts when the credit balances equal or exceed the deposit insurance threshold of \$ 250,000 to ensure that no funds are paid on any uninsured portion of the open-end credit account.

Although the requirement to restrict access to both open-end and closed-end credit account systems has been eliminated, the requirement that a covered institution's IT system be able to restrict "access to some or all of the deposits in a deposit account until the FDIC has made its deposit insurance determination for that deposit account" remains. This was not a new requirement and is not specific to § 370.4(d). Rather, it is an existing requirement from § 370.3(b)(3) and is fundamental to the FDIC's process for conducting a deposit insurance determination over any bank's closing weekend. It is customary practice for the FDIC, on closing night, to restrict access to the failed bank's deposit systems until the deposit insurance determination is completed. Usually, funds are available to the failed bank's depositors by the next business day. Rather than requiring the failed covered institution's system to restrict access to the amount equivalent to the credit balance on the loan system, the FDIC expects the covered institution's IT systems to be capable of restricting access to some or all deposits on the covered institution's deposit systems beginning on closing night. Then, provided that the covered institution's IT system is capable of producing the relevant data file in the Appendix C format, the objective is to complete the deposit insurance determination over the closing weekend, any uninsured funds that result from credit balances on open-end credit accounts will be debited, and the remaining funds will be available on the next business day – which is usually the following Monday.

Because the borrowers cannot independently access the overpayments on their closed-end credit accounts, the need to produce the file with the necessary data regarding the overpayments is not as critical as the situation regarding the open-end loan accounts. FDIC staff will use the covered institution's IT system to run the Appendix C data file for such closed-end credit accounts to complete the deposit insurance calculation process at some point after failure. It is important to note that by allowing the closed-end loan credit balances to be handled in a more idiosyncratic manner, it is quite possible that these borrowers/customers of the failed covered institution will have to wait longer to receive any additional deposit insurance funds represented by their overpayments. Nevertheless, these depositors should have access to any insured funds in their deposit accounts on the next business day because the credit balances on their closed-end loan accounts could be debited at a later time if, when aggregated with other deposits in the same right and capacity, a depositor's total amounts would exceed the SMDIA.

Two of the commenters asserted that the covered institutions are not able to take a "snapshot" of credit card accounts to identify credit balances as of close-of-business on the day of failure. From the FDIC's perspective, this functional weakness will have to be rectified. After failure, the FDIC must be able to identify the precise amount of a credit balance as of the close of the business day and will rely on that amount in making its insurance determination. Several commenters offered the alternative of placing holds on loan accounts with credit balances in excess of a predetermined threshold amount. Presumably, the covered institutions must have developed some functionality to determine large credit balances; ideally, this same functionality could be adapted to identify the overpayments on all open-end credit accounts. One commenter noted, however, that "a cardholder may have incurred transactions earlier in the day that will enter the system for processing later." Those transactions would be posted the following business day and therefore are not relevant to the deposit insurance determination.

The second step in the FDIC's approach to include all of the credit balances in the deposit insurance determination requires the covered institution's IT system to produce a data file in the Appendix C format. Several of the commenters suggested limiting the data file to only credit balances that exceed a predetermined threshold such as \$200,000 or greater. Additionally, if the list of credit balances were so limited, the commenters concluded that FDIC staff would be able to create the list manually using the covered institution's IT system. Finally, some commenters did not want to use the Appendix C format at all. The FDIC has determined that the proposed requirement to produce files of both the closed-end and the open-end credit balances, respectively, in the Appendix C format will be retained. Nevertheless, as set forth in the proposed rule, the timing of the production of the data file in the Appendix C format will depend upon whether the data file relates to closed-end or open-end credit balances.

The FDIC identified a number of issues with the commenters' recommendations. First, in order to complete the deposit insurance determination, a covered institution must be able to extract the requisite information from the data on its loan platforms to create a file listing the credit balances on the loan accounts as well as the other data fields as set forth

in the Appendix C file format. The Appendix C format includes the minimum number and type of data fields that the FDIC would need in order to identify and aggregate these credit balances with the other deposits owned by each depositor of the failed covered institution. The FDIC would expect the covered institution's IT system, which must be compliant with § 370.3(b), to be able to accept and process the file as formatted in Appendix C.

