[6714-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN [insert]

PREPAID ASSESSMENTS

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY:

Pursuant to 12 U.S.C. § 1817(b), the FDIC is amending 12 C.F.R. Part 327 to require insured institutions to prepay their estimated quarterly risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012. The prepaid assessment for these periods will be collected on December 30, 2009, along with each institution's regular quarterly risk-based deposit insurance assessment for the third quarter of 2009. For purposes of estimating an institution's assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012, and calculating the amount that an institution will prepay on December 30, 2009, the institution's assessment rate will be its total base assessment rate in effect on September 30, 2009.[1] On September 29, 2009, the FDIC increased

[1] An institution's risk-based assessment rate may change during a quarter when a new CAMELS rating is transmitted, or a new long-term debt-issuer rating is assigned. 12 CFR 327.4(f). For purposes of calculating an institution's prepaid assessment, the FDIC will use the institution's CAMELS ratings and, where applicable, long-term debt-issuer ratings, and the resulting assessment rate in effect on September 30, 2009.

annual assessment rates uniformly by 3 basis points beginning in 2011.[2] As a result, an institution's total base assessment rate for purposes of estimating an institution's assessment for 2011 and 2012 will be increased by an annualized 3 basis points beginning in 2011. Again for purposes of calculating the amount that an institution will prepay on December 30, 2009, an institution's third quarter 2009 assessment base will be increased quarterly at a 5 percent annual growth rate through the end of 2012. The FDIC will begin to draw down an institution's prepaid assessments on March 30, 2010, representing payment for the regular quarterly risk-based assessment for the fourth quarter of 2009.

EFFECTIVE DATE: [date of publication].

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SUPPLEMENTARY INFORMATION:

[2] 74 FR 51063 (Oct. 2, 2009).

I. Background

On September 29, 2009, the FDIC adopted an Amended Restoration Plan to allow the Deposit Insurance Fund (Fund or DIF) to return to a reserve ratio of 1.15 percent within eight years, as mandated by statute. At the same time, the FDIC adopted higher annual risk-based assessment rates effective January 1, 2011.[3]

Liquidity Needs Projections

While the Amended Restoration Plan and higher assessment rates address the need to return the DIF reserve ratio to 1.15 percent, the FDIC must also consider its need for cash to pay for projected failures. In June 2008, before the number of bank and thrift failures began to rise significantly and the crisis worsened, total assets held by the DIF were approximately $55 billion and consisted almost entirely of cash and marketable securities (i.e., liquid assets). As the crisis has unfolded, liquid assets of the DIF have been used to protect depositors of failed institutions and have been exchanged for less liquid claims against the assets of failed institutions. As of September 30, 2009, although total assets had increased to almost $63 billion, cash and marketable securities had fallen to approximately $23 billion. The pace of resolutions continues to put downward pressure on cash balances. While most of the less liquid assets in the DIF have value that will eventually be converted to cash when sold, the FDIC's immediate need is for more liquid assets to fund near-term failures.

The FDIC's projections of the Fund's liquidity include assumptions concerning failed-institution resolution strategies, such as the increasing use of loss sharing --

[3] 74 FR 51063 (Oct. 2, 2009).

especially for larger institutions -- which reduce the FDIC's immediate cash outlays, as well as the anticipated pace at which assets obtained from failed institutions can be sold. If the FDIC took no action under its existing authority to increase its liquidity, the FDIC's projected liquidity needs would exceed its liquid assets on hand beginning in the first quarter of 2010. Through 2010 and 2011, liquidity needs could significantly exceed liquid assets on hand.

II. The Proposed Rule

On September 29, 2009, the FDIC, using its statutory authority under sections 7(b) and 7(c) of the FDI Act (12 U.S.C. 1817(b)-(c)), adopted a notice of proposed rulemaking with request for comment to amend its assessment regulations to require all institutions to prepay, on December 30, 2009, their estimated risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012, at the same time that institutions pay their regular quarterly deposit insurance assessments for the third quarter of 2009 (the proposed rule or NPR).[4,5] Under the NPR, an institution would initially account for the prepaid assessment as a prepaid expense (an asset). The Fund would initially account for the amount collected as both an asset (cash) and an offsetting liability (deferred revenue). An institution's quarterly risk-based deposit insurance assessments thereafter would be paid from the amount the institution had prepaid until that amount was exhausted or until December 30, 2014, when any amount remaining would be returned to the institution.

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[4] Section 7(b)(3)(E) of the Federal Deposit Insurance Act (12 U.S.C. § 1817(b)(3)(E)); Section 7(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. § 1817(b)(2)).

[5] 74 FR 51063 (Oct. 2, 2009).

Under the proposed rule, the FDIC would exercise its supervisory discretion to exempt an institution from the prepayment requirement if the FDIC determined that the prepayment would adversely affect an institution's safety and soundness. In addition, an institution could apply to the FDIC for an exemption from the prepayment requirement if the institution could demonstrate that the prepayment would significantly impair the institution's liquidity, or otherwise create significant hardship.

III. Comments Received

The FDIC sought comments on every aspect of the proposed rule, with six particular issues posed. The FDIC received more than 800 comments on the proposed rule, of which approximately 680 were form letters. The comments are discussed in section V below.

IV. Final Rule

In this rulemaking, the FDIC seeks to address its upcoming liquidity needs by amending its assessment regulations to require insured institutions to prepay, on December 30, 2009, their estimated quarterly regular risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012.

Legal Authority

The FDIC's assessment authorities are set forth in section 7 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1817(b) and (c).[6] Generally, the FDIC

[6] The requirement for imposing systemic risk assessments is set forth at Section 13(c)(4)(G) of the Federal Deposit Insurance Act (12 U.S.C. § 1823(c)(4)(G)).

Board of Directors must establish, by regulation, a risk-based assessment system for insured depository institutions. 12 U.S.C. § 1817(b)(1)(A).[7] Each insured depository institution is required to pay its risk-based assessment to the Corporation in such manner and at such time or times as the Board of Directors prescribes by regulation. 12 U.S.C. § 1817(c)(2)(B).

