

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 327**

RIN-3064-AD03

**Assessments****AGENCY:** Federal Deposit Insurance Corporation (FDIC).**ACTION:** Final rule.

**SUMMARY:** The FDIC is improving and modernizing its operational systems for deposit insurance assessments in 12 CFR Part 327 to make the deposit insurance assessment system react more quickly and more accurately to changes in institutions' risk profiles and to ameliorate several causes for complaint by insured depository institutions. Under the amendments set out in this final rule, deposit insurance assessments will be collected after each quarter ends—which will allow for consideration of more current information than under the prior rule. Ratings changes will become effective when the rating change is transmitted to the institution. Although the FDIC will retain the existing assessment base as applied in practice with only minor modifications, the computation of institutions' assessment bases will change in the following significant ways: institutions with \$1 billion or more in assets will determine their assessment bases using average daily deposit balances; existing smaller institutions will have the option of using average daily deposits to determine their assessment bases; and the float deductions used to determine the assessment base will be eliminated. In addition, the rules governing assessments of institutions that go out of business will be simpler; newly insured institutions will be assessed for the assessment period in which they become insured; prepayment and double payment options will be eliminated; institutions will have 90 days from each quarterly certified statement invoice to file requests for review of their risk assignment and requests for revision of the computation of their quarterly assessment payment; and the rules governing quarterly certified statement invoices will be adjusted for a quarterly assessment system and for a three-year retention period rather than the former five-year period.

**DATES:** This final rule will become effective on January 1, 2007.**FOR FURTHER INFORMATION CONTACT:** Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and

Research, (202) 898-8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562-6167; or Christopher Bellotto, Counsel, Legal Division, (202) 898-3801.

**SUPPLEMENTARY INFORMATION:****I. Background**

On May 18, 2006, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking and request for comment on proposed amendments to 12 CFR 327 (71 FR 28790). The comment period was extended for 30 additional days (71 FR 36718) and expired on August 16, 2006. The FDIC received six comment letters—five from trade organizations and one from a depository institution.<sup>1</sup> Four of the commenters generally supported all of the FDIC's proposals; of those four, three suggested modifications to the provisions governing the use of average daily balances in determining assessment bases. Two commenters opposed elimination of the float deductions; three others opposed eliminating the deductions, but only where deposit bases are calculated using quarter-end balances. The following is a discussion of the amendments to §§ 327.1 through 327.8 and the comments received.

Prior to passage of the Federal Deposit Insurance Reform Act of 2005 and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act),<sup>2</sup> the FDIC was statutorily required to set assessments semiannually. The FDIC did so by setting assessment rates and assigning institutions to risk classes prior to each semiannual assessment period. The semiannual assessment was collected in two installments, one near the start of the semiannual period and the other three months into the period, so that, in practice, assessment collection was accomplished prospectively every quarter.

Provisions in the Reform Act removed longstanding constraints on the deposit insurance assessment system and granted the FDIC discretion to revamp and improve the manner in which assessments are determined and collected from insured depository institutions. The FDIC was vested with

<sup>1</sup> The trade organizations were: the American Bankers Association, the Independent Community Bankers of America, the Association for Financial Professionals, the New York Bankers Association, and America's Community Bankers; the depository institution was Capital One Financial Corp.

<sup>2</sup> Federal Deposit Insurance Reform Act of 2005, Public Law 109-171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Public Law 109-173, 119 Stat. 3601.

discretion to set assessment rates, classify institutions for risk-based assessment purposes and collect assessments within a system and on a schedule designed to track more accurately the degree of risk to the deposit insurance fund posed by depository institutions. The Reform Act also eliminated any requirement that the assessment system be semiannual.

The FDIC's experience with the risk-based system over the past 13 years, and with approaches and arguments made by institutions that have filed requests for review with the FDIC's Division of Insurance and Research (DIR) and subsequent appeals to the FDIC's Assessment Appeals Committee (AAC), prompted some of the proposed revisions made to the FDIC's deposit insurance assessment system. For example, many appeals to the AAC involved assertions by insured institutions that the FDIC's system did not take into account their improved condition quickly enough. The final rules will ensure that assessment rates reflect changes in an institution's risk profile much nearer to the time the changes occur. The standard float deductions will be eliminated because they appear to be obsolete and arbitrary, and because actual float appears to be small and decreasing as the result of legal, technological, and payment system changes. The revisions will enhance the assessment process for institutions and should eliminate many of the bases for requests and appeals. The amendments to the FDIC's operational processes governing assessments affect 12 CFR 327.1 through 12 CFR 327.8.<sup>3</sup> These sections detail the procedures governing deposit insurance assessment and collection as well as calculation of the assessment base.

<sup>3</sup> Pursuant to the Section 2109 of the Reform Act, current assessment regulations remain in effect until the effective date of new regulations. Section 2109(a)(5) of the Reform Act requires the FDIC, within 270 days of enactment, to prescribe final regulations, after notice and opportunity for comment, providing for assessments under section 7(b) of the Federal Deposit Insurance Act. Section 2109 also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and dividends. A final rule on deposit insurance coverage was published on September 12, 2006. 71 FR 53547. Final rules on the one-time assessment credit and dividends were published on October 18, 2006. 71 FR 61374 and 71 FR 61385. The FDIC is publishing final rulemakings on the designated reserve ratio and on risk based assessments in the same issue of the **Federal Register** as this final rule.

**II. The Final Rule**

*A. Assessments Collected After Each Quarterly Assessment Period*

Under the existing system, assessments are collected from insured institutions on a semiannual basis in

two installments. The first collection is made at the beginning of the semiannual period; the second collection is made in the middle of the semiannual period.<sup>4</sup> Under the final rule, assessments will be collected after each quarterly period

being insured. The assessment for each quarter will be due approximately at the end of the following quarter, on the specified payment date.<sup>5</sup> The chart below shows the new assessment process.

Calendar year quarter	Date of capital evaluation *	Assessment base *	Invoice date	Payment date
1 .....	March 31, 2007 .....	March 31, 2007 .....	June 15, 2007 .....	June 30, 2007.
2 .....	June 30, 2007 .....	June 30, 2007 .....	September 15, 2007 .....	September 30, 2007.
3 .....	September 30, 2007 .....	September 30, 2007 .....	December 15, 2007 .....	December 30, 2007.
4 .....	December 31, 2007 .....	December 31, 2007 .....	March 15, 2008 .....	March 30, 2008.

\* That is, the date of the report of condition on which the capital evaluation and assessment base are determined.

Collecting quarterly assessments after each assessment period was expressly supported by five commenters and opposed by none. One commenter, a trade group, stated “[t]his should help banks better manage their risk positions and expected premiums during the quarter for which they will be assessed.” Similarly, another trade group observed that “banks should be able to predict at the end of each quarter what their assessment will be for that quarter.” In line with the comments received, the FDIC believes quarterly assessment collection after the period being insured will markedly improve the responsiveness and accuracy of the assessment system.

The final rule will take effect January 1, 2007. The last deposit insurance collection under the existing system (made on September 30, 2006, in the middle of the semiannual period before the new system becomes effective) represents payment for insurance coverage through December 31, 2006. The first deposit insurance collection under the new system (made on June 30, 2007, at the end of the second quarter under the new system) will represent payment for insurance coverage from January 1 through March 31, 2007. No deposit insurance assessments will be based upon September 30 or December 31, 2006 reported assessment bases. However, institutions will continue to make the scheduled quarterly Financing Corporation (“FICO”) payments on January 2, 2007 (or on the alternate payment date, December 30, 2006) and March 30, 2007, using, respectively, these two reported assessment bases. No changes to the way FICO payments are charged or collected are being made.<sup>6</sup>

FICO collections will continue during the transition period to the new assessment system and will not be affected by the FDIC’s new rules, except to the extent that the definition and computation of assessment bases has changed. Language has been added to the regulatory text to make this clear (12 CFR 327.3(a)(3)). The date of the assessment base on which FICO payments are based will not change. Any effect on the reserve ratio of transitioning to collecting assessments after each quarterly period will be minimal. Consistent with the concepts of generally accepted accounting principles, the FDIC will recognize assessment revenue in advance of receipt based on a reliable estimate.