Second, it would not be possible for the FDIC to conduct a timely deposit insurance determination on the failed covered institution's deposit accounts if only credit balances in excess of \$200,000 on the open-end accounts are available over closing weekend. There were many comments noting that the amount of a credit balance on any individual credit card account, for example, is generally not very large. Therefore, the commenters did not believe that it should be necessary to create the capability to generate the requisite data file on all credit balances at failure. From the FDIC's perspective, there are two issues with that view. A depositor's credit balance, when aggregated with his/her deposit account balance (in the same right and capacity), could exceed the SMDIA – even if the credit balance, alone, is not significant. The FDIC, by statute, is only authorized to pay depositors their *insured deposits* in a failed bank resolution.²¹ Paying more would exceed its statutory authority. Moreover, although each individual overpayment may seem insignificant, in the aggregate – across all of the failed covered institution's credit card and deposit account owners, the DIF could fund these overpayments to uninsured depositors by a significant amount. These overpayments to uninsured depositors ultimately would diminish the FDIC's recovery from the failed covered institution's receivership.²² Paying uninsured depositors would represent a misuse of all IDIs' insurance premiums which fund the DIF. Therefore, the FDIC must be able to receive a data file in the Appendix C format that includes all of the credit balances for both the closed-end and open-end loan accounts.

Finally, the FDIC will require the Appendix C data file for open-end credit balances to be produced in a time frame that will allow the covered institution's IT system to complete the calculation of deposit insurance coverage within the first 24 hours after the covered institution's failure. Because access to the open-end credit systems will not be restricted after the covered institution's failure, the credit cardholders will still be able to run down any credit balances on their accounts during closing weekend. The FDIC will need the requisite data file within 24 hours so that FDIC staff would be able to complete the deposit insurance determination within the prescribed time frame, debit any uninsured amounts from the depositors' deposit accounts, and release the remaining insured funds by the next business day. This objective cannot be accomplished unless the covered institution's IT functionality is capable of producing the Appendix C file on a system-wide basis in a time frame that allows the covered institution's IT system to complete the deposit insurance calculation within the first 24 hours after failure. With respect to the production of the data file for the closed-end loan credit balances, the FDIC believed that the term "promptly" in the proposed rule would provide sufficient latitude to produce the

21 12 U.S.C. 1821(f)(1).

22 The FDIC, in its corporate capacity, has a subrogated claim for the amounts paid to the failed covered institution's depositors. See 12 USC 1821(g)(1).

requisite file in a reasonable time period. Nevertheless, commenters still expressed concern regarding an acceptable time frame to generate the Appendix C data file. Therefore, the FDIC confirms that there will be no mandated time frame for files generated for closed-end loan accounts in the final rule.

Several commenters expressed concern that if open-end credit systems were required to be restricted after the covered institution's failure, then the failed covered institution's credit card customers would be inconvenienced. On the other hand, if the Appendix C files are not produced in a timely manner and the deposit insurance determination cannot be completed, then the failed covered institution's depositors will be inconvenienced when their deposit accounts are not accessible on the next business day. In order to avoid such an outcome, the FDIC has adopted the § 370.4(d) provisions as set forth in this final rule.

- ***Relief***

In the NPR, the FDIC proposed to revise § 370.8(b) to expressly allow submission of a request by more than one covered institution for exception from one or more of the rule's requirements. Each covered institution would still be required to submit the institution-specific data required to substantiate the request as required under § 370.8(b). The FDIC also proposed to add a new paragraph (b)(2) to § 370.8 to provide that the FDIC will publish in the *Federal Register* a notice of its response to each exception request. The FDIC's notice of exception would not disclose the identity of the requesting covered institution(s) nor any confidential or material nonpublic information. Additionally, the FDIC proposed a new paragraph (b)(3) to § 370.8 that would allow a covered institution to notify the FDIC that, based on substantially similar facts and the same circumstances as presented in the notice published by the FDIC pursuant to § 370.8(b)(2) in the proposed rule, the covered institution 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 covered institution to the contrary within 120 days after receipt of the covered institution's complete notification letter. Under this proposal, the covered institution's notification letter would need to include the information required under § 370.8(b)(1), cite the applicable notice of exception published pursuant to § 370.8(b)(2), and demonstrate how the covered institution's exception is based upon substantially similar facts and the same circumstances as described in the applicable notice published by the FDIC.

