

SUPPORTING STATEMENT

TREATMENT BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AS CONSERVATOR OR RECEIVER OF FINANCIAL ASSETS TRANSFERRED BY AN INSURED DEPOSITORY INSTITUTION IN CONNECTION WITH A SECURITIZATION OR PARTICIPATION OMB Control No. 3064-0177

INTRODUCTION

The subject collection of information is currently approved by OMB under control number 3064-0177. This submission is being made in connection with the issuance of a final rule by the Federal Deposit Insurance Corporation (the “FDIC”) whereby the FDIC is amending its securitization safe harbor rule, which relates to the treatment of financial assets transferred in connection with a securitization transaction, to eliminate a requirement that the securitization documents comply with Regulation AB of the Securities and Exchange Commission in circumstances where Regulation AB by its terms would not apply to the issuance of obligations backed by such financial assets.

JUSTIFICATION

1. Circumstances that make the collection necessary:

The FDIC, as deposit insurer and receiver for failed IDIs, has a unique responsibility and interest in ensuring that residential mortgage loans and other financial assets originated by IDIs are originated for long-term sustainability. The FDIC’s responsibilities to protect insured depositors and resolve failed insured banks and thrifts and its responsibility to the DIF require it to ensure that, where it provides a safe harbor consenting to special relief from the application of its receivership powers, it must do so in a manner that fulfills these responsibilities.

It would be imprudent for the FDIC to provide consent or other clarification of its application of its receivership powers without imposing requirements designed to realign the incentives in the securitization process to avoid the effects of the misalignment of incentives described below. The FDIC’s adoption of 12 C.F.R. § 360.6 in 2000 provided clarification of “legal isolation” and facilitated legal and accounting analyses that supported securitization. In view of the accounting changes and the effects they have upon the application of the Securitization Rule, it is crucial that the FDIC provide clarification of the application of its receivership powers in a way that reduces the risks to the DIF by better aligning the incentives in securitization to support sustainable lending and structured finance transactions.

The Securitization Safe Harbor Rule addresses circumstances that may arise if the FDIC is appointed receiver or conservator for an IDI that has sponsored one or more securitization transactions. If a securitization satisfies one of the sets of conditions established by the Securitization Safe Harbor Rule, the Rule provides that, depending on which set of conditions is satisfied, either (i) in the exercise of its authority to repudiate or disclaim contracts, the FDIC

shall not reclaim, recover or recharacterize as property of the institution or receivership the financial assets transferred as part of the securitization transaction, or (ii) if the FDIC repudiates the securitization agreement pursuant to which financial assets were transferred and does not pay damages within a specified period, or if the FDIC is in monetary default under a securitization for a specified period due to its failure to pay or apply collections received by it under the securitization documents, certain remedies will be available to investors on an expedited basis.

2. Use of the Information:

The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the DIF from the opaque securitization structures and the poorly underwritten loans that led to the onset of the financial crisis. In addition, these conditions were designed to address the difficulties provided by the then existing model of securitization. However, greater transparency is not solely for investors but will serve to more closely tie the origination of loans to their long-term performance by requiring disclosure of that performance.

3. Consideration of the use of improved information technology:

Respondents may use technology to the extent feasible, desirable or appropriate to make the required disclosures and to maintain the required records that permits review by FDIC examiners.

4. Efforts to identify duplication:

The information required is unique. It is not duplicated elsewhere.

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

The information is collected only from a limited group of IDIs who engage in securitization transactions. Small entities are not affected.

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

The disclosure requirements are imposed on a per occurrence/transaction basis. Less frequent disclosures would impair the ability of investors to adequately evaluate the investment potential of each transaction. The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the DIF from opaque securitization structures and poorly underwritten loans.

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

None. The information collection is conducted in accordance with OMB guidelines in 5 CFR part 1320.5(d)(2).

8. Efforts to consult with persons outside the agency:

The FDIC published a notice of proposed rulemaking (NPR) with a 60-day comment period in the Federal Register on August 22, 2019 (84 FR 43732) seeking comments on the proposed rule. The FDIC received ten comment letters in total: five from trade organizations; one from an IDI; two from individuals; one from a financial reform advocacy group; and one from a financial market public interest group. These comment letters are available on the FDIC's website. The FDIC considered all of the comments it received when developing the final rule, which is unchanged from the rule proposed in the NPR.