Invoices will continue to be presented using FDICconnect, and institutions will continue to be required to designate and fund deposit accounts from which the FDIC can make direct debits. Invoices will, as at present, be made available on FDICconnect no later than 15 days prior to the payment date. However, the payment dates themselves, in relation to the coverage period, will shift. Collections will be made at or near the end of the following quarter (i.e., June 30, September 30, December 30, and March 30). In this way, the proposed assessment system will synchronize the insurance coverage period with the reporting dates and the institutions’ risk assignments.<sup>7</sup>

The FDIC will set assessment rates for each risk category no later than 30 days before the date of the invoice for the quarter, which will give the FDIC’s Board of Directors the option of setting rates before the beginning of a quarter or after its completion. The final rule will

provide the FDIC with flexibility to set final rates for the first quarter of a year at any time up to May 16 of that year (30 days before the June 15 invoice date). However, the FDIC will not necessarily need to continually reconsider or update assessment rates. Once set, rates will remain in effect until changed by the FDIC’s Board. Institutions will have at least 45 days notice of the applicable rates before assessment payments are due.

*B. Ratings Changes Effective When Transmitted*

Under the present system, an insured institution retains its supervisory and capital group ratings throughout a semiannual period. Any change is reflected in the next semiannual period; in this way, an examination can remain the basis for an institution’s assessment rating long after newer information has become available.

The FDIC proposed that changes to an institution’s supervisory rating be reflected as of the date the examination or targeted examination began; if no such date existed, then an institution’s supervisory rating would have changed as of the date the institution was notified of its rating change by its primary federal regulator (or state authority). In either case, if the FDIC, after taking into account other information that could affect the rating, did not agree with the classification implied by the examination, then the institution’s rating would change as of the date that the FDIC determined that the change in the supervisory rating occurred.

Five commenters supported making ratings changes effective when they occur; no one opposed. One of the

<sup>4</sup> In December of 1994, the FDIC modified the procedure for collecting deposit insurance assessments, changing from semiannual to quarterly collection.

<sup>5</sup> Adjustments to prior period invoices will continue to be reflected in invoices for later periods.

<sup>6</sup> Pursuant to statute and a memorandum of understanding with the Financing Corporation, the FDIC collects FICO assessments from insured depository institutions based upon quarterly report dates. See 12 U.S.C. 1441(f)(2). FICO payments represent funds remitted to FICO to ensure sufficient funding to distribute interest payments for the outstanding FICO obligations.

<sup>7</sup> The existing regulations refer to an institution’s “risk classification,” that is, one of the nine classifications in the nine-cell matrix, 1A, 2A, and so forth. Under the final rule, an institution’s “risk assignment” (see 12 CFR 327.4(a)) includes assignment to Risk Category I, II, III, or IV, and, within Risk Category I, assignment to an assessment rate or rates.

supporters, a trade group, suggested that in all cases the change be implemented “when the bank is notified of a change, not the date an examination begins \* \* \* .”

The FDIC has decided to adopt the suggested approach. Under the final rule, changes to an institution’s supervisory rating will be reflected as of the date that the rating change is transmitted to the institution. However, if the FDIC disagrees with the CAMELS composite rating assigned by an institution’s primary federal regulator, and assigns a different composite rating, the supervisory change will be effective for assessment purposes as of the date that the FDIC assigns a rating. Disagreements of this type between the FDIC and the other federal regulators have been rare.

Using the transmittal date as the effective date for supervisory changes has a number of benefits. First, additional research after publication of the NPR in May revealed that the federal banking agencies do not all define and record an examination start date the same way.<sup>8</sup> If the start date were used to determine ratings changes for supervisory purposes, similarly situated institutions could be treated differently, simply because they have different primary federal regulators. This result could have been unfair to a large number of institutions. Second, using the start date would have potentially produced ratings changes in many prior quarters, with adjustments to prior assessments paid. By contrast, the final rule should result in far fewer alterations to earlier assessments, allowing greater finality in assessments and enabling institutions to better plan their finances. Several commenters recommended notifying institutions in advance of a ratings change. While the final rule does not provide for advance notification, institutions will receive notice contemporaneously with a change. Third, the final rule is simpler and more uniform than the proposed rule and produces a more cohesive system. The effective date of a ratings change will be defined in the same way for all institutions, large and small. This result comports with the opinions of several commenters who recommended that the risk differentiation and

<sup>8</sup> For example, while the Board of Governors of the Federal Reserve System and the Office of Thrift Supervision (OTS) define and record as the start date the date that an examiner arrives at an institution to begin the bulk of examination activity, the Office of the Comptroller of the Currency does not. Rather, for the OCC the start date represents the date that examination activity begins based on an activity plan. This date bears no consistent relation to the date that an examiner arrives at an institution.

assessment system be made simpler and more cohesive. Fourth, as stated, the trade group specifically recommended that in all cases the effective date for recognition of a change in supervisory rating should be when the bank is notified of a change.<sup>9</sup>

Accordingly, under the final rule, supervisory ratings changes will become effective as of the date the institution is notified of its rating change by its primary federal regulator or state authority, assuming that the FDIC, after taking into account other information that could affect the rating, agrees with the assignment implied by the examination, or it will change as of the date that the FDIC determines that the change in the supervisory rating occurs.

### C. Modifications to the Assessment Base

At present, an institution’s assessment base is principally derived from total domestic deposits. The current definition of the assessment base is detailed in 12 CFR 327.5. Generally, the definition is deposit liabilities as defined by section 3(l) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(l)) with some adjustments. However, because the total deposits that institutions report in their reports of condition do not coincide with the section 3(l) definition, institutions report several adjustments elsewhere in their reports of condition; these adjustments are used to determine the assessment base.

For example, banks are specifically instructed to exclude uninvested trust funds from deposit liabilities as reported on Schedule RC–E of their Reports of Condition and Income (Call Reports). However, these funds are considered deposits as defined by section 3(l) of the FDI Act and are therefore included in the assessment base. Line item 3 on Schedule RC–O of the Call Report was included to facilitate reporting these funds. For this line item and for the many others, banks simply report the amount of each item that was excluded from the RC–E calculation. Other line items require the restoration of amounts that were netted for reporting purposes on Schedule RC–E. For example, when banks were instructed to file Call Reports in accordance with Generally Accepted Accounting Principles, they were permitted to offset deposit liabilities against assets in certain circumstances. In order to comply with the statutory definition of deposits, lines 12a and 12b were added to Schedule RC–O to recapture those amounts.

<sup>9</sup> The FDIC received no other comments specifically directed to this issue.

The final rule will retain the current assessment base as applied in practice with minor modifications. The reworded definition will operate in concert with a proposed simplification of the associated reporting requirements on insured institutions’ reports of condition.<sup>10</sup> The assessment base definition will continue to be deposit liabilities as defined by section 3(l) of the FDI Act with enumerated allowable adjustments. These adjustments will include drafts drawn on other depository institutions that meet the definition of deposits per section 3(l) of the FDI Act, but are specifically excluded from reporting requirements in section 7(a)(4) of the FDI Act (12 U.S.C. 1817(a)(4)). Similarly, although depository institution investment contracts meet the definition of deposits as defined by section 3(l) of the FDI Act, they are presently excluded from the assessment base under 12 CFR 327.5 and will continue to be excluded, as will pass-through reserves. Certain reciprocal bank balances will also be excluded. In addition, hypothecated deposits will be excluded.

Unposted debits will not reduce the assessment base and unposted credits will be excluded from the definition of the assessment base for institutions that report average daily balances because these debits and credits are captured in the next day’s deposits (and thus reflected in the averages). For consistency, and because they should not materially affect assessment bases, unposted debits will not reduce the assessment base and unposted credits

<sup>10</sup> At present, 26 items are required in the Reports of Condition and Income (Call Reports) to determine a bank’s assessment base, and 11 items are required in the Thrift Financial Report (TFRs) to determine a thrift’s assessment base. Under the final rule, changes to the way the assessment base is reported should reduce these items to between two and six, depending, in part, on whether an institution reports average daily balances. Essentially, instead of starting with deposits as reported in the report of condition and making adjustments, banks will start with a balance that approximates the statutory definition of deposits. The FDIC believes that this balance is typically found within most insured institutions’ deposit systems. In this way, institutions will be required to track far fewer adjustments. In any case, no additional burden will result for insured institutions since the items required to be reported will remain essentially the same under the new regulatory definition. The changes to reporting requirements should also allow institutions to report daily average deposits more easily, since they will not have to track and average adjustment items separately. As now, the Call Report and TFR instructions will continue to specify the items required to meet the requirements of section 3(l) of the FDI Act for reporting purposes. The FDIC has proposed appropriate changes to reports of condition, to become effective March 31, 2007, and is coordinating with the Federal Financial Institutions Examination Council (FFIEC) on the necessary changes to the reports of condition.

will also be excluded from the definition of the assessment base for institutions that report quarter-end balances.