Commenters generally supported the FDIC's proposal to revise § 370.8(b). Two commenters supported the revision regarding multiple covered institutions submitting an exception request because it reduces burden for covered institutions and the industry. However, one of the two commenters believed that industry associations should also be allowed to submit requests for relief on behalf of covered institutions. Several commenters recommended the FDIC shorten its proposed 120-day timeframe for disallowing a covered institution's invoked exception. Three commenters suggested that 120 days is too long for the FDIC to deny a deemed exception and suggested the time frame be shortened to 60 days.

One of the three commenters argued that covered institutions “would be concerned with the cost and delay of progressing with part 370 implementation for four months only then to have to backtrack to treat accounts understood to be excused.” Another commenter suggested a 120-day time frame is too long and a denial of an exception request would result in the need for customer outreach or significant system enhancements. This commenter stated that 30 days seems more reasonable. Three commenters supported the FDIC’s proposal of the “substantially similar facts and the same circumstances” standard and believed that this standard was a reasonable basis for deeming an exception granted. Another commenter suggested that this proposed standard be changed to “substantially similar facts and circumstances” without providing a rationale. Additionally, several commenters requested that certain data be removed from the FDIC response to exception requests before publication in the *Federal Register*. One commenter suggested that dollar amounts and bank-specific information be categorized as identifying information and be removed from the FDIC’s response. Another commenter advocated that the proposed § 370.8(b)(2) add a nondisclosure provision specifically stating that the notice will not disclose identifying, confidential, or material nonpublic information of the requesting covered institution(s).

The FDIC has amended § 370.8(b) along the lines proposed, with one further revision based on a comment. The final rule expressly allows submission of a request by more than one covered institution for exception from one or more of the rule’s requirements. Each covered institution will still be required to submit the covered institution-specific data required to substantiate the request as required under current § 370.8(b). The final rule also provides that the FDIC will publish in the *Federal Register* a notice of its response to each exception request. The FDIC’s notice of exception will not disclose the identity of the requesting covered institution(s) nor any confidential or material nonpublic information. The FDIC believes that it is unnecessary to add a provision to the rule stating that the FDIC will not disclose the identity of the requesting covered institution and confidential, material nonpublic information. Subject to statutory and regulatory exceptions, the FDIC does not disclose confidential or material nonpublic information and will not do so under this rule.

The final rule further amends § 370.8(b) to include the “substantially similar facts and circumstances” standard as suggested by a commenter. The final rule revises the proposed new paragraph (b)(3) to § 370.8 by allowing a covered institution to notify the FDIC that, based on “substantially similar facts and circumstances” as presented in the notice published by the FDIC pursuant to § 370.8(b)(2), the covered institution elects to use the same exception.

The FDIC wants to provide covered institutions with more certainty with respect to exception relief and believes that § 370.8(b)(3) of the final rule provides covered institutions with more flexibility to determine whether one of the FDIC’s published responses is applicable to its situation. The FDIC will still make the determination of whether a covered institution’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 covered institution’s invocation of relief pursuant to § 370.8(b)(3). The final rule will

also minimize time spent by the FDIC and covered institutions alike on processing this type of exception request.

The FDIC also believes that the 120-day time frame for a response to a request under this process is appropriate. The FDIC understands that covered institutions will be expecting a quick response from the FDIC, and it will make every effort to respond promptly within 120 days. Covered institutions providing notice to the FDIC under § 370.8(b)(3) should submit such notice to the FDIC at least 120 days before the covered institution's compliance date. Any covered institution that is denied a request for relief must comply with the requirements of the rule. However, if the covered institution's compliance date has not passed, the covered institution may submit an extension request at the same time it submits an exception request or notice under § 370.8(b)(3).

- ***Technical modifications***

Two commenters addressed proposed technical amendments. Both commenters suggested that the government ID fields in the appendices should be allowed to be populated with a null value. One commenter explained that part 370 requires a unique ID, which can be a government ID but may be another unique number. This commenter also stated that covered institutions may not have a government ID for every account. Additionally, this commenter stated that the purpose of the DP_Hold_Amount field in the appendices is unclear and reporting this field involves unnecessary complexity for covered institutions.

The final rule adopts the amendments as proposed. The FDIC believes that covered institutions should have a valid customer identification type as described in the appendices. Additionally, the DP_Hold_Amount cannot be given a null value, but if there is no hold amount then the value should reflect a zero amount.