A majority of the comment letters support the amendment to the Securitization Safe Harbor Rule. All of the trade group and IDI letters support removing the requirement to impose Regulation AB compliance on transactions where Regulation AB is not otherwise applicable. This requirement was characterized by the letters as “an insurmountable obstacle”, a “barrier”, “a regulatory impediment”, a “disincentive” to IDI sponsorship of RMBS, and a “roadblock” to increased RMBS issuance by IDIs. In addition, three of the letters observed that aligning the Regulation AB disclosure requirement contained in the Securitization Safe Harbor Rule with the SEC rule as to the scope of transactions to which Regulation AB disclosure applies would level the playing field for sponsorship of securitizations between IDIs, which prior to the final rule are required by the Securitization Safe Harbor Rule to comply with Regulation AB in private transactions, and securitization sponsors not subject to the Securitization Safe Harbor Rule, which are not required to comply with Regulation AB in connection with private transactions.¹ Indeed, the lack of alignment of the disclosure rules governing private IDI securitization sponsors and non-IDI securitization sponsors was viewed as so significant that one trade organization indicated that although its investor members would prefer obtaining Regulation AB disclosure in private transactions, the investor members generally joined with its other members in supporting the amendment “based on the principle that the regulations applicable to industry participants should be consistent.”

Several of the letters expressed the view that removal of this Regulation AB requirement would help promote an increase in credit available to the mortgage market. Some of the letters also maintained that this amendment to the Securitization Safe Harbor Rule would increase liquidity for mortgage and other asset classes and lower costs and improve choices for consumers. One commenter stated that the proposal was consistent with principles regarding the need for increased private securitization set forth in a Treasury Department September 2019 report on capital markets² and in a separate Treasury Department paper on housing finance reform.³ This letter also stated that the proposal would provide benefits to the economy by weaning the

¹ As noted below, National Credit Union Administration Rules also require compliance with Regulation AB in private transactions.

² www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf

³ <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf>

mortgage market off of its significant dependency on government backed securitization programs and thus reduce the risk to taxpayers.

The letters from the individuals, the financial reform advocacy group and the public interest group were critical of the rule change. One of the letters asserted that an expected result of the change, an increase in RMBS, was not an appropriate goal since, according to the letters, RMBS was a primary cause of the 2008 financial crisis.⁴ The letter stated the FDIC should include a finding that adequate safeguards protecting investors and the financial system remain in place, and demonstrate a dire shortage of residential mortgage credit sufficient to justify the need for the amendment. Another letter argued that while the NPR identified certain risks that could arise from the amendment to the Securitization Safe Harbor Rule, it did not adequately explain why these risks (reduced information flow to investors, a less efficient allocation of credit, increased risk of potential losses to investors, and, if private placements increased and became more risky, an increase in vulnerability of the mortgage market to a period of financial stress) were minimized by reference to post-financial crisis regulatory changes that were not specifically identified in the NPR. This letter also criticized the NPR for not explaining how such regulatory changes would prevent the amendment to the Securitization Safe Harbor Rule from leading to the conditions that led to the financial crisis.

The FDIC did note that a possible effect of removing an unnecessary barrier to IDI sponsorship of RMBS was an increase in RMBS issuance, but it does not follow that the FDIC is attempting with the final rule to cure a deficiency of mortgage credit. The FDIC believes that the reasons articulated in support of the rule are sound, and do not require a further demonstration of a shortage of mortgage credit. In addition, as for the claim that the NPR did not address the risks identified in the NPR, such as a possible increase in the vulnerability of the mortgage market to a period of financial stress in the event that the amendment results in an increase in risky, privately placed securitizations, the NPR explained that “[i]n this respect, a significant part of the problems experienced with RMBS during the crisis were attributable to the proliferation of subprime and so-called alternative mortgages as underlying assets for those RMBS. The FDIC believes that a number of post-crisis regulatory changes make it unlikely that substantial growth of similar types of RMBS would occur again.”⁵ This analysis applies equally to the other potential risks cited in the preceding paragraph that were noted in the NPR.