The current definition of the assessment base, in 12 CFR 327.5, has been driven by reporting requirements that have evolved over time. These requirements have changed because of the evolving reporting needs of all of the federal regulators. As a result, the FDIC's regulatory definition of the assessment base has required periodic updates when reporting requirements in reports of condition are changed for other purposes.<sup>11</sup> By rewording the definition of the assessment base to deposit liabilities as defined by section 3(l) of the FDI Act with allowable exclusions, the FDIC will no longer be required to update its regulation periodically in response to outside factors. Two commenters generally supported the minor modifications the FDIC is making to the definition of assessment base; no commenters opposed them.

#### *D. Average Daily Deposit Balance for Institutions With Assets of \$1 Billion or More*

Currently, an insured institution's assessment base is computed using quarter-end deposit balances. Most schedules of the Call Report and the TFR are based on quarter-end data, but there are drawbacks to using quarter-end balances for assessment determinations. Under the current system, deposits at quarter-end are used as a proxy for deposits for an entire quarter, but balances on a single day in a quarter may not accurately reflect an institution's typical deposit level. For example, if an institution receives an unusually large deposit at the end of a quarter and holds it only briefly, the institution's assessment base and deposit insurance assessment may increase disproportionately to the amount of deposits it typically holds. A misdirected wire transfer received at the end of a quarter can create a similar result. Using quarter-end balances creates incentives to temporarily reduce deposit levels at the end of a quarter for the sole purpose of avoiding assessments. Institutions of various sizes have raised these issues with the FDIC.

Under the final rule, instead of using quarter-end deposits, certain institutions will use average daily balances over the quarter, which will

give a more accurate depiction of an institution's deposits. When combined with other operational changes to the assessment system, the use of average daily balances will provide a more realistic and timely depiction of actual events. The FDIC's proposal to use average daily balances was supported by all six commenters; however, three of those six suggested that the use of average daily balances be mandatory only for institutions of \$1 billion or more in assets rather than \$300 million as proposed. For example, one trade group suggested the higher cutoff because "the FDIC and other federal bank regulators use \$1 billion in assets as the cutoff in other Call Report requirements and for other regulatory purposes." Similarly, another trade group urged the higher cutoff because "[t]his increase would be consistent with other FDIC regulations and reporting requirements \* \* \* and would affect only a very small proportion of insured deposits." In addition, a third trade group urged the \$1 billion cutoff "to not impose unnecessary paperwork burden on smaller institutions and to be consistent with the \$1 billion threshold for other FDIC regulations \* \* \*." After consideration of these comments, the FDIC has changed the final rule to incorporate the higher cutoff amount.

Institutions do not at present report average daily balances on Call Reports and TFRs. Reporting average assessment bases will therefore necessitate changes to Call Reports and TFRs requiring the approval of the FFIEC and time to implement. Until these changes to the Call Report and TFR are made, institutions will continue to determine assessment bases using quarter-end balances.

Under the final rule, for one year after the necessary changes to the Call Report and TFR have been made, each existing institution will have the option of continuing to use quarter-end balances to determine its assessment base. Thereafter, institutions with \$1 billion or more in assets will be required to report average daily balances. To avoid burdening smaller institutions, which might have to modify their accounting and reporting systems, existing institutions with less than \$1 billion in assets will have the option of continuing to use quarter-end balances to determine their assessment bases.<sup>12</sup>

If its assessment base is growing, an institution will pay smaller assessments if it reports daily averages rather than quarter-end balances, all else equal. Nevertheless, a smaller institution that elects to report quarter-end balances may continue to do so, so long as its assets, as reported in its Call Report or TFR, do not equal or exceed \$1 billion in two consecutive reports. Otherwise, the institution will be required to begin reporting average daily balances for the quarter that begins six months after the end of the quarter in which the institution reported that its assets equaled or exceeded \$1 billion for the second consecutive time. An institution with less than \$1 billion in assets may switch from reporting quarter-end balances to reporting average daily balances for an upcoming quarter. Any institution, once having begun to report average daily balances, either voluntarily or because required to, may not switch back to reporting quarter-end balances.

Finally, one commenter, a trade group, urged that the \$1 billion cutoff apply to newly insured institutions because those institutions "should not be treated differently in the assessment base calculation" and because "having the option to file using quarter-end balances is important as some banks believe the cost of the more involved General Ledger systems is excessive." The FDIC believes that systems likely to be in place in newly insured institutions can generate average daily balances and will therefore impose no additional costs in doing so. In addition, this approach will encourage the transition to average daily balances throughout the industry, which will improve the accuracy of institutions' assessment base calculations. Accordingly, under the final rule, any institution that becomes insured after the necessary modifications to the Call Report and TFR have been made will be required to report average daily balances for assessment purposes.

#### *E. Float Deductions Eliminated*

The largest overall adjustments to the current assessment base are deductions for float, deposits reported as such for assessment purposes that were created by deposits of cash items (checks) for which the institution has not itself received credit or payment. The current float deductions are 16 $\frac{2}{3}$  percent for demand deposits and 1 percent for time and savings deposits. Under the final rule, the float deductions will be eliminated.

on an unconsolidated basis so that assessment bases can be determined separately for each institution.

<sup>11</sup> In fact, the regulatory definition has not kept pace with these reporting changes. In practice, however, the assessment base is calculated as if the regulatory definition had kept pace.

<sup>12</sup> In those instances where a parent bank or savings association files its Call Report or TFR on a consolidated basis by including a subsidiary bank(s) or savings association(s), the assessment bases for all institutions included in the consolidated reporting must be reported separately

Two basic rationales existed for allowing institutions to deduct float. First, without float deductions, institutions would be assessed for balances created by deposits of checks for which they had not actually been paid. Second, crediting an uncollected cash item (a check) to a deposit account can temporarily create double counting in the aggregate assessment base—once at the insured institution that credited the cash item to the deposit account, and again at the payee insured institution on which the cash item is drawn. Deducting float from deposits when calculating the assessment base reduced this double counting.

Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. This proved to be onerous at the time. In 1960, Congress by statute established the standardized float deductions in an effort to simplify and streamline the assessment base calculation. Section 7(b) of the FDI Act defined the deposit insurance assessment base until passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), which removed the statutory definition.<sup>13</sup> In its proposal, the FDIC sought comment on whether to eliminate the float deductions, whether to allow the deduction of actual float, or whether to retain the present standardized float deductions.

All six commenters addressed the float issue. Two opposed elimination of the float deductions. One supported retaining the standard float deductions and “if necessary, modifying them to recognize reduction in float due to technology advances” but opposed requiring banks to deduct actual float. Another urged the adoption of “rules that allow for the deduction of actual float—base assessments on collected balances” and opposed eliminating the standard float deductions because that would “increase in the premiums that corporate depositors pay.” Three other commenters generally supported elimination of the float deductions, but urged retention of the deductions for quarter-end filers, as opposed to institutions reporting average daily balances. A trade group noted that while float has declined, it has not gone away, and without the float deductions for quarter-end filers “the assessment base using quarter-end balances would be greater than appropriate and, therefore, the premium assessed would be higher

than appropriate.” Two of the trade groups suggested revising the current float deductions for quarter-end filers and allowing such institutions to continue their use.