- ***Additional recommendations from commenters***

Some comment letters also made recommendations that were not addressed in the proposed rule. The FDIC summarized these comments in the final rule preamble and considered all comments for the final rule.

9. Payments or gifts to respondents:

None.

10. Any assurance of confidentiality:

The final rule expressly allows submission of a request under §370.8(b) by more than one covered institution for exception from one or more of the rule's requirements. Each covered institution will still be required to submit the covered institution-specific data required to substantiate the request as required under current § 370.8(b). The final rule also provides that the FDIC will publish in the *Federal Register* a notice of its response to each exception request. The FDIC's notice of exception will not disclose the identity of

the requesting covered institution(s) nor any confidential or material nonpublic information. The FDIC believes that it is unnecessary to add a provision to the rule stating that the FDIC will not disclose the identity of the requesting covered institution and confidential, material nonpublic information as requested by a commenter. Subject to statutory and regulatory exceptions, the FDIC does not disclose confidential or material nonpublic information and will not do so under this rule. Information will be kept private to the extent allowed by law.

11. Justification for questions of a sensitive nature:

Part 370 generally requires covered institutions to ensure that their deposit account records contain sufficient information to identify owners of deposits, unless they are permitted otherwise in accordance with the FDIC's deposit insurance rules in 12 CFR part 330. Such information would include personal and sensitive information such as the owner's social security number, among other things. To pay deposit insurance, the FDIC uses a failed IDI's records to aggregate the amounts of all deposits that are maintained by a depositor in the same right and capacity and then applies the standard maximum deposit insurance amount ("SMDIA") of \$250,000. All sensitive information included in the information collection is required to enable the FDIC to make a timely deposit insurance determination in the event of the failure of an IDI.

12. Estimate of hour burden including annualized hourly costs:

The estimated average annual burden for finalizing the implementation of the collection of information under Part 370 is approximately 544,948 hours²³. The estimated ongoing annual burden for the respondents is approximately 6,197 hours per year. The estimated total average annual burden for the information collection is 551,145 hours.

²³ The 2016 final rule provided for a three-year initial implementation phase at an estimated average annual implementation burden of 1,735,511 hours. Two years of the three-year initial implementation phase have elapsed and only the third year and associated labor costs remains. The 2019 final rule gives covered institutions the option of completing the remaining implementation phase over a maximum of two years. The average implementation burden was updated to reflect current data and the revisions made by the 2019 final rule. The remaining average implementation burden (and the associated labor cost discussed below) is calculated based on one third of the total estimated burden and is currently estimated to be 1,634,844 hours. Spread over the three-year validity of the information collection, the remaining average annual implementation burden is 544,948 hours.

Summary of Annual Burden

	Type of Burden	Obligation to Respond	Estimated Number of Respondents	Estimated Time per Response (Hours)	Frequency of Response	Total Estimated Annual Burden (Hours)
Average Implementation Burden						
<i>Low Complexity Institutions</i>	Recordkeeping	Mandatory	12	3,145	Once	37,739
<i>Mid Complexity Institutions</i>	Recordkeeping	Mandatory	12	5,960	Once	71,524
<i>High Complexity Institutions</i>	Recordkeeping	Mandatory	12	36,307	Once	435,685
Total Average Implementation Burden						544,948
Average Ongoing Burden						
<i>Low Complexity Institutions</i>	Recordkeeping	Mandatory	12	162	On Occasion	1,948
<i>Mid Complexity Institutions</i>	Recordkeeping	Mandatory	12	163	On Occasion	1,952
<i>High Complexity Institutions</i>	Recordkeeping	Mandatory	12	186	On Occasion	2,232
<i>Request for Release</i>	Reporting	Voluntary	1	5	On Occasion	5
<i>Request for Exception</i>	Reporting	Voluntary	1	60	On Occasion	60
Total Average Ongoing Burden						6,197
Total Estimated Average Annual Burden						551,145

The FDIC assumes that the final rule affects an estimated one to 20 percent of accounts on average, for covered institutions.²⁴ For the purposes of the Paperwork Reduction Act, the FDIC estimates that approximately 10 percent of non-retirement accounts consist of the type of accounts for which the FDIC has granted relief under the final rule. The number of accounts affects only one of eight components of the burden model for the final rule for Part 370 adopted in 2016 (the “2016 Final Rule”): Legacy Data Clean-up. This component consists of two portions: 1) automated clean-up, and 2) manual clean-up. The number of accounts affects only the manual portion associated with correcting bank records, and thus the final rule affects only that estimate.