In addition, section 7(b)(5) of the FDI Act, governing special assessments, empowers the Corporation to impose one or more special assessments on insured depository institutions in an amount determined by the Corporation for any purpose that the Corporation may deem necessary. 12 U.S.C. § 1817(b)(5). The FDIC exercised this authority earlier this year when it promulgated a regulation imposing a special assessment on June 30, 2009, of 5 basis points of an institution's total assets minus its Tier 1 capital as of that date, not to exceed 10 basis points of the institution's risk-based assessment base as of that date.[8] Pursuant to that rulemaking, the FDIC's Board of Directors may impose up to two additional special assessments, each at up to the same rate, at the end of the third and fourth quarters of 2009, without the need for additional notice-and-comment rulemaking.

Instead of imposing any additional special assessments while the industry is in a weakened condition, the FDIC is relying on its section 7 authorities to require insured

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[7] The regulations governing the FDIC's risk-based assessment system are set out at 12 CFR Part 327. Those regulations give the FDIC the authority to raise assessment rates by 3 basis points without additional rulemaking. 12 CFR 327.10(c). On September 29, 2009, the FDIC Board voted to use this authority and adopted higher assessment rates effective January 1, 2011.

[8] 74 FR 25639 (May 29, 2009).

institutions to prepay their estimated regular quarterly risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012 (the "prepayment period").

Calculation of Estimated Prepaid Assessment Amount

For purposes of estimating an institution's assessments for the prepayment period and calculating the amount that an institution will prepay on December 30, 2009 ("prepaid amount"), the institution's assessment rate will be its total base assessment rate in effect on September 30, 2009.[9] Since the FDIC has already increased annual assessment rates uniformly by 3 basis points beginning in 2011, an institution's total base assessment rate for purposes of estimating its assessments for 2011 and 2012 will be increased by an annualized 3 basis points beginning in 2011.[10] Again for purposes of calculating the prepaid amount, an institution's third quarter 2009 assessment base will be increased quarterly at a 5 percent annual growth rate through the end of 2012. Changes to data underlying an institution's September 30, 2009, assessment rate or assessment base received by the FDIC after December 24, 2009, will not affect an institution's prepaid amount.[11, 12] The FDIC will collect the prepaid assessments for the

[9] An institution's risk-based assessment rate may change during a quarter when a new CAMELS rating is transmitted, or a new long-term debt-issuer rating is assigned. 12 CFR 327.4(f). For purposes of calculating an institution's prepaid assessment, the FDIC will use the institution's CAMELS ratings and, where applicable, long-term debt-issuer ratings, and the resulting assessment rate in effect on September 30, 2009.

[10] 74 FR 51063 (Oct. 2, 2009).

[11] Thus, for purposes of calculating the prepaid assessment, the FDIC will take into account mergers and consolidations that are recorded in the FDIC's computer systems as of December 24, 2009. If a merger is recorded by this date, the assessment for the acquired institution will be paid by the acquirer at the acquirer's rate.

[12] An institution's failure to file its third quarter of 2009 report of condition will not exempt it from the requirement to prepay under this rulemaking.

prepayment period on December 30, 2009, along with the institution's regular quarterly deposit insurance assessments for the third quarter of 2009.[13]

An institution's prepaid assessment will be set as described in the previous paragraph and will be applied to the institution's risk-based assessments beginning with the fourth quarter of 2009. Events during the prepayment period, such as slower deposit growth or changes in CAMELS ratings, may cause an institution's actual assessments to differ from the pre-paid amount. Assessment billing will account for events that occur during the prepayment period and may result in an institution either paying assessments in cash before the prepayment period has concluded or ultimately receiving a rebate of unused amounts. An institution's quarterly certified statement invoice will include (1) the regular quarterly risk-based assessment due for the corresponding quarter based on the assessment base and assessment rate applicable to that quarter, (2) the amount of the prepayment that will be applied toward the risk-based assessment for that quarter, and (3) the amount (if any) of any remaining prepaid amount. An insured depository institution may continue to request review or revision (as appropriate) of its regular risk-based assessment each quarter under sections 327.4(c) and 327.3(f) of the FDIC regulations.

Requiring prepaid assessments does not preclude the FDIC from changing assessment rates or from further revising the risk-based assessment system during 2009, 2010, 2011, 2012, or thereafter, pursuant to notice-and-comment rulemaking under 12 U.S.C. § 1817(b)(1). Prepaid assessments made by insured depository institutions will

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[13] The amount and calculation of each insured depository institution's prepaid assessment will be included on its quarterly certified statement invoice for the third quarter of 2009, which will be available on FDIC*connect* no later than 15 days prior to the December 30, 2009, payment date.

continue to be applied against quarterly assessments as they may be so revised until the prepaid assessment is exhausted or the prepayment is returned, whichever comes first.

Implementing Prepaid Assessments

The FDIC will begin to offset prepaid assessments on March 30, 2010, representing payment of the regular quarterly risk-based deposit insurance assessment for the fourth quarter of 2009. Any prepaid assessment not exhausted after collection of the amount due on June 30, 2013, will be returned to the institution (rather than December 30, 2014, as provided in the proposed rule). If the FDIC determines its liquidity needs allow, it may return any remaining prepaid assessment to the institution sooner.

Accounting and Risk-Weight for Prepaid Assessments

1. Accounting for Prepaid Assessments

Each institution should record the entire amount of its prepaid assessment as a prepaid expense (asset) as of December 30, 2009. Notwithstanding the prepaid assessment, each institution should record the estimated expense for its regular risk-based assessment each calendar quarter. However, the offsetting entry to the expense for a particular quarter will depend on the method of payment for that quarter's expense. As of September 30, 2009, each institution should have accrued an expense (a charge to earnings) for its estimated regular quarterly risk-based assessment for the third quarter of 2009, which is a quarter for which assessments would not have been prepaid, and a corresponding accrued expense payable (a liability). On December 30, 2009, each institution will pay both its assessment for the third quarter of 2009, thereby eliminating the related accrued expense payable, and the entire amount of its prepaid assessments, which it should record as a prepaid expense (asset).