The FDIC has decided to eliminate the float deductions for all institutions on the grounds that, based on available information, the standard float deductions appear to be obsolete. Actual float appears to be small and decreasing as the result of legal, technological, and payment systems changes. The basis for the percentages in the standardized deductions chosen by Congress is not clear. However, even if the percentages were a realistic approximation of average bank float when they were selected over 40 years ago, legal, technological, and payment systems changes—such as Check 21—that have accelerated check clearing should have reduced float, everything else being equal, and made the existing standard float deductions obsolete.<sup>14</sup> Consequently, the current standardized float deductions probably do not reflect real float for most institutions. In addition, cash items in the process of collection as a percent of domestic deposits for commercial banks with total assets greater than or equal to \$300 million has been decreasing. Over the long term, the ratio of cash items in the process of collection to total domestic deposits has fallen significantly. Cash items in the process of collection can be viewed as a rough approximation of actual float.

Eliminating the float deductions will favor some institutions over others. Institutions with larger percentages of time and savings deposits will see smaller increases in their assessment bases; conversely, those with larger percentages of demand deposits will see greater increases in their assessment bases. However, eliminating the float deductions will only minimally affect the relative distribution of the aggregate assessment base among institutions of

different asset sizes and between banks and thrifts (although it will have a greater effect on the assessment bases of some individual institutions). While eliminating the float deductions will increase assessment bases and affect the distribution of the assessment burden among institutions, it should not, in itself, increase assessments. The assessment rates that the FDIC will set in the new pricing system will take into account the elimination of the float deductions.

The FDIC has decided not to deduct actual float to arrive at the assessment base for a number of reasons. Deducting actual float would require that institutions report actual float; and institutions that determine their assessment base using average daily balances would be required to report average daily float. This would necessitate a new information requirement for float data.<sup>15</sup> Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. Because this proved to be onerous at one time, Congress established the standardized float deductions by statute. Asking institutions again to report actual float could create significant regulatory burden, which the FDIC has decided to avoid.

Finally, the FDIC does not agree with the suggestion that the float deductions (or revised or adjusted float deductions) be retained for institutions reporting quarter-end balances, as three commenters urged. It is not clear that reporting quarter-end balances would result in a larger than appropriate assessment than reporting average daily balances, as one commenter suggested. Moreover, allowing standardized deductions for institutions that report quarter-end balances could provide institutions with incentives for retaining the quarter-end balance method. The FDIC believes that institutions will generally benefit from reporting average daily balances and believes the assessment system should generally be structured to encourage the bulk of institutions with less than \$1 billion in assets to opt to use average daily

<sup>14</sup> Congress enacted Public Law 108–100, the Check Clearing for the 21st Century Act (Check 21), on October 28, 2004. Check 21 allows banks to electronically transfer check images instead of physically transferring paper checks. The Federal Reserve Board, What You Should Know About Your Checks, <http://www.federalreserve.gov/pubs/check21/shouldknow.htm> (updated Feb. 16, 2005). As a result, the transmission and processing of electronic checks can be done faster than transferring paper checks through the clearing process. A recent Federal Reserve payment survey indicates that, for the first time, bank-to-bank electronic payments have exceeded payments by check. Treasury and Risk Management, Just Another Step Along the Way to a Checkless Economy, [www.treasuryandrisk.com](http://www.treasuryandrisk.com), September 2005. With Check 21, the volume of paper checks processed is expected to continue to decline with more payments processed electronically resulting in a smaller float.

<sup>15</sup> Despite one commenter's suggestion, the Call Report item “Cash items in process of collection” could not be used to determine the actual float deduction for individual institutions. Because “Cash items in process of collection” contains items other than float, it may overstate actual float. For a few institutions, “Cash items in process of collection,” exceeds the institutions' assessment bases. (These institutions' “Cash items” are not included in the approximation of actual float in the text.) Conversely, given the small size of the “Cash items in process of collection” reported by many institutions, this item may understate float at some institutions.

<sup>13</sup> Since FDICIA, the FDIC's regulations alone defined the assessment base. The current definition, at 12 CFR 327.5, generally tracks the former statutory definition.

balances in reporting their assessment bases.

#### *F. Terminating Transfer Rule Modified*

At present, complex rules apply to terminating transfers<sup>16</sup> to ensure that the assessment of a terminating institution is paid. Determining and collecting assessments after the end of each quarter and using average daily assessment bases make these complex rules largely obsolete. An acquiring institution (or institutions) will remain liable for the quarterly assessment(s) owed by a terminating institution; the assessment base of the terminating institution will be zero for the remainder of the quarter after the terminating transfer.

The terminating transfer provision in the final rule will deal with a few remaining situations. If the terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurred, calculation of its quarterly certified statement invoices for those quarters will be based on its assessment base from its most recently filed report of condition. For the quarter before the terminating transfer occurs, the terminating institution's assessment will be determined using its most recent rate; for the quarter in which the terminating transfer occurs, the acquirer's rate will apply, but the calculation will be different depending upon whether the acquiring institution reports its assessment base using average daily balances or quarter-end balances.

Under the final rule, once institutions begin reporting average daily deposits, the average assessment base of the acquiring institution will properly reflect the terminating transfer and will increase after the terminating transfer. When this happens, the terminating institution's assessment for the quarter in which the terminating transfer occurs will be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquirer's rate.

Three of the six commenters generally supported these changes to the terminating transfer rule, and none opposed them.

<sup>16</sup> Generally speaking, a *terminating transfer* occurs when an institution assumes another institution's liability for deposits—often through merger or consolidation—when the terminating institution essentially goes out of business. Neither the assumption of liability for deposits from the estate of a failed institution nor a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution is a terminating transfer.

Under the final rule, an acquiring institution that reports quarter-end balances will have its assessment for the quarter in which the terminating transfer occurred calculated slightly differently from the language in the proposal. Because the acquiring institution is not averaging its assessment base, its assessment for the quarter in which the terminating transfer occurs will be its assessment base (which will include the acquired deposits) calculated at its assessment rate. Thus, for example, an institution that reports quarter-end balances might acquire another institution by merger one month (one-third of the way) into a quarter. Since the acquiring institution's assessment base for that quarter will include the acquired deposits, application of the acquirer's rate to that base will obviate the need to assess the terminating institution separately for that quarter. The final rule has been revised from the proposed rule to reflect this simpler calculation for acquiring institutions that use quarter-end balances.

#### *G. Newly Insured Institutions Assessed for the Quarter in Which They Become Insured*

At present, a newly insured institution is not liable for assessments for the semiannual period in which it becomes insured, but is liable for assessments for the following semiannual period. The institution's assessment base as of the day before the following semiannual period begins is deemed to be its assessment base for the entire semiannual period. These special rules were needed because assessments were based upon assessment bases that an institution reported in the past. Under the existing rules, a newly insured institution reports an assessment base at the end of the quarter in which it becomes insured but that assessment base is not used to calculate its assessment until the following semiannual period. Further, if an institution becomes insured in the second half of a semiannual period, it has no reported assessment base on which to calculate the first installment of its premium for the next semiannual period.

Under the final rules, each quarterly assessment will be based upon the assessment base that an institution reports at the end of that quarter. Since a newly insured institution will have reported an assessment base (using average daily balances) for the quarter in which it becomes insured, its assessment will be computed in the same manner as all other institutions. Three commenters generally supported

elimination of the special rules for newly insured institutions, and none opposed it.

#### *H. Ninety Days Each Quarter To File a Request for Review or Request for Revision*

The current deadline for an institution to request a review of its assessment risk classification is 90 days from the invoice date for the first quarterly installment of a semiannual period. Under the final rule, each quarterly assessment will be separately computed. Consequently, the final rule will provide institutions with 90 days from the date of each quarterly certified statement invoice to file a request for review from its risk assignment. Institutions will also have 90 days from the date of any subsequent invoice that adjusted the assessment of an earlier assessment period to request a review. The final rule clarifies that an institution with between \$5 billion and \$10 billion in assets may request review if the FDIC denies its request to be assessed as a large bank; in addition, institutions may request review of an FDIC determination that they are new.<sup>17</sup>

A parallel amendment will allow requests for revision of an institution's quarterly assessment payment computation to be filed within 90 days of the quarterly assessment invoice for which revision is requested (rather than the present 60 days). Three commenters generally supported these changes to the rules; none opposed them.

