

levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. Nor shall this section be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers or other conveyances taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2), may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank.

(k) *Repeal.* This section may be repealed by the FDIC upon 30 days notice provided in the FEDERAL REGISTER, but any repeal shall not apply to any issuance made in accordance with this section before such repeal.

[75 FR 60297, Sept. 30, 2010]

#### § 360.7 Post-insolvency interest.

(a) *Purpose and scope.* This section establishes rules governing the calculation and distribution of post-insolvency interest to creditors with proven claims in all FDIC-administered receiverships established after June 13, 2002.

(b) *Definitions*—(1) *Equityholder.* The owner of an equity interest in a failed depository institution, whether such ownership is represented by stock, membership in a mutual association, or otherwise.

(2) *Post-insolvency interest.* Interest calculated from the date the receivership is established on proven creditor claims in receiverships with surplus funds.

(3) *Post-insolvency interest rate.* For any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar

quarter, and adjusted each quarter thereafter.

(4) *Principal amount.* The proven claim amount and any interest accrued thereon as of the date the receivership is established.

(5) *Proven claim.* A claim that is allowed by a receiver or upon which a final non-appealable judgment has been entered in favor of a claimant against a receivership by a court with jurisdiction to adjudicate the claim.

(c) *Post-insolvency interest distributions.* (1) Post-insolvency interest shall only be distributed following satisfaction by the receiver of the principal amount of all creditor claims.

(2) The receiver shall distribute post-insolvency interest at the post-insolvency interest rate prior to making any distribution to equityholders. Post-insolvency interest distributions shall be made in the order of priority set forth in section 11(d)(11)(A) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(d)(11)(A).

(3) Post-insolvency interest distributions shall be made at such time as the receiver determines that such distributions are appropriate and only to the extent of funds available in the receivership estate. Post-insolvency interest shall be calculated on the outstanding balance of a proven claim, as reduced from time to time by any interim dividend distributions, from the date the receivership is established until the principal amount of a proven claim has been fully distributed but not thereafter. Post-insolvency interest shall be calculated on a contingent claim from the date such claim becomes proven.

(4) Post-insolvency interest shall be determined using a simple interest method of calculation.

[67 FR 34386, May 14, 2002]

#### § 360.8 Method for determining deposit and other liability account balances at a failed insured depository institution.

(a) *Purpose.* The purpose of this section is to describe the process the FDIC will use to determine deposit and other liability account balances for insurance coverage and receivership purposes at a failed insured depository institution.

(b) *Definitions*—(1) The *FDIC Cutoff Point* means the point in time the FDIC establishes after it has been appointed receiver of a failed insured depository institution and takes control of the failed institution.

(2) The *Applicable Cutoff Time* for a specific type of deposit account transaction means the *earlier* of either the failed institution's normal cutoff time for that specific type of transaction or the *FDIC Cutoff Point*.

(3) *Close-of-Business Account Balance* means the closing end-of-day ledger balance of a deposit or other liability account on the day of failure of an insured depository institution determined by using the *Applicable Cutoff Times*. This balance may be adjusted to reflect steps taken by the receiver to ensure that funds are not received by or removed from the institution after the *FDIC Cutoff Point*.

(4) A *sweep account* is an account held pursuant to a contract between an insured depository institution and its customer involving the pre-arranged, automated transfer of funds from a deposit account to either another account or investment vehicle located within the depository institution (*internal sweep account*), or an investment vehicle located outside the depository institution (*external sweep account*).

(c) *Principles*—(1) In making deposit insurance determinations and in determining the value and nature of claims against the receivership on the institution's date of failure, the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly provided otherwise in this section, the depository institution's normal posting procedures.

(2) In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the *FDIC Cutoff Point*, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new

liabilities or extinguishing existing liabilities for the depository institution.

(3) End-of-day ledger balances are subject to corrections for posted transactions that are inconsistent with the above principles.

(d) *Determining closing day balances*—(1) In determining account balances for insurance coverage and receivership purposes at a failed insured depository institution, the FDIC will use *Close-of-Business Account Balances*.

(2) A check posted to the *Close-of-Business Account Balance* but not collected by the depository institution will be included as part of the balance, subject to the correction of errors and omissions and adjustments for uncollectible items that the FDIC may make in its role as receiver of the failed depository institution.