As of December 31, 2009, each institution should record (1) an expense (a charge to earnings) for its estimated regular quarterly risk-based assessment for the fourth quarter of 2009, and (2) an offsetting credit to the prepaid assessment asset because the fourth quarter assessment of 2009 will have been prepaid.[14]

Each quarter thereafter, an institution should record an expense (a charge to earnings) for its regular quarterly risk-based assessment for that quarter and an offsetting credit to the prepaid assessment asset until this asset is exhausted. Once the asset is exhausted, the institution should record an expense and an accrued expense payable each quarter for its regular assessment payment, which will be paid, in cash, in arrears at the end of the following quarter.

2. Risk Weighting of Prepaid Assessments

The federal banking agencies' risk-based capital rules permit an institution to apply a zero percent risk weight to claims on U.S. Government agencies.[15] The FDIC

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[14] Some institutions record the estimated expense and an accrued expense payable for their regular risk-based assessments monthly during each calendar quarter rather than quarterly as of quarter-end. On December 30, 2009, when such an institution pays both its assessment for the third quarter of 2009 and the entire amount of its prepaid assessments, it should eliminate the accrued expense payable recorded for the third quarter 2009 assessment as well as the accrued expense payable recorded for the first two months of its estimated fourth quarter 2009 assessment and it should record the remaining amount of its prepaid assessments (i.e., the entire amount of the prepaid assessments less the accrued expense payable for the first two months of the fourth quarter 2009 assessment) as a prepaid expense (asset). As of December 31, 2009, this institution should record (1) an expense (a charge to earnings) for the third month of its estimated fourth quarter 2009 assessment and (2) an offsetting credit to the prepaid assessment asset.

[15] 12 CFR Part 3, Appendix A (OCC); 12 CFR Parts 208 and 225, Appendix A (Federal Reserve Board); 12 CFR Part 325, Appendix A (FDIC); and 12 CFR Part 567, Appendix C (OTS).

believes the prepaid assessment imposed under this rule qualifies for a zero percent risk weight.

For the same reasons, the FDIC believes that Temporary Liquidity Guarantee Program (TLGP) nondeposit debt obligations should receive a zero percent risk weight consistent with the risk weight proposed for prepaid assessments. When the FDIC determined that a depository institution could apply a 20 percent risk weight to debt covered by the TLGP, the determination referenced the 20 percent risk weight that has traditionally been applied to assets covered by the FDIC's deposit insurance. Because insured deposits are fully backed by the full faith and credit of the United States government and no insured depositor has ever or will ever take a loss, the FDIC will review reducing the risk weight on insured deposits to zero percent consistent with the treatment of other government-backed obligations.

Restrictions on Use of Prepaid Assessments

Under the final rule, prepaid assessments may only be used to offset regular quarterly risk-based deposit insurance assessments. Prepaid assessments may not be used, for example, for the following:

- To offset FICO assessments (which are governed by section 21(f) of the Federal Home Loan Bank Act, 12 U.S.C. 1441(f));
- To offset any future special assessments under FDI Act section 7(b)(5);
- To offset any future systemic risk assessments under FDI Act section 13(c)(4)(G)(ii);

- To offset Temporary Liquidity Guarantee Program assessments under 12 C.F.R. 370;
- To pay assessments for quarters prior to the fourth quarter of 2009;
- To pay civil money penalties; or
- To offset interest owed to the FDIC for underpayment of assessments for assessment periods prior to the fourth quarter of 2009.

The FDIC will apply an institution's remaining one-time assessment credits under Part 327 subpart B before applying its prepaid assessment to its regular quarterly risk-based deposit insurance assessments.[16]

Exemptions for Certain Insured Depository Institutions

The final rule makes a few modifications to the exemption process proposed in the NPR that are intended to benefit institutions. These modifications impose stricter deadlines on the FDIC (in order to provide institutions with earlier notice and greater opportunity to plan), allow the FDIC to postpone determination of exemption applications if necessary (on condition of postponing the due date for the prepaid assessment), and give exempted institutions an opportunity to request that the FDIC withdraw an exemption.

Under the final rule, the FDIC may exercise its discretion as supervisor and insurer to exempt an institution from the prepayment requirement if the FDIC determines that the prepayment would adversely affect the safety and soundness of the institution.

[16] One-time assessment credits will not reduce an institution's prepaid assessment.

The FDIC will consult with the institution's primary federal regulator in making this determination, but will retain the ultimate authority to exercise such discretion. The FDIC will notify any exempted institution of its determination to exempt the institution as soon as possible, but in no event later than November 23, 2009. A separate set of deadlines applies to institutions that file applications for exemption and is described in the following paragraphs. The FDIC does not believe that the exemptions that will be granted will prevent it from meeting its current liquidity needs.

In addition, an insured depository institution may apply to the FDIC for an exemption from the prepayment requirement if the prepayment would significantly impair the institution's liquidity, or would otherwise create extraordinary hardship.[17] The FDIC will consider exemption requests on a case-by-case basis and expects that only a few institutions will find an exemption necessary.

Written applications for exemption from the prepayment obligation should be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail or fax.[18] In order for an application to be accepted and considered by the FDIC, the application must contain a full explanation of the need for the exemption with supporting documentation, to include current financial

[17] The NPR stated that "an insured depository institution could apply to the FDIC for an exemption from all or part of the prepayment requirement if the prepayment would significantly impair the institution's liquidity, or would otherwise create significant hardship. The FDIC would consider exemption requests on a case-by-case basis and expects that only a few would be necessary." 74 FR 51,063, 51,065 (Oct. 2, 2009). The final rule uses the phrase "extraordinary hardship" rather than "significant hardship" to clarify that the FDIC expects that few exemptions will be necessary other than for those institutions exempted through the FDIC's own initiative. The final rule also eliminates the option of a partial prepayment exemption since the FDIC determined that it would be infeasible to determine partial payments.

[18] Applications for exemption should be submitted by either electronic mail (prepaidassessment@fdic.gov) or fax (202-898-6676).

statements, cash flow projections, and any other relevant information that the FDIC deems appropriate.