Using this adjusted burden as a baseline for the burden reduction associated with the final rule, FDIC estimates that the final rule reduces the implementation burden by 139,287 hours. This includes 139,352 hours of burden reduction but adds 65 hours of additional burden for requests for extensions and exemptions under the final rule.²⁵

Estimated Monetized Costs by Component²⁶

²⁴ The FDIC analyzed the dollar volume of retirement, mortgage servicing, and trust accounts as reported on the December 31, 2018 Call Reports for covered institutions .

²⁵ Ongoing burden decreased by 13, 856 hours from the 2016 rule estimate, solely because of adjustments due to updating data and coverage.

²⁶ The 2016 final rule provided for a three-year initial implementation phase. Two years of the three-year

	Original Part 370 (2016 Rule)	Updated Data and Coverage	Final Rule	Change from Updated Data and Coverage	Change from Final Rule
Implementation Costs					
<i>Legacy Data Cleanup</i>	\$25,164,704	\$25,272,194	\$22,949,709	\$107,491	(\$2,322,485)
<i>Data Aggregation</i>	\$7,112,819	\$6,967,513	\$6,967,513	(\$145,306)	\$0
<i>Data Standardization</i>	\$4,063,766	\$3,979,062	\$3,979,062	(\$84,704)	\$0
<i>Data Extraction</i>	\$2,821,973	\$2,785,921	\$2,785,921	(\$36,052)	\$0
<i>Quality Control and Compliance</i>	\$2,044,778	\$2,002,720	\$2,002,720	(\$42,059)	\$0
<i>Insurance Calculation</i>	\$1,055,600	\$953,778	\$953,778	(\$101,822)	\$0
<i>Reporting</i>	\$663,533	\$629,000	\$629,000	(\$26,785)	\$0
Total Implementation Costs	\$42,927,174	\$42,590,188	\$40,267,703	(\$336,986)	(\$2,322,485)
Ongoing Costs	\$333,329	\$306,544	\$306,544	(\$26,785)	\$0
Total Costs	\$43,260,503	\$42,896,733	\$40,574,248	(\$363,771)	(\$2,322,485)

Methodology

In estimating the costs of Part 370, the FDIC engaged the services of an independent consulting firm. Working with the FDIC, the consultant used its extensive knowledge and experience with IT systems at financial institutions to develop a model to provide cost estimates for the following activities:

- Implementing the deposit insurance calculation
- Legacy data clean-up
- Data extraction
- Data aggregation
- Data standardization
- Data quality control and compliance
- Data reporting
- Ongoing operations

Cost estimates for these activities were derived from a projection of the types of workers needed for each task, an estimate of the amount of labor hours required, an estimate of the industry average labor cost (including benefits) for each worker needed, and an estimate of worker productivity. The analysis assumed that manual data clean-up would be needed for 5 percent of deposit accounts, 10 accounts per hour would be resolved, and

initial implementation phase have elapsed and only the third year and associated labor costs remains. The 2019 final rule gives covered institutions the option of completing the remaining implementation phase over a maximum of two years. The average implementation burden was updated to reflect current data and the revisions made by the 2019 final rule. Labor costs are calculated based on one third of the total estimated burden and is currently estimated to be 1,634,844 hours. Spread over the three-year validity of the information collection, the remaining average annual implementation burden is 544,948 hours.

internal labor would be used for 60 percent of the clean-up. This analysis also projected higher costs for institutions based on the following factors:

- Higher number of deposit accounts
- Higher number of distinct core servicing platforms
- Higher number of depository legal entities or separate organizational units
- Broader geographic dispersal of accounts and customers
- Use of sweep accounts
- Greater degree of complexity in business lines, accounts, and operations.

Approximately half of part 370's estimated total costs are attributable to legacy data clean-up. The legacy data clean-up cost estimates are sensitive to both the number of deposit accounts and the number of deposit IT systems. More than 90 percent of the legacy data clean-up costs are associated with manually collecting account information from customers and entering it into the covered institutions' IT systems. Data aggregation, which is sensitive to the number of deposit IT systems, makes up about 13 percent of the rule's estimated costs.