(3) In determining *Close-of-Business Account Balances* involving sweep accounts:

(i) For internal sweep accounts, the FDIC will determine the ownership of the funds and the nature of the receivership claim based on the records established and maintained by the institution for that specific account or investment vehicle as of the closing day end-of-day ledger balance. (For example, if a sweep account entails the daily transfer of funds from a demand deposit account to a Eurodollar account at a foreign branch of the insured depository institution, if the institution should fail on that day, the FDIC would treat the funds swept to the Eurodollar account, as reflected on the institution's end-of-day records, as an unsecured general creditor's claim against the receivership.);

(ii) For external sweep accounts, the FDIC will treat swept funds consistent with their status in the end-of-day ledger balances of the depository institution and the external entity, as long as the transfer of funds is completed prior to the *Applicable Cutoff Time*. (For example, if funds held in connection with a money market sweep account are wired from a customer's deposit account at the insured depository institution to the mutual fund prior to the *Applicable Cutoff Time*, if the institution should fail on that day, the FDIC would recognize that sweep

transaction as completed for claims and receivership purposes.);

(iii) For repurchase agreement sweep accounts, where, as a result of the sweep transaction, the customer becomes either the legal owner of identified assets subject to repurchase or obtains a perfected security interest in those assets, the FDIC will recognize, for receivership purposes, the customer's ownership interest or security interest in the assets.

(4) For deposit insurance and receivership purposes in connection with the failure of an insured depository institution, the FDIC will determine the rights of the depositor or other liability holder as of the point the *Close-of-Business Account Balance* is calculated.

(e) *Disclosure requirements.* Beginning July 1, 2009, in all new sweep account contracts, in renewals of existing sweep account contracts and within sixty days after July 1, 2009, and no less than annually thereafter, institutions must prominently disclose in writing to sweep account customers whether their swept funds are deposits within the meaning of 12 U.S.C. 1813(1). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its quarterly Consolidated Reports of Condition and Income or Thrift Financial Reports. The disclosure requirements imposed under this provision do not apply to sweep accounts where: The transfers are within a single account, or a sub-account; or the sweep account involves only deposit-to-deposit sweeps, such as zero-balance accounts, unless the sweep results in a change in the customer's insurance coverage.

[74 FR 5806, Feb. 2, 2009]

### **§ 360.9 Large-bank deposit insurance determination modernization.**

(a) *Purpose and scope.* This section is intended to allow the deposit and other operations of a large insured depository institution (defined as a "Covered Institution") to continue functioning on the day following failure. It also is intended to permit the FDIC to fulfill

its legal mandates regarding the resolution of failed insured institutions to provide liquidity to depositors promptly, enhance market discipline, ensure equitable treatment of depositors at different institutions and reduce the FDIC's costs by preserving the franchise value of a failed institution.

(b) *Definitions.* (1) A *covered Institution* means an insured depository institution which, based on items as defined in Reports of Income and Condition or Thrift Financial Reports filed with the applicable federal regulator, has at least \$2 billion in deposits and at least either:

(i) 250,000 deposit accounts; or

(ii) \$20 billion in total assets, regardless of the number of deposit accounts.

(2) *Deposits, number of deposit accounts and total assets* are as defined in the instructions for the filing of Reports of Income and Condition and Thrift Financial Reports, as applicable to the insured depository institution for determining whether it qualifies as a covered institution. A foreign deposit means an uninsured deposit liability maintained in a foreign branch of an insured depository institution. An *international banking facility deposit* is as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR § 204.8(a)(2)). A *demand deposit account, NOW account, money market deposit account, savings deposit account and time deposit account* are as defined in the instructions for the filing of Reports of Income and Condition and Thrift Financial Reports.

(3) *Sweep account arrangements* consist of a deposit account linked to an interest-bearing investment vehicle whereby funds are swept to and from the deposit account according to prearranged rules, usually on a daily basis, where the sweep investment vehicle is not a deposit and is reflected on the books and records of the *Covered Institution*.

(4) *Automated credit account arrangements* consist of a deposit account into which funds are automatically credited from an interest-bearing investment vehicle where the funds in the interest-bearing investment vehicle were not invested by prearranged rules.

(5) *Non-covered institution* means an insured depository institution that