Any application for exemption will be deemed to be denied unless the FDIC notifies the applying institution by December 15, 2009, that either: (1) the institution is exempt from the prepaid assessment or (2) the FDIC has postponed determination of the application for exemption until no later than January 14, 2010. The FDIC expects that it will postpone few, if any, determinations of applications for exemption. In the event, however, that the FDIC postpones such determinations, the institution will not have to pay its prepaid assessment on December 30, 2009. If the FDIC ultimately denies the institution's request for exemption, the FDIC will notify the institution of the denial and of the date by which the institution must pay the prepaid assessment. That date will be no less than 15 days after the date of the notice of denial.

Under the final rule, an institution that the FDIC has exempted from prepayment on the grounds that prepayment would adversely affect the safety and soundness of the institution may request that the FDIC allow the institution to nevertheless pay the prepaid amount. If the FDIC, after consulting with the institution's primary federal regulator, determines that exemption is not necessary, it will notify the institution that the exemption has been withdrawn. Again, the FDIC retains the ultimate authority to make this determination.

Written applications requesting that the FDIC withdraw an exemption should be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail or fax.[19] To be accepted and considered by the FDIC, an application requesting that the FDIC withdraw an exemption must contain a full explanation of the reasons the exemption is not needed with supporting documentation, to include current financial statements, cash flow projections, and other relevant information that the FDIC deems appropriate. Any application requesting that the FDIC withdraw an exemption will be deemed denied unless the FDIC notifies the applying institution by December 15, 2009 that the exemption has been withdrawn.

Other than through an application requesting that the FDIC withdraw an exemption, determinations of eligibility for exemption made by the FDIC are final and are not subject to further agency review. Decisions by the FDIC on applications requesting that the FDIC withdraw an exemption are also final and are not subject to further agency review.

Any exempted institution and any institution where the FDIC has postponed determination of its request for exemption must still pay its third quarter 2009 risk-based assessment on December 30, 2009.

Transfer of Prepaid Assessments

An insured depository institution will be permitted to transfer any portion of its prepaid assessment to another insured depository institution, provided that the institutions involved notify the FDIC's Division of Finance and submit a written agreement signed by the legal representatives of the institutions. In their submission to the FDIC, the

[19] Applications requesting that the FDIC withdraw an exemption should be submitted by either electronic mail (prepaidassessment@fdic.gov) or fax (202-898-6676).

institutions must include documentation that each representative has the legal authority to bind the institution. Adjustments to the institutions' prepaid assessments will be made by the FDIC on the next assessment invoice that will be available via FDIC*connect* at least 10 days after the FDIC receives the written agreement. This aspect of the final rule is similar to the procedural requirements associated with the transfer of the one-time assessment credit provided by the Federal Deposit Insurance Reform Act of 2005, Pub. L. No. 109-171, 120 Stat. 9, and implemented by regulation. See 12 CFR 327.34(c).

Prepaid assessments cannot be transferred to any entity that is not an insured depository institution. Prepaid assessments cannot be pledged to any insured depository institution or any entity that is not an insured depository institution.

In the event that an insured depository institution merges with, or is consolidated into, another insured depository institution, the surviving or resulting institution will be entitled to use any unused portion of the disappearing institution's prepaid assessment not otherwise transferred.[20]

Disposition in the Event of Failure or Termination of Insured Status

In the event that an insured depository institution's insured status terminates, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment obligations not yet offset against the prepaid amount) will be refunded to the institution.[21] In the event of failure of an insured depository institution, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment

[20] As noted above, the parties to a transfer agreement must provide notice to the FDIC.

[21] See 12 CFR 327.6 (2009).

obligations not yet offset against the prepaid amount) will be refunded to the institution's receiver.

V. Summary of Comments

The FDIC received more than 800 comments, of which approximately 680 were form letters. The vast majority of the commenters supported the FDIC meeting its upcoming liquidity needs by requiring prepaid risk-based assessments.

Alternatives

The majority of commenters, including the major trade groups, supported the prepaid assessment funding option over one or more special assessments, borrowing from Treasury Department ("Treasury"), and borrowing from the industry as a means of providing immediate liquidity to the DIF. Those that supported the prepaid assessment option stated that it was the most palatable and least costly of the alternatives, particularly another special assessment. The commenters supported the prepaid assessment option specifically because the prepayment would initially be accounted for as a prepaid expense, which is an asset, and would not affect earnings. Furthermore, since it is not a borrowing, the DIF would not incur any interest costs. An overwhelming majority of commenters opposed more special assessments. The commenters stated that special assessments are too unpredictable and they preferred options that did not result in decreased earnings.

Some commenters opposed the prepaid assessment because they said that the prepayment would cause financial strain on the industry. They disputed the FDIC's assertion that banks have excess liquidity and claimed that the prepayment would cause banks to decrease lending or make up for the loss of liquidity by borrowing. A few commenters also stated that banks are holding excess liquidity to prepare for better economic times when deposits may decrease and loan demand may increase. Other commenters noted that since the prepayment is actually an interest-free loan from the industry, the FDIC is underestimating the full opportunity cost of the prepaid asset.

Most commenters indicated support for the FDIC's belief that the industry could pay the prepaid assessment without a strain on liquidity. The FDIC understands that the prepayment may affect the safety and soundness of some institutions and cause liquidity concerns for others. As a result, the final rule allows the FDIC to exempt from prepayment any institution if the FDIC, in consultation with the institution's primary federal regulator, determines that the prepayment would adversely affect the safety and soundness of the institution. Additionally, an insured institution may apply to the FDIC for an exemption from the prepayment requirement if the prepayment would significantly impair the institution's liquidity, or otherwise create extraordinary hardship. In addition, institutions may sell remaining prepayment amounts to other institutions if needed to bolster liquidity.

A number of commenters supported the idea of the FDIC borrowing from the Treasury. Some of these commenters preferred borrowing from Treasury over the prepayment option, while others stated that the FDIC should reserve the borrowing option in case of worsening economic conditions next year. However, if the prepayment turns out to be insufficient to meet the liquidity needs of the DIF, these commenters favored borrowing from Treasury over imposing another prepayment or special assessment.