#### *I. Conforming Changes to the Certified Statement Rules*

The Reform Act eliminated the requirement that the deposit insurance assessment system be semiannual and provided a new three-year statute of limitations for assessments. Accordingly, the FDIC has revised the provisions of 12 CFR 327.2 to clarify that the certified statement is the quarterly certified statement invoice and to provide for the retention of the quarterly certified statement invoice by insured institutions for three years, rather than five years under the prior law. Three commenters generally supported these changes; none opposed them.

#### *J. Prepayment and Double Payment Options Eliminated*

When the present assessment system was proposed more than 10 years ago, the original quarterly dates for payment of assessments were: March 30; June 30;

<sup>17</sup> 12 CFR 327.9(d)(6) and (7). See the FDIC's final rulemaking regarding risk based assessments published in this issue of the **Federal Register**.

September 30; and December 30. The FDIC recognized that the December 1995 collection date could present a one-time problem for institutions using cash-basis accounting, since these institutions would, in effect, be paying assessments for five quarters in 1995. The FDIC believed that few institutions would be adversely affected. Soon after the new system was adopted, however, the FDIC began to receive information that more institutions than had originally been identified would be adversely affected by the December collection date. As a result, the FDIC amended the regulation in 1995 to move the collection date to January 2, but allowed institutions to elect to pay on December 30, thus establishing the prepayment date.

The prepayment option is eliminated under the final rule. With implementation of the new assessment system, a transition period will be created in which institutions will not be subject to collection of deposit insurance assessments after the September 30, 2006 payment date until June 30, 2007. Consequently, reestablishing the original December 30 payment date should have no adverse consequences for institutions that use cash-basis accounting. No institution would make more than four insurance payments in calendar year 2006; those using the December 30, 2005 payment date would make only three payments in 2006. All institutions would make four payments annually thereafter. This change will keep all assessment payments within each calendar year.<sup>18</sup>

In addition, insured institutions presently have the regulatory option of making double payments on any payment date except January 2. Under the final rule, this option is also eliminated. The double payment option originated in the 1995 amendment, when the payment date was modified from December 30, 1995 to January 2, 1996. The double payment option was adopted to provide cash-basis institutions the opportunity to pay the full amount of their semiannual assessment premium on December 30 so as to have the complete benefit of this modification. The transition period from September 30, 2006 to June 30, 2007 and four payments annually beginning in 2007 should eliminate the need for the double payment option, since the FDIC will no longer be charging semiannual premiums.

The final rule also makes clear that scheduled quarterly FICO payments will

be collected from all institutions on January 2, 2007, and March 30, 2007, based upon, respectively, their September 30, 2006 and December 31, 2006 reported assessment bases (see 12 CFR 327.3(a)(3)). Institutions that elect to do so, however, will still be able to make prepayment of their first quarter 2007 FICO payment on December 30, 2006, as provided for under the existing rules at 12 CFR 327.3(c)(3). Institutions that do not choose this prepayment option will make their first quarter 2007 FICO payment on January 2, 2007, as the final rule will provide.

### III. Regulatory Analysis and Procedure

#### A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (GLBA), Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The proposed rules requested comments on how the rules might be changed to reflect the requirements of GLBA. No GLBA comments were received.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 604, 605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of “rule” for purposes of the RFA. 5 U.S.C. 601. The final rule provides operational procedures governing assessments and relates directly to the rates imposed on insured depository institutions for deposit insurance, by providing for the determination of assessment bases to which the rates will apply and providing the operational processes required for deposit insurance assessments. Consequently, no regulatory flexibility analysis is required. Nonetheless, the FDIC is voluntarily undertaking a regulatory flexibility analysis of the final rule.

The provisions dealing with determining assessment bases using average daily balances include an opt-out for insured institutions with assets of less than \$1 billion, which would permit small institutions under the RFA

(i.e., those with \$165 million or less in assets) to continue (as they do now) reporting quarter-end balances. Newly insured institutions with \$165 million or less in assets, however, will be required to report average daily balances. For the period from 2001 through 2005, the average number of small institutions that became insured each year was approximately 126. Most small, newly insured institutions will ordinarily implement systems permitting calculation of average daily balances and, therefore, will not be significantly burdened by this requirement.

Similarly, elimination of the float deduction in calculating assessment bases will not have a significant economic impact on a substantial number of small (\$165 million in assets or less) insured depository institutions within the meaning of the RFA. Based on December 31, 2005 reports of condition, small institutions represented 5.09 percent of the total assessment base, with large institutions (i.e., those with more than \$165 million in assets) representing 94.91 percent. Without the existing float deduction, those percentages would have been 5.14 and 94.86, respectively, a change of only 0.05 percent. By way of example, if a flat 2 basis point annual charge had been assessed on the December 31, 2005 assessment base without the float deduction (i.e., with the float deduction added back to the assessment base), the amount collected would have been approximately \$1.267 billion. To collect the same amount from the industry on the same assessment base, but allowing the float deduction, approximately a 2.05 basis point charge would have been required, since the assessment base would have been smaller. The average difference in assessment charged a small institution for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be about \$110. The actual increase in assessments charged small institutions for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be greater than or equal to \$1,000 for only 38 out of 5,362 small institutions as of December 31, 2005.<sup>19</sup> The largest resulting increase for any small institution would be about \$2,500.

Moreover, the final rule will not have a significant economic impact on a

<sup>18</sup> The allowance for payment on the following business day—should January 2 fall on a non-business day—is eliminated as well.

<sup>19</sup> Of the 8,832 insured depository institutions, there were 5,362 small insured depository institutions (i.e., those with \$165 million or less in assets) as of December 31, 2005.

substantial number of small institutions within the meaning of those terms as used in the RFA. The final rule sets out the operational format for the FDIC's assessment system for the collection of deposit insurance assessments. Most of the processes within this proposed regulation are analogous to existing FDIC assessment processes; variances occur largely in timing, not in the processes themselves; no additional reporting requirements or record retention requirements are created by the proposed rules.

Comments were sought regarding any information about the likely quantitative effects of the proposal on small insured depository institutions; no comments were received.

#### C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the final rule. Any paperwork created as the result of the conversion to reporting average daily assessment balances will be submitted to the Office of Management and Budget (OMB) for review and approval as an adjustment to the Consolidated Reports of Condition and Income (Call Reports), an existing collection of information approved by OMB under Control No. 3064-0052.

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

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

#### E. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

#### List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

■ For the reasons set forth in the preamble, the FDIC hereby amends part 327 of chapter III of title 12 of the Code of Federal Regulations as follows:

#### PART 327—ASSESSMENTS

■ 1. The authority citation for part 327 is revised to read as follows:

**Authority:** 12 U.S.C. 1441, 1813, 1815, 1817-1819, 1821; Sec. 2101-2109, Pub. L. 109-171, 120 Stat. 9-21, and Sec. 3, Pub. L. 109-173, 119 Stat. 3605.

■ 2. Revise §§ 327.1 through 327.8 of Subpart A to read as follows:

##### § 327.1 Purpose and scope.

(a) *Scope.* This part 327 applies to any insured depository institution, including any insured branch of a foreign bank.

(b) *Purpose.* (1) Except as specified in paragraph (b)(2) of this section, this part 327 sets forth the rules for:

- (i) The time and manner of filing certified statements by insured depository institutions;
- (ii) The time and manner of payment of assessments by such institutions;
- (iii) The payment of assessments by depository institutions whose insured status has terminated;
- (iv) The classification of depository institutions for risk; and
- (v) The processes for review of assessments.

(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in subpart B part 347 of this chapter.

##### § 327.2 Certified statements.

(a) *Required.* (1) The certified statement shall also be known as the quarterly certified statement invoice. Each insured depository institution shall file and certify its quarterly certified statement invoice in the manner and form set forth in this section.

(2) The quarterly certified statement invoice shall reflect the institution's risk assignment, assessment base, assessment computation, and assessment amount, for each quarterly assessment period.

(b) *Availability and access.* (1) The Corporation shall make available to each insured depository institution via the FDIC's e-business Web site *FDICconnect* a quarterly certified statement invoice each assessment period.

