October 11, 2006

MEMORANDUM TO: The Board of Directors

FROM: Douglas H. Jones
Acting General Counsel

Fred S. Selby
Director, Division of Finance

SUBJECT: Amendment to 308.132(c)(3)(v)
Increasing Fees for Late Assessment Penalties

Recommendation

Staff recommends adopting a final rule amending 12 C.F.R. 308.132(c)(3)(v) concerning penalties for failure to timely pay assessments with no substantive changes from the proposed rule published in the Federal Register on Wednesday, July 19, 2006. See 71 Fed. Reg. 40,938. The final rule adopts changes made by the Federal Deposit Insurance Reform Act of 2005 ("Reform Act"), which amended provisions of the Federal Deposit Insurance Act ("FDI Act"). The statute generally provides that an insured depository institution which fails or refuses to pay any assessment shall be subject to a penalty of not more than 1 percent of the assessment due for each day the violation continues. The statute includes an exception if the failure to pay results from a dispute with the FDIC over the amount of the assessment and the institution deposits satisfactory security with the FDIC. The statute includes a provision covering assessment amounts of less than $10,000, which authorizes penalties up to $100 per day. Finally, the statute accords the FDIC discretion to compromise, modify or remit any penalty imposed on a finding that good cause prevented timely payment. The final rule amends the FDIC's former rule concerning late assessment penalties, 12 C.F.R. 308.132(c)(3)(v), in conformity with these provisions of the Reform Act.

Background

Section 2104 (c) of the Reform Act amends section 18(h) of the FDI Act, 12 U.S.C. 1828(h).[1] As described in the proposal, the FDIC added the present rule concerning late assessment penalties when it amended 12 C.F.R. 308.132 pursuant to the Debt Collection Improvement Act of 1996 ("DCIA").[2] 71 FR 40, 938, citing 61 Fed. Reg. 57,987 (Nov. 12, 1996).[3] Accordingly, the FDIC increased the late assessment

[1] See Federal Deposit Insurance Reform Act of 2005, section 2104(c), Public Law 109-171, 120 Stat. 9, 13.
[2] Public Law 104-134, 110 Stat. 1321-358, 373, amending section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990 ("Inflation Adjustment Act"), 28 U.S.C. 2461 (2000).
[3] The DCIA required the head of each Federal Agency to enact rules adjusting each Civil Money Penalty ("CMP"), under the agency's jurisdiction, by a rate of inflation prescribed in the DCIA.

penalty amount from a maximum of $100, as originally established in section 18(h) of the FDI Act, to a maximum of $110 for each day the violation continues. Id.[4] This final rule amends the FDIC's late assessment penalty rule, 12 C.F.R. 308.132(c)(3)(v), to reflect the changes made by section 2104(c) of the Reform Act. Section 2104(c) of the Reform Act changes the late assessment penalty from not more than $100 per day to not more than 1 percent of any assessment owed, per day that the violation continues, if the amount owed is $10,000 or more at the time the institution fails or refuses to pay the assessment. If the institution owes less than $10,000 at the time the institution fails or refuses to pay the assessment, then the amendment authorizes penalties up to $100 for each day that the violation continues. The Reform Act also provides for an exception if the failure to pay results from a dispute with the FDIC over the amount of the assessment and the institution deposits satisfactory security with the FDIC.

Comments Received

On July 19, 2006, the FDIC published in the Federal Register a notice of proposed rulemaking and request for comment, which reflected the proposed amendments to the late assessment penalties rule, 12 C.F.R. 308.132(c)(3)(v). See 71 Fed. Reg. 40,398. The FDIC received one substantive comment from a trade association. It acknowledged the former late assessment penalty provisions were outdated and supported the FDIC's proposal. Therefore, staff recommends adopting the proposed amendments to 12 C.F.R. 308.132(c)(3)(v) with no changes in its final rule.

The trade association specifically supported the statutory provision that allows the FDIC to compromise, modify, or remit any penalty upon a determination that good cause prevented the timely payment of an assessment. It noted that natural disasters, such as Hurricane Katrina that struck the Gulf Coast in August of 2005, can affect numerous institutions' ability to pay assessments in a timely manner. Staff recognizes that situations may arise where a depository institution's failure to pay may be due to matters outside the control of the institution therefore establishing good cause for a failure to pay in a timely manner. After according an institution an opportunity to request a good cause determination, and when applicable because the FDIC and the institution are unable to resolve the matter, staff will impose the penalty in the same manner as civil money penalties issued pursuant to section 8(i) of the FDI Act, 12 U.S.C. 1818(i).

Description of the Final Rule

Section 132(c)(3)(v) of part 308 is being amended by conforming it to the changes made by section 2104(c) of the Reform Act. The late assessment penalty is changed from a maximum of $110 per day (as previously adjusted under the Inflation Adjustment Act, supra note 2) to not more than 1 percent of the assessment owed if the institution owes an assessment of $10,000 or more at the time the institution refuses or

[4] Section 2104(c) of the Reform Act effectively returns the late assessment penalty on assessments of less than $10,000 to the original amount of up to $100. The Inflation Adjustment Act, supra note 2, may require a readjustment of this amount in 2008.

fails to pay any assessment.[5] Additionally, if the amount the institution fails or refuses to pay is less than $10,000, the rule authorizes penalties of up to $100 for each day that the violation continues. Finally, section 132(c)(3)(v) incorporates the statutory provisions providing for an exception when the failure to pay results from a dispute with the FDIC over the amount of the assessment and the institution deposits satisfactory security with the FDIC. Section 132(c)(3)(v) also recognizes the FDIC's discretion to compromise, modify, or remit any penalty that the FDIC may assess upon a finding that good cause prevented the timely payment of an assessment. Staff is preparing a separate board case concerning delegations and internal procedures for imposing the late assessment penalty. When applicable, staff will follow the FDIC's Uniform Rules of Practice and Procedure, set forth in Subpart A of Part 308 (12 C.F.R. 308.1-308.41), to impose the penalty in cases where good cause for the failure to pay does not exist and the applicable depository institution refuses to stipulate to the penalty.

Conclusion

The proposed amendments ensure that the FDIC's final rule concerning late assessment penalties incorporates the changes made by the Reform Act to section 18(h) of the FDI Act. This final rule, if adopted by the Board, will become effective when the final rule providing for risk based assessments takes effect pursuant to sections 2104(e) and 2109(a)(5) of the Reform Act.

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[5] The FDIC can also initiate a termination of insurance proceeding, pursuant to section 8(a) of the FDI ACT, 12 U.S.C. 1818(a), when an institution withholds portions of its insurance assessments. Doolin Security Savings Bank v. FDIC, 53 F.3d 1395, 1408 (4th Cir. 1995).