Those that supported borrowing from Treasury over the current prepayment stated that banks have already been tainted as being bailed out so there is minimal danger that Treasury borrowing would further stigmatize the industry. They stressed that Treasury borrowing is not the same as taxpayer funds. These commenters further stated that borrowing from Treasury provides necessary funding without putting an additional burden on banks in the near term when economic conditions remain challenging. They stated that the current environment is an emergency situation, the type for which the FDIC has reserved Treasury borrowing.

A few commenters suggested a hybrid approach that would entail either a mandatory one year prepayment or a voluntary three-year prepayment with the remaining funding needs being met with borrowing from Treasury. In the latter case, only those institutions that did not prepay would be responsible for the interest payments on Treasury borrowing.

A few commenters opposed borrowing from Treasury or said that it should only be used as a last resort. Some commenters feared that Treasury might impose a repayment structure that would require the FDIC to issue special assessments or that Treasury could impose restrictions on the entire industry similar to those imposed under the Troubled Asset Relief Program (TARP) if the FDIC were to draw on its line of credit. Others feared additional congressional oversight. A few commenters noted the negative public perception of FDIC borrowing from Treasury could result in decreased depositor confidence.

The FDIC agrees that prepayment is preferable to borrowing from Treasury. Borrowing from Treasury would increase the explicit cost to the industry, as the interest would be paid to Treasury, and could decrease the FDIC's flexibility in managing assessment rates during the repayment period. Prepayment of assessments is consistent with maintaining an industry-funded deposit insurance system. In addition, borrowing from Treasury could risk diminishing public confidence in the FDIC and in insured depository institutions.

A few commenters supported the option of borrowing from the industry. One commenter stated that borrowing from the industry would be preferable because banks are having a hard time finding acceptable investments. However, those that supported this option also stated that their support was dependent on the borrowing being backed by the full faith and credit of the federal government, providing a minimum return, and having zero percent risk weight.

If the FDIC borrowed from the industry, the FDIC would still need to raise the same total amount of funds. However, by statute, any borrowing from the industry, or the Federal Home Loan Banks, authorized under Section 14(e) of the FDI Act, would be voluntary. Consequently, the FDIC could not ensure that the borrowing would raise the necessary funds. In addition, while the FDIC appreciates the opportunity cost associated with prepaying assessments, any borrowing would have an explicit interest cost, which would also be borne by the industry. Interest on borrowing from the Federal Home Loan

Banks would result in a transfer of funds (in the form of interest) from the banking industry to the Federal Home Loan Banks.

An overwhelming majority of the commenters stated that prepaid assessments should be mandatory. The FDIC agrees. Non-mandatory prepayments would be functionally equivalent to borrowing from the banking industry and would entail the same drawbacks.

Many commenters requested a “FICO-like” bond issuance. Issuing bonds to the public, however, would require congressional action and, thus, in the FDIC’s view, is not a practical solution to its immediate liquidity needs.

A few commenters suggested that the fees that the FDIC has collected from the TLGP be transferred to the DIF. While the amount of TLGP fees currently collected exceeds losses thus far, it is prudent to maintain separate TLGP reserves because of continued exposure from outstanding debt issued under the program and from guarantee coverage of transaction accounts upon failure of an insured institution. In addition, the current liquidity needs of the FDIC significantly exceed TLGP reserves.

Balancing the options, the FDIC agrees with the majority of commenters that prepaying assessments represents the best alternative for meeting the immediate liquidity needs of the FDIC.

<u>Assessment Base</u>

The FDIC received many comment letters arguing that the prepayment assumption of 5 percent annual growth rate in deposits for 2009, 2010, 2011, and 2012 is too high and that the FDIC should use a lower annual growth rate for those institutions that historically have experienced slower growth. One commenter argued that growth assumptions should be lowered or eliminated because changes in economic conditions make it unlikely that historic growth rates over the last several years will continue in the near term.

The FDIC developed the 5 percent deposit growth assumption from historical data that showed industry domestic deposits increased by more than 5 percent during each of the most recent 1 year, 3 year, and 5 year time horizons. The FDIC believes that deposit growth is an important factor that needs to be included in any estimate of future assessments. For purposes of simplicity and fairness, the FDIC also believes that a single growth rate assumption should be used for all insured institutions since actual future growth for individual institutions is unknown. In addition, growth rate assumptions are only used to estimate the prepayment amount and will not affect the actual amount of insurance assessments that each institution will be charged for the fourth quarter of 2009 or for 2010, 2011, or 2012.

The FDIC received several hundred comment letters arguing that, to be fair to small institutions, the assessment base used for the prepayment calculation should be changed to Total Assets less Tier 1 capital, so that larger institutions would pay a portion of the prepayment proportional to their size rather than to their share of deposits. Most of these comments were form letters. Several commenters argued that the amount of assets that an institution holds is a more accurate gauge of its risk to the DIF than the amount of deposits it holds, since troubled assets, not deposits, cause institution failures, and all forms of liabilities, not just deposits, fund institution assets. The FDIC also received several comments, including comments from several trade groups, maintaining that the prepaid assessment should be calculated based on an institution's total domestic deposit base. One of these commenters wrote that deposits represent the actual dollar amount being insured and that there is no proven correlation between total assets and insured deposits for all institutions.

The prepaid assessment amount is based upon an institution's estimated assessments during the prepayment period. At present, the assessment base for quarterly risk-based assessments is approximately equal to total domestic deposits; it is not based upon assets. Any change to the assessment base for quarterly risk-based assessments would require either legislation or additional rulemaking; changing the existing assessment base from domestic deposits to some other measure is outside the scope of the prepaid assessment proposal. In the FDIC's view, the estimate of assessments for prepayment purposes should be based upon the existing assessment base.

Rate Assumptions

The FDIC received several comments requesting that the assumption of a 3 basis point rise in assessment rates beginning in 2011 be eliminated from the prepayment calculation. One commenter argued that the need to increase the assessment rate in the future is not certain and that the decision to make an assessment rate increase should be deferred until it can be determined one is necessary. Another commenter wrote that it may be premature to levy a 3 basis point increase in the assessment rate for 2011 and 2012 given the fact that once the industry begins to stabilize this increase may prove unnecessary.