13. Estimate of start-up costs to respondents:

None. FDIC estimates that the existing computer systems and equipment currently used by respondent institutions will be sufficient to make the calculations and maintain the records required by the final rule.

14. Estimate of annualized costs to the government:

None.

15. Analysis of change in burden:

Correction of Overstated Burden in 2016 Submission

The original (2016 rule) estimated total burden for this information collection was 5,226,520 hours. That burden should have been annualized over the three-year implementation period contemplated under the 2016 rule. The correct annual burden should have been entered in ROCIS as 1,755,499 hours. In other words, burden was overstated by 3,471,021 hours. The current burden estimates incorporate a correction of this error.

	2016 ROCIS			2016 Corrected			Change (Hours)
	No. of Resp.	Hours per Response	Total Burden Hours	No. of Resp.	Hours per Response	Total Burden Hours	
Implementation Burden							
Low Complexity RK	13	32,040.15	416,522	13	10,680.05	138,841	(277,681)
Mid Complexity RK	13	48,060.31	624,784	13	16,020.10	208,261	(416,523)
High Complexity RK	12	347,102.17	4,165,226	12	115,700.72	1,388,409	(2,776,817)
Total Implementation	38		5,206,532	38		1,735,511	(3,471,021)
Ongoing Burden							
Low Complexity RK	13	507.38	6,596	13	507.38	6,596	0
Mid Complexity RK	13	507.38	6,596	13	507.38	6,596	0
Mid Complexity RK	12	566.33	6,796	12	566.33	6,796	0
Total Ongoing			19,988			19,988	0
Total Burden			5,226,520			1,755,499	(3,471,499)

Updated Data and Coverage

The 2016 Final Rule estimated 38 banks would be covered. As of April 1, 2017, the effective date of the rule, only 32 banks were covered by the rule. Since then, four additional banks became covered by the rule for a total of 36 covered banks. FDIC’s burden estimate uses bank-level data from December 31, 2018, updating the original burden estimate which was based on December 31, 2016 data. Part of the reduction in burden is attributed to a reduction in the number of respondents from 38 to 36 institutions.

An analysis of deposit account information at covered institutions suggested that the final rule could affect an estimated one to 20 percent of accounts on average, for covered institutions.²⁷ The realized effect would vary depending upon the types of accounts that a covered institution offers. The more deposit accounts a covered institution has, the greater the reduction in recordkeeping requirements these final rule amendments would provide. To conservatively estimate the expected benefits of the final rule, the FDIC assumed that the reduced recordkeeping and requirements would affect between one and 20 percent of all deposit accounts at covered institutions.

For the purposes of the Paperwork Reduction Act, the FDIC estimates that approximately 10 percent of non-retirement accounts consist of the type of accounts for which the FDIC proposes to grant relief. The number of accounts affects only one of eight components of the burden model for the final rule for Part 370 adopted in 2016 (the “2016 Final Rule”): Legacy Data Clean-up. This component consists of two portions: 1) automated clean-up, and 2) manual clean-up. The number of accounts affects only the manual portion associated with correcting bank records, and thus the final rule affects only that estimate.

Using this adjusted burden as a baseline for the burden reduction of the final rule, FDIC

²⁷ The FDIC analyzed the dollar volume of retirement, mortgage servicing, and trust accounts as reported on the December 31, 2018 Call Reports for covered institutions.

estimates that the above data and coverage adjustments result in a net increase in the total estimated burden of 24,829 hours. This includes an increase in estimated implementation burden of 38,685 hours and a reduction in ongoing burden of 13,856 hours.

	2016 Corrected			Updated Data & Coverage			
	No. of Resp.	Hours per Response	Total Burden Hours	No. of Resp.	Hours per Response	Total Burden Hours	Change (Hours)
Implementation Burden							
Low Complexity RK	13	10,680.05	138,841	12	10,101.33	121,216	(17,625)
Mid Complexity RK	13	16,020.10	208,261	12	19,371.00	232,452	24,191
High Complexity RK	12	115,700.72	1,388,409	12	118,377.33	1,420,528	32,119
Total Implementation	38		1,735,511	36		1,774,196	38,685
Ongoing Burden							
Low Complexity RK	13	507.38	6,596	12	162.33	1,948	(4,648)
Mid Complexity RK	13	507.38	6,596	12	162.67	1,952	(4,644)
Mid Complexity RK	12	566.33	6,796	12	186.00	2,232	(4,564)
Total Ongoing			19,988			6,132	(13,856)
Total Burden			1,755,499			1,780,328	24,829

Final Rule Revisions

Burden was updated to reflect current data and the revisions made by the 2019 final rule. Implementation burden decreased by 139,352 hours but ongoing burden increased by 65 hours due to new voluntary reporting provisions contained in the 2019 final rule. This resulted in a net decrease in burden due to revisions made by the 2019 final rule of 139,287 hours.