(2) Insured depository institutions shall access their quarterly certified statement invoices via *FDICconnect*, unless the FDIC provides notice to insured depository institutions of a successor system. In the event of a contingency, the FDIC may employ an

alternative means of delivering the quarterly certified statement invoices. A quarterly certified statement invoice delivered by any alternative means will be treated as if it had been downloaded from *FDICconnect*.

(3) Institutions that do not have Internet access may request a renewable one-year exemption from the requirement that quarterly certified statement invoices be accessed through *FDICconnect*. Any exemption request must be submitted in writing to the Manager of the Assessments Section.

(4) Each assessment period, the FDIC will provide courtesy e-mail notification to insured depository institutions indicating that new quarterly certified statement invoices are available and may be accessed on *FDICconnect*. E-mail notification will be sent to all individuals with *FDICconnect* access to quarterly certified statement invoices.

(5) E-mail notification may be used by the FDIC to communicate with insured depository institutions regarding quarterly certified statement invoices and other assessment-related matters.

(c) *Review by institution.* The president of each insured depository institution, or such other officer as the institution's president or board of directors or trustees may designate, shall review the information shown on each quarterly certified statement invoice.

(d) *Retention by institution.* If the appropriate officer of the insured depository institution agrees that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice and shall retain it in the institution's files for three years as specified in section 7(b)(4) of the Federal Deposit Insurance Act.

(e) *Amendment by institution.* If the appropriate officer of the insured depository institution determines that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is not true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice, and may:

(1) Amend its report of condition, or other similar report, to correct any data believed to be inaccurate on the quarterly certified statement invoice; amendments to such reports timely filed under section 7(g) of the Federal Deposit

Insurance Act but not permitted to be made by an institution's primary federal regulator may be filed with the FDIC for consideration in determining deposit insurance assessments; or

(2) Amend and sign its quarterly certified statement invoice to correct a calculation believed to be inaccurate and return it to the FDIC by the applicable payment date specified in § 327.3(b)(2).

(f) *Certification.* Data used by the Corporation to complete the quarterly certified statement invoice has been previously attested to by the institution in its reports of condition, or other similar reports, filed with the institution's primary federal regulator. When an insured institution pays the amount shown on the quarterly certified statement invoice and does not correct that invoice as provided in paragraph (e) of this section, the information on that invoice shall be deemed true, correct, complete, and certified for purposes of paragraph (a) of this section and section 7(c) of the Federal Deposit Insurance Act.

(g) *Requests for revision of assessment computation.* (1) The timely filing of an amended report of condition or other similar report under paragraph (e)(1) of this section, or the timely filing of an amended quarterly certified statement invoice under paragraph (e)(2), that will result in a change to deposit insurance assessments owed or paid by an insured depository institution, shall be treated as a timely filed request for revision of computation of quarterly assessment payment under § 327.3(f).

(2) The assessment rate on the quarterly certified statement invoice shall be amended only if it is inconsistent with the assessment risk assignment(s) provided to the institution by the Corporation for the assessment period in question pursuant to § 327.4(a). Agreement with the assessment rate shall not be deemed to constitute agreement with the assessment risk assignment. An institution may request review of an assessment risk assignment it believes to be incorrect pursuant to § 327.4(c).

### § 327.3 Payment of assessments.

(a) *Required—(1) In general.* Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation for each assessment period an assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account.* For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the

Corporation. No later than 30 days prior to the next payment date specified in paragraph (b)(2) of this section, each institution shall provide notice to the Corporation via FDICconnect of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(3) *Transition Rule for Financing Corporation (FICO) Payments.* Quarterly FICO payments shall be collected by the FDIC without interruption during the assessment system transitional period in 2007. All insured depository institutions shall make scheduled quarterly FICO payments on January 2, 2007 (unless prepaid on December 30, 2006), and March 30, 2007, based upon, respectively, their September 30, 2006, and December 31, 2006 reported assessment bases, which shall be the final assessment bases calculated pursuant to 12 CFR 327.5(a) and (b) (2006). Simultaneous collection of deposit insurance assessments and FICO assessments will resume in June of 2007, based on the March 31, 2007 reported assessment base.

(b) *Assessment payment—(1) Quarterly certified statement invoice.* Starting with the first assessment period of 2007, no later than 15 days prior to the payment date specified in paragraph (b)(2) of this section, the Corporation will provide to each insured depository institution a quarterly certified statement invoice showing the amount of the assessment payment due from the institution for the prior quarter (net of credits or dividends, if any), and the computation of that amount. Subject to paragraph (e) of this section, the invoiced amount on the quarterly certified statement invoice shall be the product of the following: the assessment base of the institution for the prior quarter computed in accordance with § 327.5 multiplied by the institution's rate for that prior quarter as assigned to the institution pursuant to §§ 327.4(a) and 327.9.

(2) *Quarterly payment date and manner.* The Corporation will cause the amount stated in the applicable quarterly certified statement invoice to be directly debited on the appropriate payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the assessment payment for the quarter that begins on

January 1, the payment date is the following June 30;

(ii) In the case of the assessment payment for the quarter that begins on April 1, the payment date is the following September 30;

(iii) In the case of the assessment payment for the quarter that begins on July 1, the payment date is the following December 30; and

(iv) In the case of the assessment payment for the quarter that begins on October 1, the payment date is the following March 30.

(c) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment. Penalties for failure to timely pay assessments are provided for at 12 CFR 308.132(c)(3)(v).

(d) *Business days.* If a payment date specified in paragraph (b)(2) falls on a date that is not a business day, the applicable date shall be the previous business day.

(e) *Payment adjustments in succeeding quarters.* Quarterly certified statement invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk assignment, and revision of the Corporation's assessment computations for prior quarters.

(f) *Request for revision of computation of quarterly assessment payment—(1) In general.* An institution may submit a written request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly certified statement invoice in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the quarterly certified statement invoice;

(ii) The institution determines that the rate applied by the Corporation is inconsistent with the assessment risk assignment(s) provided to the institution in writing by the Corporation

for the assessment period for which the payment is due; or

(iii) The institution believes that the quarterly certified statement invoice does not fully or accurately reflect adjustments provided for in paragraph (e) of this section.

(2) *Inapplicability.* This paragraph (f) is not applicable to requests for review of an institution's assessment risk assignment, which are covered by § 327.4(c) of this part.

(3) *Requirements.* Any such request for revision must be submitted within 90 days from the date the computation being challenged appears on the institution's quarterly certified statement invoice. The request for revision shall be submitted to the Manager of the Assessments Section and shall provide documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for revision will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the DOF Director (or designee) shall promptly notify the institution in writing of his or her determination of whether revision is warranted. If the institution requesting revision disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(g) *Quarterly certified statement invoice unavailable.* Any institution whose quarterly certified statement invoice is unavailable on FDICconnect by the fifteenth day of the month in which the payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its quarterly certified statement invoice for the preceding assessment period, subject to subsequent correction.

#### § 327.4 Assessment rates.

(a) *Assessment risk assignment.* For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured depository institution will be provided an assessment risk assignment. Notice of an institution's current assessment risk assignment will be provided to the

institution with each quarterly certified statement invoice. Adjusted assessment risk assignments for prior periods may also be provided by the Corporation. Notice of the procedures applicable to reviews will be included with the notice of assessment risk assignment provided pursuant to paragraph (a) of this section.

(b) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk assignment in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (c) of this section. Assessment risk assignments remain in effect for future assessment periods until changed. If the risk assignment in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Requests for review.* An institution that believes any assessment risk assignment provided by the Corporation pursuant to paragraph (a) of this section is incorrect and seeks to change it must submit a written request for review of that risk assignment. An institution cannot request review through this process of the CAMELS ratings assigned by its primary federal regulator; each federal regulator has established procedures for that purpose. An institution may also request review of a determination by the FDIC to assess the institution as a large or a small institution (12 CFR 327.9(d)(6)) or a determination by the FDIC that the institution is a new institution (12 CFR 327.9(d)(7)). Any request for review must be submitted within 90 days from the date the assessment risk assignment being challenged pursuant to paragraph (a) of this section appears on the institution's quarterly certified statement invoice. The request shall be submitted to the Corporation's Director of the Division of Insurance and Research in Washington, DC, and shall include documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding

the outcome of its request. Upon completion of a review, the Director of the Division of Insurance and Research (or designee) or the Director of the Division of Supervision and Consumer Protection (or designee), as appropriate, shall promptly notify the institution in writing of his or her determination of whether a change is warranted. If the institution requesting review disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(d) *Disclosure restrictions.* The portion of an assessment risk assignment provided to an institution by the Corporation pursuant to paragraph (a) of this section that reflects any supervisory evaluation or confidential information is deemed to be exempt information within the scope of § 309.5(g)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(e) *Limited use of assessment risk assignment.* Any assessment risk assignment provided to a depository institution under this part 327 is for purposes of implementing and operating the FDIC's risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material, or in any other public place or manner, the assessment risk assignment provided to it pursuant to this part.