The FDIC has already increased annual assessment rates uniformly by 3 basis points beginning in 2011, based on the FDIC's long term projections for the DIF and liquidity needs and to ensure that the fund reserve ratio returns to 1.15 percent within the statutorily mandated eight years. In the FDIC's view, since the 3 basis point increase has already been adopted, the estimated future assessments on which the prepayment amount is based should take the increase into account.

<u>Prepayment Period</u>

Slightly less than half of the respondents expressed general agreement with the proposed period (the fourth quarter of 2009, and all of 2010, 2011, and 2012) that the prepayment would cover. Many wished to decrease the three-year prepayment period to a shorter period: two-years or on an annual basis were typical suggestions. The FDIC considered a shortened timeframe. However, the FDIC has concluded that the liquidity needs of the DIF require the substantial cash inflow that the three-year period would bring.

Many commenters requested that they receive interest or a discount on their prepayments (or that those who are exempted from prepayment be required to pay a premium). The final rule, like the proposed rule, contains no provision for interest or discount. A discount or payment of interest would mean that the FDIC is in substance borrowing from the industry. In addition, the costs associated with paying interest or funding a discount would be borne by the industry in the same proportion as their assessments. As previously mentioned, any borrowing from the industry would have to be voluntary and would not provide assurance that the FDIC would be able to raise the necessary funds.

All respondents who wrote on the issue considered the timing of the refunds too far in the future. The FDIC agrees. Under the final rule, any prepayment amounts not exhausted after collection of the amount due on June 30, 2013, will be refunded to the institution (rather than on December 30, 2014, as provided in the final rule). If the FDIC determines its liquidity needs allow, it may return any remaining prepaid assessment to the institution sooner; however, the FDIC considers an earlier refund unlikely given its current projections.

Exemptions

A few commenters expressed general support for the FDIC's decision to grant exemptions when prepayment would significantly affect the safety and soundness of the institution. One commenter advocated that the FDIC grant no exemptions.

Many commenters suggested various groups that should receive a blanket exemption. One commenter requested that banks that make loans in their communities, rather than those benefiting from TARP funding, should be exempted. Other commenters advocated that banks with fewer than one billion dollars in assets be exempted from prepaying assessments. Another commenter suggested that new banks were natural candidates for exemption, in part, because the FDIC required them to produce strict business plans that did not anticipate prepaid assessments. Yet another commenter expressed concern that the FDIC would be so preoccupied with exemption requests from larger regional banks that it might not have time to address those from smaller community banks.

Some commenters requested that the FDIC provide more clarity regarding its criteria, process, and timing for exemption determinations. One banking association suggested that the FDIC provide notice to banks of its exemption decisions no fewer than 30 days from the effective date of the final rule.

The final rule closely follows the NPR with some revisions to the exemption process that are intended to benefit insured institutions. Upon approval of the final rule by the Board, the FDIC will, on its own initiative and as soon as possible, notify institutions that meet the criteria for exemption based on safety and soundness concerns. The FDIC will notify any institution that the FDIC exempts on its own initiative no later than November 23, 2009. In addition, an insured institution may apply before December 1, 2009, to the FDIC for an exemption from the prepayment requirement if the prepayment would significantly impair the institution's liquidity, or otherwise create extraordinary hardship. Similarly, the FDIC will endeavor to maintain communication with banks as to the status of their application.

Tax/Accounting Issues

Many commenters have suggested that the FDIC structure the invoicing and collection of prepaid assessments to maximize the tax benefits to insured depository institutions. This would include working with the IRS to adjust certain tax rules.[22]

[22] Under Section 1.263(a)-4(d)(3)(i) of the Treasury's regulations, in general, a taxpayer must capitalize prepaid expenses, regardless of whether the taxpayer is a cash or accrual basis taxpayer and regardless of

Suggested structures included: allowing institutions to deduct all prepaid assessments in 2009 for income tax purposes and invoicing, and collecting prepaid assessments two or three times (in 2009, 2010, and/or 2011) to allow institutions to deduct prepaid amounts earlier. Subchapter S institutions are particularly concerned with this issue.

Under the final rule, institutions will continue to be able to deduct quarterly assessments at least as quickly as they have in the past. The FDIC structured the prepaid assessment requirement for DIF liquidity needs and believes that using prepaid assessments will not result in any worse tax treatment than banks would have absent prepayment.

Effect on Capital and Liquidity

A number of commenters expressed the opinion that requiring prepaid assessments at this time would have a negative effect on monetary supply and would hamper community banks' liquidity. As noted above, the FDIC will exempt institutions whose prepayment of assessments would adversely affect their safety and soundness. The FDIC's determination on an application for exemption will include an evaluation of the institution's cash on hand, capital reserves, and lending activities. Based on data available to the FDIC, the FDIC believes that most of the prepaid assessment will be drawn from available liquidity, which should not significantly affect depository institutions' current lending activities.

Amended Restoration Plan

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whether the taxpayer is a C Corporation or an S Corporation. The regulations also specify certain exceptions to this general rule.

A few commenters agreed with the FDIC's Amended Restoration Plan allowing the DIF up to eight years to restore the reserve ratio up to 1.15 percent. A number of commenters did not want the FDIC to impose a special assessment or a higher assessment on a temporary basis to restore the reserve ratio in a shorter period of time. One bank recommended that the FDIC reevaluate whether the reserve ratio of 1.15 percent would be sufficient to handle future downturns. The FDIC will take such comments into consideration in its implementation of the Amended Restoration Plan and in any possible future amendments to the plan.

Termination of Insured Status

One commenter, who represented a bank that is voluntarily liquidating, suggested that the regulatory text include a subsection outlining what happens to the prepaid assessment if there is any remaining at the time of liquidation. Since the preamble of the NPR contained language outlining the disposition of any remaining prepaid assessment in the event of termination of insured status, as well as a failure, the FDIC generally agrees with the comment and has added words to this effect in the final rule.