	Updated Data & Coverage			2019 Final Rule Revisions			
	No. of Resp.	Hours per Response	Total Burden Hours	No. of Resp.	Hours per Response	Total Burden Hours	Change (Hours)
Implementation Burden							
Low Complexity RK	12	10,101.33	121,216	12	9,434.67	113,216	(8,000)
Mid Complexity RK	12	19,371.00	232,452	12	17,881.00	214,572	(17,880)
High Complexity RK	12	118,377.33	1,420,528	12	108,921.33	1,307,056	(113,472)
Total Implementation	36		1,774,196	36		1,634,844	(139,352)
Ongoing Burden							
Low Complexity RK	12	162.33	1,948	12	162.33	1,948	0
Mid Complexity RK	12	162.67	1,952	12	162.67	1,952	0
Mid Complexity RK	12	186.00	2,232	12	186.00	2,232	0
Req. Release RPT				1	5.00	5	5
Req. Exception RPT				1	60.00	60	60
Total Ongoing			6,132			6,197	65
Total Burden			1,780,328			1,641,041	(139,287)

Remaining Implementation Phase Adjustment

The 2016 final rule provided for a three-year initial implementation phase. Two years of the three-year initial implementation phase have elapsed and only the third year remains. The 2019 final rule gives covered institutions the option of completing the remaining implementation phase over a maximum of two years. FDIC assumes that ongoing burden will remain the same over the three-year validity of this information collection. The average implementation burden was updated to reflect current data and the revisions made by the 2019 final rule. Implementation burden is reported based on one third of the total estimated remaining burden of 1,634,844 hours. Spread over the three-year validity of the information collection, the remaining average annual implementation burden is 544,948 hours. Annualizing the remaining implementation burden results in a reduction in implementation burden of 1,089,896 hours.

	2019 Final Rule Revisions			Annualized 2019 Rule Burden				
	No. of Resp.	Hours per Response	Total Burden Hours		No. of Resp.	Hours per Response	Total Burden Hours	Change (Hours)
Implementation Burden								
Low Complexity RK	12	9,434.67	113,216		12	3,144.89	37,739	(75,477)
Mid Complexity RK	12	17,881.00	214,572		12	5,960.33	71,524	(143,048)
High Complexity RK	12	108,921.33	1,307,056		12	36,307.11	435,685	(871,371)
Total Implementation	36		1,634,844		36		544,948	(1,089,896)
Ongoing Burden								
Low Complexity RK	12	162.33	1,948		12	162.33	1,948	0
Mid Complexity RK	12	162.67	1,952		12	162.67	1,952	0
Mid Complexity RK	12	186.00	2,232		12	186.00	2,232	0
Req. Release RPT		5.00	5		1	5.00	5	0
Req. Exception RPT		60.00	60		1	60.00	60	0
Total Ongoing			6,197				6,197	0
Total Burden			1,780,328				1,641,041	(1,089,896)

Change in Burden Summary

The change in burden is 4,675,375 hours from the 5,226,520 hours originally reported under the 2016 final rule to 551,145 hours for the annualized total burden under the 2019 final rule. The change in burden components are summarized in the following table:

	Total Burden	Change in Burden	Cumulative Change
Overstated 2016 Burden	5,226,520		
Corrected 2016 Burden	1,755,499	(3,471,021)	(3,471,021)
Updated Data and Coverage Adjustment	1,780,328	24,829	(3,446,192)
2019 Final Rule Revisions	1,641,041	(139,287)	(3,585,479)
Annualized Remaining Burden 2019 Rule	551,145	(1,089,896)	(4,675,375)

16. Information regarding collections whose results are planned to be published for statistical use:

The results of this collection will not be published for statistical use.

17. Display of expiration date:

The OMB Control Number and expiration date for this collection of information is displayed in the final rule published in the *Federal Register*.

B. Collection of Information Employing Statistical Methods

Not applicable.