(f) *Effective date for changes to risk assignment.* (1) Changes to an insured institution's risk assignment resulting from a supervisory ratings change become effective as of the date of written notification to the institution by its primary federal regulator or state authority of its supervisory rating (even when the CAMELS component ratings have not been disclosed to the institution), if the FDIC, after taking into account other information that could affect the rating, agrees with the rating. If the FDIC does not agree, changes to an insured institution's risk assignment become effective as of the date that the FDIC determines that a change in the supervisory rating is warranted.

(2) Changes to an insured institution's risk assignment resulting from a change in a long-term debt issuer rating become effective as of the date the change is announced by the rating agency.

#### § 327.5 Assessment base.

(a) *Quarter-end balances and average daily balances.* An insured depository institution shall determine its assessment base using quarter-end

balances until changes in the quarterly report of condition allow it to report average daily deposit balances on the quarterly report of condition, after which—

(1) An institution that becomes newly insured after the first report of condition allowing for average daily balances shall have its assessment base determined using average daily balances;

(2) An insured depository institution (other than one covered in paragraph (a)(1) of this section) reporting assets of \$1 billion or more on the first report of condition allowing for average daily balances, shall within one year after so reporting have its assessment base determined using average daily balances;

(3) An insured depository institution (other than one covered in paragraph (a)(1) of this section) that was insured prior to the first report of condition allowing for average daily balances, reporting less than \$1 billion in assets on the first report of condition allowing for average daily balances—

(i) May continue to have its assessment base determined using quarter end balances; or

(ii) May opt permanently to have its assessment base determined using average daily balances after notice to the Corporation, but

(iii) Shall have its assessment rate determined using average daily balances for any quarter beginning six months after the institution reported that its assets equaled or exceeded \$1 billion for two consecutive quarters and thereafter; and

(4) In any event, an insured depository institution that files its report of condition on a consolidated basis by including a subsidiary bank(s) or savings association(s) shall report its assessment base on an unconsolidated basis.

(b) *Computation of assessment base.* Whether computed on a quarter-end balance or an average daily balance, the assessment base for any insured institution that is required to file a quarterly report of condition shall be computed by:

(1) Adding all deposit liabilities as defined in section 3(l) of the Federal Deposit Insurance Act, to include deposits that are held in any insured branches of the institution that are located in the territories and possessions of the United States, but does not include unposted credits and is not reduced by unposted debits; and

(2) Subtracting the following allowable exclusions, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any demand deposit balance due from or cash item in the process of collection due from any depository institution (not including a private depository institution, a foreign depository institution, a foreign office of another U.S. depository institution, or a U.S. branch of a foreign depository institution) up to the total of the amount of deposit balances due to and cash items in the process of collection due to such depository institution that are included in paragraph (b)(1) of this section;

(ii) Any outstanding drafts (including advices and authorization to charge deposit institution's balance in another bank) drawn in the regular course of business;

(iii) Any pass-through reserve balances;

(iv) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(5)); and

(v) Deposits accumulated for the payment of personal loans, which represent actual loan payments received by the depository institution from borrowers and accumulated by the depository institution in hypothecated deposit accounts for payment of the loans at maturity. Time and savings deposits that are pledged as collateral to secure loans are not "deposits accumulated for the payment of personal loans."

(c) *Newly insured institutions.* A newly insured institution shall pay an assessment for the assessment period during which it became an insured institution.

#### **§ 327.6 Terminating transfers; other terminations of insurance.**

(a) *Terminating institution's final two quarterly certified statement invoices.* If a terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurs, its assessment base for the quarterly certified statement invoice or invoices for which it failed to file a report of condition shall be deemed to be its assessment base for the last quarter for which the institution filed a report of condition. The acquiring institution in a terminating transfer is liable for paying the final invoices of the terminating institution. The terminating institution's assessment for the quarter prior to the quarter in which the terminating transfer occurs shall be calculated at the terminating institution's rate.

(b) *Assessment for quarter in which the terminating transfer occurs—(1)*

*Acquirer using Average Daily Balances.* If an acquiring institution's assessment base is computed using average daily balances pursuant to § 327.5, the terminating institution's assessment for the quarter in which the terminating transfer occurs shall be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquiring institution's rate.

(2) *Acquirer using Quarter-end Balances.* If an acquiring institution's assessment base is computed as a quarter-end balance pursuant to § 327.5, its assessment for the quarter in which the terminating transfer occurs shall be the acquiring institution's quarter-end balance calculated at the acquiring institution's assessment rate, and the terminating institution shall not be assessed separately for that quarter.

(c) *Other terminations.* When the insured status of an institution is terminated, and the deposit liabilities of such institution are not assumed by another insured depository institution—

(1) *Payment of assessments; quarterly certified statement invoices.* The terminating depository institution shall continue to file and certify its quarterly certified statement invoice and pay assessments for the assessment period its deposits are insured. Such terminating institution shall not be required to certify its quarterly certified statement invoice and pay further assessments after it has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the assessment period in which its deposit liabilities are paid in full, and after it, under applicable law, goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments.

(2) *Payment of deposits; certification to Corporation.* When the deposit liabilities of the depository institution have been paid in full, the depository institution shall certify to the Corporation that the deposit liabilities have been paid in full and give the date of the final payment. When the depository institution has unclaimed deposits, the certification shall further state the amount of the unclaimed deposits and the disposition made of the funds to be held to meet the claims. For assessment purposes, the following will be considered as payment of the unclaimed deposits:

(i) The transfer of cash funds in an amount sufficient to pay the unclaimed and unpaid deposits to the public official authorized by law to receive the same; or

(ii) If no law provides for the transfer of funds to a public official, the transfer of cash funds or compensatory assets to an insured depository institution in an amount sufficient to pay the unclaimed and unpaid deposits in consideration for the assumption of the deposit obligations by the insured depository institution.

(3) *Notice to depositors.* (i) The terminating depository institution shall give sufficient advance notice of the intended transfer to the owners of the unclaimed deposits to enable the depositors to obtain their deposits prior to the transfer. The notice shall be mailed to each depositor and shall be published in a local newspaper of general circulation. The notice shall advise the depositors of the liquidation of the depository institution, request them to call for and accept payment of their deposits, and state the disposition to be made of their deposits if they fail to promptly claim the deposits.

(ii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(i) of this section, a certified copy of the public official's receipt issued for the funds shall be furnished to the Corporation.

(iii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(ii) of this section, an affidavit of the publication and of the mailing of the notice to the depositors, together with a copy of the notice and a certified copy of the contract of assumption, shall be furnished to the Corporation.

(4) *Notice to Corporation.* The terminating depository institution shall advise the Corporation of the date on which it goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments and the method whereby the termination has been effected.

(d) *Resumption of insured status before insurance of deposits ceases.* If a depository institution whose insured status has been terminated is permitted by the Corporation to continue or resume its status as an insured depository institution before the insurance of its deposits has ceased, the institution will be deemed, for assessment purposes, to continue as an insured depository institution and must thereafter file and certify its quarterly certified statement invoices and pay assessments as though its insured status had not been terminated. The procedure for applying for the continuance or resumption of insured status is set forth in § 303.248 of this chapter.

### § 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest—(1) Payment by institutions.* Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation.* The Corporation will pay interest on any overpayment by the institution of its assessment.

(3) *Accrual of interest.* (i) Interest on an amount owed to or by the Corporation for the underpayment or overpayment of an assessment shall accrue interest at the relevant interest rate.