One Time Assessment Credits

One industry trade group argued that banks with residual one-time assessment credits should be allowed to reduce the prepaid assessment by the remaining amount of their one-time credits. The FDIC does not believe that this is necessary. At the end of the second quarter of 2009, only about 200 banks had any remaining unused one-time assessment credits. FDIC regulations allow institutions with remaining credits to transfer these credits to other insured institutions. Thus, whether an institution currently has credits remaining does not necessarily determine whether it will have credits to apply during the prepayment period. For the sake of simplicity and uniformity, the FDIC continues to believe that residual one-time credits should not reduce an institution's prepaid assessment amount.

VI. Regulatory Analysis and Procedure

A. Administrative Procedure Act

This final rule will become effective immediately upon publication. In this regard, the FDIC invokes the good cause exception to the requirements in the Administrative Procedure Act that, once finalized, a rulemaking must have a delayed effective date of thirty days from the publication date.[23] The FDIC finds that good cause exists to waive the customary 30-day delayed effective date.

The FDIC's finding is based upon its upcoming liquidity needs to fund future resolutions. The pace of resolutions of failed institutions continues to put downward pressure on cash balances of the DIF. The FDIC projects that its liquidity needs could exceed its liquid assets on hand beginning in the first quarter of 2010 and, that its liquidity needs could significantly exceed its liquid assets on hand through 2011. To address its upcoming liquidity needs, the FDIC is adopting a final rule which requires institutions to prepay, on December 30, 2009, their estimated quarterly risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012. In order for the FDIC to collect these prepaid assessments on December 30, 2009, certain provisions in the final rule must go into effect immediately. In particular, the final rule

[23] 5 U.S.C. § 553(d)(3).

provides that the FDIC make determinations regarding exempting institutions from the prepayment requirement. These determinations must be made well in advance of the December 30, 2009 collection. An immediate effective date will enable the FDIC to implement these provisions without delay, and without threatening the FDIC's ability to meet its liquidity needs and to resolve failed institutions. For these reasons, the FDIC finds that good cause exists to justify an immediate effective date.

B. Riegle Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act provides that any new regulations and amendments to regulations prescribed by a federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first calendar quarter which begins on or after the day the regulations are published in final form, unless the agency determines, for good cause published with the regulation, that the regulation should become effective before such time. 12 U.S.C. 4802(b)(1)(A). For the same reasons discussed in paragraph A above, the FDIC finds that good cause exists for an immediate effective date for the final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a final 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.[24] 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.[25] The final rule relates directly to the rates imposed on insured depository institutions for deposit insurance, and by providing for the determination of assessment bases to which the rates will apply. Nonetheless, the FDIC is voluntarily undertaking a regulatory flexibility analysis of the final rule.

As of June 30, 2009, of the 8,195 insured commercial banks and savings institutions, there were 4,597 small insured depository institutions as that term is defined for purposes of the RFA (i.e., those with $175 million or less in assets).[26]

For purposes of this analysis, whether the FDIC were to collect needed assessments under the existing rule or under the final rule, the total amount of assessments would be the same. The FDIC's total assessment needs are driven by the statutory mandate that the FDIC adopt a restoration plan and by the FDIC's aggregate insurance losses, expenses, investment income, and insured deposit growth, among other factors. Given the FDIC's total assessment needs, the final rule would alter the payment schedule of assessments. Using the data as of December 31, 2008, the FDIC calculated the total assessments that would be collected under the final rule.

The final rule has no significant effect on capital and earnings, although there could be a small loss of interest earned by some small institutions. Given current low

[24] See 5 U.S.C. § 603, 604 and 605.

[25] 5 U.S.C. § 601.

[26] Throughout this section (unlike the rest of the notice of proposed rulemaking), a ‘‘small institution’’ refers to an institution with assets of $175 million or less.

interest rates, the FDIC estimates that all institutions, including those with $175 million or less in assets, will only lose between 0.03 percent and 0.04 percent of total interest over the prepayment period. In addition, the final rule could affect the liquidity of insured depository institutions, including small institutions. However, for 95.8 percent of small institutions, the prepayment would be less than 25 percent of their cash and cash equivalent assets. Moreover, the final rule includes a mechanism by which the FDIC will exempt those institutions (including small institutions) that cannot prepay their assessments without leading to safety and soundness concerns. In addition, institutions not so exempted may request an exemption. Finally, the effect on liquidity for all institutions (including small institutions) is further mitigated by the institutions' ability to transfer their prepaid assessments.

Comments were sought on the initial regulatory flexibility analysis in the proposed rule. No comments were received.

D. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The collection of information contained in this final rule has been submitted to OMB under emergency processing procedures in OMB regulations, 5 CFR 1320.13. The FDIC is requesting approval by November 10, 2009. These request requirements are needed immediately to enable the FDIC to meet its upcoming liquidity needs and to pay for projected insured institution failures. To address the FDIC's liquidity needs, the final rule requires institutions to pay, on December 30, 2009, their estimated risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012. In order to collect prepaid assessments by December 30, 2009, the FDIC must determine whether to exempt certain institutions from the prepayment requirement well in advance of the December 30, 2009 collection date. The FDIC will first, in its discretion as supervisor and insurer, review all institutions and determine which institutions to exempt. The FDIC will also make exemption determinations based upon application from institutions that the FDIC did not exempt in its initial review. In addition, the FDIC will consider applications from institutions exempted by the FDIC that nevertheless wish to pay the prepaid assessment. All of these applications must be submitted to the FDIC by December 1, 2009. The use of emergency processing will enable the FDIC to collect the information necessary to implement these provisions without delay, and without threatening the FDIC's ability to meet its liquidity needs and resolve failed institutions. The use of normal procedures is reasonably likely to prevent or disrupt the collection of information necessary for the FDIC to implement the final rule, and could adversely affect current economic conditions.

The initial burden estimates have been modified to reflect an additional information collection through which exempted institutions may request withdrawal of the exemption from the prepayment requirement. The FDIC, in its supplemental initial Paperwork Reduction Act notice (74 F.R. 52697 (Oct. 14, 2009), requested comment on the estimated paperwork burden. No comments were received.