One of these letters also asserted that the proposal did not address the danger that the amendment could increase activity in other potentially risky asset classes and did not adequately quantify the effects of the proposed rule. This letter also stated that the FDIC’s suggestion that the amendment would increase the willingness of IDIs to sponsor securitizations was speculative, that any reduction of burden is irrelevant because it is not the FDIC’s mission to reduce burden, and that the likely impact of the proposal included in the NPR must be evaluated in light of the other current deregulatory efforts.⁶

While the FDIC appreciates the concerns as to the effect of the final rule expressed in these

⁴ One of the letters cited two chapters of an FDIC publication (*FDIC, Crisis and Response: An FDIC History, 2008-2013*, Chapters 1 and 4 (2017) (avail. at <https://www.fdic.gov/bank/historical/crisis/>)) as support for the view that excessive RMBS issuance was a leading cause of the 2008 financial crisis. In fact, while noting that increased RMBS issuance was one of several causes of the financial crisis, the applicable parts of the chapters focused on subprime and other high-risk alternative type mortgages, as well as relaxed lending standards, as significant contributors to the problems it discussed.

⁵ 84 FR 43732, 43735.

letters, it does not believe that the concerns are justified. In adopting the final rule, the FDIC evaluated the numerous other significant disclosure requirements identified in section *II. Background* of the final rule preamble and has concluded that the Securitization Safe Harbor Rule continues to require robust and adequate disclosure to investors. As noted in the NPR, a significant part of the problems experienced with RMBS during the financial crisis was attributable to the proliferation of subprime and alternative mortgages (sometimes referred to as “nontraditional mortgages”). As further noted in the NPR, a major part of the problems with RMBS that surfaced during the financial crisis arose from poorly underwritten loans and a significant portion of these problems was attributable to relaxed lending standards and the making of mortgages to persons who were unable to repay the loans. As also noted in the FDIC study referenced in one of the letters,⁷ the originate to distribute model, under which sponsoring institutions retained limited or no exposure to the mortgages that they sold to securitization vehicles, was a major source of the proliferation of poorly underwritten mortgage loans and risky RMBS issuances. The regulatory developments mentioned in *II. Background*, which (among other items) strongly motivate lenders to ascertain a borrower’s ability to pay, require that sponsors retain a portion of the risk of mortgages that they securitize, imposed new appraisal requirements and mandated more easily understandable disclosures, address these problems and other objections from commenters cited above, and have made it very unlikely that substantial growth of similar types of RMBS securitized in risky transactions will re-occur.⁸

The FDIC agrees with the comment that the NPR did not offer an analysis of whether the amendment to the Securitization Safe Harbor Rule could increase activity in other “potentially risky asset classes.” The discussion in the NPR, as well as the discussion in this final rule, has focused on RMBS because FDIC staff found no evidence that the Regulation AB compliance requirement of the Securitization Safe Harbor Rule had prevented would-be IDI sponsors from sponsoring securitizations of other asset classes that are subject to Regulation AB.

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

⁶ A letter also stated the amendment would result in an inconsistency with regulations of the National Credit Union Administration (NCUA), which adopted a securitization safe harbor in 2017 which includes the Regulation AB requirement. The FDIC was pleased that the NCUA adopted a securitization safe harbor rule that was consistent with the Securitization Safe Harbor Rule, and notes, in response to this letter, that the NCUA is free to maintain that consistency, if it chooses to do so, by adopting an amendment similar to the final rule.

⁷ See footnote 10, *supra*.

⁸ Several of these regulatory developments (the ability to pay regulation and the capital and liquidity regulations) are presumably well-recognized by investors, as they are discussed in two of the comment letters that were critical of the NPR.

reputational risks for RMBS sponsors and privacy risks to borrowers.”