(ii) Interest on an amount specified in paragraph (a)(3)(i) of this section shall begin to accrue on the day following the regular payment date, as provided for in § 327.3(b)(2), for the amount so overpaid or underpaid, provided, however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation. Interest shall continue to accrue through the date on which the overpayment or underpayment (together with any interest thereon) is discharged.

(iii) The relevant interest rate shall be redetermined for each quarterly assessment interval. A quarterly assessment interval begins on the day following a regular payment date, as specified in § 327.3(b)(2), and ends on the immediately following regular payment date.

(b) *Interest rates.* (1) The relevant interest rate for a quarterly assessment interval that includes the month of January, April, July, and October, respectively, is the coupon equivalent yield of the average discount rate set on the 3-month Treasury bill at the last auction held by the United States Treasury Department during the preceding December, March, June, and September, respectively.

(2) The relevant interest rate for a quarterly assessment interval will apply to any amounts overpaid or underpaid on the payment date immediately prior to the beginning of the quarterly assessment interval. The relevant interest rate will also apply to any amounts owed for previous overpayments or underpayments (including any interest thereon) that remain outstanding, after any adjustments to such overpayments or underpayments have been made thereon, at the end of the regular payment date immediately prior to the beginning of the quarterly assessment interval. Interest will be compounded daily.

### § 327.8 Definitions.

For the purpose of this part 327:

(a) *Deposits.* The term *deposit* has the meaning specified in section 3(l) of the Federal Deposit Insurance Act.

(b) *Quarterly report of condition.* The term *quarterly report of condition* means a report required to be filed pursuant to section 7(a)(3) of the Federal Deposit Insurance Act.

(c) *Assessment period—In general.* The term *assessment period* means a period beginning on January 1 of any calendar year and ending on March 31 of the same year, or a period beginning on April 1 of any calendar year and ending on June 30 of the same year; or a period beginning on July 1 of any calendar year and ending on September 30 of the same year; or a period beginning on October 1 of any calendar year and ending on December 31 of the same year.

(d) *Acquiring institution.* The term *acquiring institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(e) *Terminating institution.* The term *terminating institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a terminating transfer.

(f) *Terminating transfer.* The term *terminating transfer* means the assumption by one insured depository institution of another insured depository institution's liability for deposits, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, when the terminating institution goes out of business or transfers all or substantially all its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments by or at the end of the assessment period during which such assumption of liability for deposits occurs. The term *terminating transfer* does not refer to the assumption of liability for deposits from the estate of a failed institution, or to a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution.

(g) *Small Institution.* An insured depository institution with assets of less than \$10 billion as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a small institution. If, after December 31, 2006, an institution classified as large under paragraph (h) of this section reports assets of less than \$10 billion in its reports of condition for four

consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter.

(h) *Large Institution*. An insured depository institution with assets of \$10 billion or more as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a large institution. If, after December 31, 2006, an institution classified as small under paragraph (g) of this section reports assets of \$10 billion or more in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as large beginning the following quarter.

(i) *Long-Term Debt Issuer Rating*. A long-term debt issuer rating shall mean a current rating of an insured depository institution's long-term debt obligations by Moody's Investor Services, Standard & Poor's, or Fitch Ratings. A long-term debt issuer rating does not include a rating of a company that controls an insured depository institution, or an affiliate or subsidiary of the institution. A current rating shall mean one that has been confirmed or assigned within 12 months before the end of the quarter for which an assessment rate is being determined. If no current rating is available, the institution will be deemed to have no long-term debt issuer rating.

(j) *CAMELS composite and CAMELS component ratings*. The terms *CAMELS composite ratings* and *CAMELS component ratings* shall have the same meaning as in the Uniform Financial Institutions Rating System as published by the Federal Financial Institutions Examination Council.

(k) *ROCA supervisory ratings*. ROCA supervisory ratings rate risk management, operational controls, compliance, and asset quality.

(l) *New depository institution*. A new insured depository institution is a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(m) *Established depository institution*. An established institution is a bank or thrift that has been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(n) *Risk assignment*. An institution's risk assignment includes assignment to Risk Category I, II, III, or IV, and, within Risk Category I, assignment to an assessment rate or rates.

By order of the Board of Directors.

Dated at Washington, DC, this 2nd day of November, 2006.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

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## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 327

**RIN 3064-AD09**

#### Assessments

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The Federal Deposit Insurance Reform Act of 2005 requires that the Federal Deposit Insurance Corporation (the FDIC) prescribe final regulations, after notice and opportunity for comment, to provide for deposit insurance assessments under section 7(b) of the Federal Deposit Insurance Act (the FDI Act). In this rulemaking, the FDIC is amending its regulations to create a new risk differentiation system, to establish a new base assessment rate schedule, and to set assessment rates effective January 1, 2007.

**DATES:** *Effective Date:* January 1, 2007.

**FOR FURTHER INFORMATION CONTACT:** Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898-8967; or Christopher Bellotto, Counsel, Legal Division, (202) 898-3801.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On February 8, 2006, the President signed the Federal Deposit Insurance Reform Act of 2005 into law; on February 15, 2006, he signed the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act).<sup>1</sup> The Reform Act enacts the bulk of the recommendations made by the FDIC in 2001. The Reform Act, among other things, requires that the FDIC, within 270 days, "prescribe final regulations, after notice and opportunity for comment \* \* \* providing for assessments under section 7(b) of the Federal Deposit Insurance Act, as amended \* \* \*," thus giving the FDIC, through its rulemaking authority, the opportunity to better price deposit insurance for risk.<sup>2</sup>

<sup>1</sup> Federal Deposit Insurance Reform Act of 2005, Public Law 109-171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Public Law 109-173, 119 Stat. 3601.

<sup>2</sup> Section 2109(a)(5) of the Reform Act. Pursuant to the Section 2109 of the Reform Act, current

On July 24, 2006, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking providing for deposit insurance assessments (the NPR). 71 FR 41910. The FDIC sought public comment on its proposal and received 707 comment letters, including numerous comments from trade organizations.<sup>3</sup> The comments and the final rule providing for assessments are discussed in later sections.

#### A. The Current Risk-Differentiation Framework

The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) required that the FDIC establish a risk-based assessment system. To implement this requirement, the FDIC adopted by regulation a system that places institutions into risk categories<sup>5</sup> based on two criteria: capital levels and supervisory ratings. Three capital groups—well capitalized, adequately capitalized, and undercapitalized, which are numbered 1, 2 and 3, respectively—are based on leverage ratios and risk-based capital ratios for regulatory capital purposes. Three supervisory subgroups, termed A, B, and C, are based upon the FDIC's consideration of evaluations provided by the institution's primary federal regulator and other information the FDIC deems relevant.<sup>6</sup> Subgroup A

assessment regulations remain in effect until the effective date of new regulations. Section 2109(a)(5) of the Reform Act requires the FDIC, within 270 days of enactment, to prescribe final regulations, after notice and opportunity for comment, providing for assessments under section 7(b) of the Federal Deposit Insurance Act. Section 2109 also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and dividends. A final rule on deposit insurance coverage was published on September 12, 2006. 71 FR 53547. Final rules on the one-time assessment credit and dividends were published on October 18, 2006. 71 FR 61374; 71 FR 61385. The FDIC is publishing final rulemakings on the designated reserve ratio and on operational changes to part 327 elsewhere in this issue of the **Federal Register**.

<sup>3</sup> The comment period expired on September 22, 2006. The FDIC also received many comments relevant to this rulemaking in response to the other rulemakings discussed in footnote 2. All comments have been considered and are available on the FDIC's Web site, <http://www.fdic.gov/regulations/laws/federal/propose.html>.

<sup>4</sup> The trade associations included the American Bankers Association, the Independent Community Bankers of America, America's Community Bankers, the Clearing House, the Financial Services Roundtable, the New York Bankers Association, the New Jersey League of Community Bankers, the Massachusetts Bankers Association, the Kansas Bankers Association, and the Association for Financial Professionals.

<sup>5</sup> The FDIC's regulations refer to these risk categories as "assessment risk classifications."

<sup>6</sup> The term "primary federal regulator" is synonymous with the statutory term "appropriate federal banking agency." 12 U.S.C. 1813(q).