Comment letters that criticized the change to the Regulation AB provision of the Securitization Safe Harbor Rule suggested that the amendment to the Securitization Safe Harbor Rule was intended to enhance proliferation of RMBS. It is important to note that by removing a regulatory requirement that poses an obstacle to IDI access to a segment of the capital markets, and acknowledging that such removal can be expected to increase RMBS sponsorship (and possibly other asset class sponsorship) by IDIs, the FDIC should not be interpreted as enunciating a policy goal to increase such IDI participation. The amendment should be viewed as clearing or leveling the field from unnecessary regulatory interference, rather than as an action whose goal is the increase of such activity.⁹ If such an increase occurs, it will occur due to individual decisions of market participants, and all such issuances will be subject to the suite of post-2010 regulations mentioned in *II. Background*. The FDIC believes that if such market decisions result in increased RMBS activity, the remaining disclosure requirements of the Securitization Safe Harbor Rule together with the other requirements of the Rule, when coupled with the other post-crisis regulatory developments, will promote sustainable, prudent securitization sponsorship by IDIs to at least the same extent as such goals were promoted by the Securitization Safe Harbor Rule Regulation AB requirement when it was adopted in 2010.

As noted, one commenter asserted that the analysis that the amendment will increase private RMBS is speculative. The FDIC notes that the NPR did not predict an increase in RMBS. The NPR stated that if market participants’ perceptions are correct that the rule could increase insured banks’ willingness to participate in private RMBS activity, then the proposed rule “*could* (emphasis added) result in an increase in the dollar volume of privately issued RMBS ...”¹⁰

One of the comment letters also asserted that the statement that some associated increase in U.S. economic input would be expected to accompany an increased volume of mortgage credit is a “bold assertion apparently based on speculation for which the FDIC offers no support”. In fact, the NPR states that the possibility of increased economic activity is, in part, because “the imputed value of credit services banks provides is a component of measured GDP. The purchase of a new home also may be accompanied by the purchase of other household goods and services that contribute to an increase in overall economic activity.” 84 FR 43732, 43735. This comment letter also states that the FDIC must consider the impact of the proposal “in light of the deregulatory environment that currently prevails.” As noted in the NPR and as discussed in this Supplementary Information, an array of important regulatory safeguards now exist that should minimize the likelihood of a recurrence of a substantial volume of risky securitizations backed by poorly underwritten mortgages.

⁹ As noted above, one letter critical of the amendment referred to the analysis in the NPR that the amendment would reduce costs for IDIs and stated that reduction of compliance costs should not be considered an element of the FDIC’s mission. The NPR cited, and this Supplementary Information cites, the reduction in costs as part of its analysis of expected effects. While a policy to remove unnecessary regulatory requirements is indeed reflected in the NPR (and in this Supplementary Information), it is not the case (and the NPR and this Supplementary Information do not suggest) that the FDIC’s mission is to generally reduce compliance costs, without regard to the substance of the regulation necessitating such compliance costs.

¹⁰ 84 FR 43732, 43735.

The comment letters that criticized the amendment also asserted that if the FDIC adopts the amendment to the Securitization Safe Harbor Rule, the FDIC will be acting contrary to its mandate to protect the Deposit Insurance Fund (DIF) and that, in not applying Regulation AB to transactions to which Regulation AB does not otherwise apply, the FDIC lost sight of the fact that it has a different mandate than the SEC. The FDIC does not agree with these assertions. In adopting the final rule, the FDIC carefully considered the risks to IDIs and to the DIF, and also reviewed the array of disclosure requirements that will remain part of the Securitization Safe Harbor Rule as well as the regulatory safeguards described in *II. Background*. The FDIC also notes that the final rule will enable IDIs to diversify their sources of funding and enhance options for obtaining liquidity for mortgage loans. Comment letters support this analysis. According to one letter, the amendment would benefit “IDIs, who would see additional risk management paths that would allow them to maintain lending through a variety of economic circumstances.” Indeed, another letter evaluated the amendment to the Regulation AB provision as “an appropriate balance of protection of the Deposit Insurance Fund and facilitation of insured institutions’ prudent participation in the private securitization markets.”

9. Payments or gifts to respondents:

None.

10. Any assurance of confidentiality:

The information collected will be kept confidential to the extent permitted by law. The information may be afforded confidential treatment pursuant to sections (b)(4), (b)(6), and (b)(8) of the Freedom of Information Act (5 U.S.C. §§ 552(b)(4), (b)(6), and (b)(8); and section 1103 of the Right to Financial Privacy Act (12 U.S.C. § 3403).

11. Justification for questions of a sensitive nature:

None of the information required to be reported, disclosed or maintained is of a sensitive nature.

12. Estimate of hour burden including annualized hourly costs:

Estimated Annual Burden

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

§ 360.6(b)(2)(ii)(C)	Disclosure	3	2	1	6
§ 360.6(c)(7)	Recordkeeping	14	6	1	84
Total Estimated Annual Burden (Hrs)					348

Annualized Cost of Total Proposed Hourly Burden

The estimated average hourly compliance cost for complying with this IC is \$124.68 for certain items, \$70.17 for other items, and \$151.75 for one item.¹¹ Other items have different cost estimates if it seems that complying with the IC would require multiple individuals with different skill sets.¹² The table below shows the estimates of the number of hours required to comply with the various items in this IC, as well as how those estimates compare to the estimates used in the previous submission.

Information collection	Burden type	Estimated burden hours	Estimated hourly cost	Estimated cost of compliance
Section 360.6(b)(2)(i)(D)	Disclosure	252	\$97.43	\$24,552
Section 360.6(b)(2)(i)(B)	Disclosure	6	\$124.68	\$748
Section 360.6(b)(2)(i)(C)	Disclosure	6	\$124.68	\$748
Section 360.6(c)(7)	Recordkeeping	84	\$70.17	\$5,894
Total Change:		348		\$31,942

13. Estimate of start-up costs to respondents:

None.

14. Estimate of annualized costs to the government:

None.

¹¹ Estimated total hourly compensation of Lawyers (\$124.68), Financial Managers (\$70.17), and Chief Executives (\$151.75) in the Depository Credit Intermediation sector as of September 2019. The estimate includes the May 2018 median hourly wage rate reported for these professions by the Bureau of Labor Statistics, National Industry-Specific Occupational Employment, and Wage Estimates. This wage rate has been adjusted for changes in the Consumer Price Index for all Urban Consumers between May 2018 and September 2019 (2.28 percent) and grossed up by 51 percent to account for non-monetary compensation as reported by the September 2019 Employer Costs for Employee Compensation Data.

¹² Certain items have an hourly cost estimate of \$97.43; for those items the FDIC assumes half of the work would be completed by a Lawyer and half would be completed by a Financial Manager ($0.5 * \$124.68 + 0.5 * \$70.17 = \$97.43$). Another item has an hourly cost estimate of \$113.78; for that item the FDIC assumes 80 percent of the work would be completed by a Lawyer and 20 percent would be completed by a Financial Manager ($0.8 * \$124.68 + 0.2 * \$70.17 = \$113.78$).

15. Analysis of change in burden:

The estimated burden decreased by a total of 15,924 hours. This is made up of a decrease of 15,984 hours due to the change in the final rule that no longer requires transactions to comply with SEC Regulation AB, offset by an increase of 60 hours due to the FDIC revising its estimate of the number of respondents affected by the rule, in some instances down from 35 to 14 respondents, while in others up from one respondent to three.

Changes Resulting from Decrease in the Estimated Number of Respondents						
Information collection	Burden type	Previous estimated burden hours	Revised estimated burden hours	Change in estimated burden hours	Estimated hourly cost	Change in estimated cost of compliance
Section 360.6(b) (2)(i)(A), (D) Private Transactions – Non Reg. AB Compliant	Disclosure	15,984	0	-15,984	\$124.68	-\$1,992,885
Section 360.6(b) (2)(i)(D)	Disclosure	207	252	45	\$97.43	\$4,384
Section 360.6(b) (2)(i)(B)	Disclosure	6	6	0	\$124.68	0
Section 360.6(b) (2)(i)(C)	Disclosure	6	6	0	\$124.68	0
Section 360.6(c) (7)	Recordkeeping	69	84	15	\$70.17	\$1,053
Total Change:		16,272	348	-15,924		-\$1,987,448

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:

Not applicable.

18. Exceptions to certification:

None.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.