1. Application for Exemption

Need and Use of the Information: Exemption requests will supplement the FDIC's exercise of its discretion as supervisor and insurer to exempt an institution from the prepayment requirement if the FDIC determines that the prepayment will adversely affect the safety and soundness of that institution.

Respondents: Insured depository institutions.

Number of responses: 30-200 by the December 1, 2009 deadline

Frequency of response: Once.

Average number of hours to prepare a response: 8 hours.

Total annual burden: 240-1600 hours for one-time exemption request.

2. Application for Withdrawal of Exemption

Need and Use of the Information: Under the final rule, an institution that the FDIC has exempted from prepayment may request that the FDIC allow the institution to nevertheless pay the prepaid amount.

Respondents: Insured depository institutions.

Number of responses: 0-20 by the December 1, 2009 deadline

Frequency of response: Once.

Average number of hours to prepare a response: 8 hours.

Total annual burden: 0-160 hours for one-time application for withdrawal of exemption.

3. Transfer of Prepaid Assessments

Need and use of the information: Institutions will be required to notify the FDIC of the transfer of prepaid assessments so that the FDIC can accurately track these transfers, and apply available prepaid assessments appropriately against institutions' deposit insurance assessments. The need for credit transfer information will expire when the prepaid assessments have been exhausted or when remaining prepaid assessments are returned to the institution after June 30, 2013.

Respondents: Insured depository institutions.

Number of responses: 75 during the first year; 25 the second year and 10 in the final year.

Frequency of response: Occasional.

Average number of hours to prepare a response: 2 hours.

Total annual burden: 150 hours the first year; 50 hours the second year; and 20 hours in the third year.

The FDIC plans to follow this emergency request with a request for the standard three-year approval. Although most of the burden on participating entities will largely end by early 2010, a few elements will be ongoing until 2013. The request will be processed under OMB's normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. To facilitate processing of the emergency and normal clearance submissions to OMB, the FDIC invites the general public to comment on: (1) whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start up costs and the costs of operation, maintenance, and purchase of services to provide the information.

Interested parties are invited to submit written comments to the FDIC concerning the Paperwork Reduction Act implications of this final rule. Such comments should refer to "Exemption Request, Withdrawal of Exemption Request, and Transfer Notification, 3064-AD49". Comments may be submitted by any of the following methods:

- Agency Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html. Follow instructions for submitting comments on the Agency Web Site.
- E-mail: Comments@FDIC.gov. Include "Exemption Request, Withdrawal of Exemption Request, and Transfer Notification, 3064-AD49" in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: PRA Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

All comments received will be posted without change to http://www.fdic.gov/regulations/laws/federal/propose.html including any personal information provided. A copy of the comments may also be submitted to the OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

E. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, 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 FDIC invited comments on how to make this proposal easier to understand. No comments addressing this issue were received.

F. Small Business Regulatory Enforcement Fairness Act [AWAITING OMB RULING]

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 Act of 1996 (SBREFA) Public Law 110–28 (1996). As required by law, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

G. The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed 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).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations

Part 327 – Assessments

1. The authority citation for part 327 continues 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. In part 327, add new § 327.12 to Subpart A to read as follows:

§ 327.12 Prepayment of quarterly risk-based assessments.

(a) *Requirement to prepay assessment.* On December 30, 2009, each insured depository institution shall pay to the FDIC a prepaid assessment, which shall equal its estimated quarterly risk-based assessments aggregated for the fourth quarter of 2009, and all of 2010, 2011, and 2012 (the "prepayment period").

(b) *Calculation of prepaid assessment*.

(1) *Prepaid assessment.*

(i) *Fourth quarter 2009 and all of 2010.* An institution's prepaid assessment for the fourth quarter of 2009 and for all of 2010 shall be determined by multiplying its prepaid assessment rate as defined in paragraph (b)(2) below, times the corresponding prepaid assessment base for each quarter as determined pursuant to paragraph (b)(3) below.

(ii) *All of 2011 and 2012.* An institution's prepaid assessment for each quarter of 2011 and 2012 shall be determined by multiplying the sum of its prepaid assessment rate as defined in paragraph (b)(2) below, plus .75 basis points (which implements the 3 basis point increase in annual assessment rates adopted by the Board on September 29, 2009), times the corresponding prepaid assessment base for each quarter determined pursuant to paragraph (b)(3) below.

(2) *Prepaid assessment rate.* For each quarter of the prepayment period, an institution's prepaid assessment rate shall equal the total base assessment rate that the institution would have paid for the third quarter of 2009 had the institution's CAMELS ratings in effect on September 30, 2009, and, where applicable, long-term debt issuer ratings in effect on September 30, 2009, been in effect for the entire third quarter of 2009.

(3) *Prepaid assessment base.* For each quarter of the prepayment period, an institution's prepaid assessment base shall be calculated by increasing its third quarter 2009 assessment base at an annual rate of 5 percent.

(4) *Finality of prepaid assessment.* The prepaid assessment rate and prepaid assessment base defined in paragraphs (2) and (3) above shall be determined based upon data in the FDIC's computer systems as of December 24, 2009. Changes to data underlying an institution's adjusted total base assessment rate or assessment base, whether by amendment to a report of condition or otherwise, received by the FDIC after December 24, 2009, shall not affect an institution's prepaid assessment.

(5) *Prepaid assessment rates for mergers and consolidations.* For mergers and consolidations recorded in the FDIC's computer systems no later than December 24, 2009, the acquired institution's prepaid assessment rate under paragraph (2) above shall be the prepaid assessment rate of the acquiring institution.

(c) *Invoicing of prepaid assessment.* The FDIC shall advise each insured depository institution of the amount and calculation of its prepaid assessment at the same time the FDIC provides the institution's quarterly certified statement invoice for the third quarter of 2009. The FDIC will re-invoice through FDIC*connect* based upon any data changes as provided in paragraph (b)(4) above.

(d) *Payment of prepaid assessment.* Each insured depository institution shall pay to the Corporation the amount of its prepaid assessment as required under paragraph (a) above in compliance with and subject to the provisions of §§ 327.3 and 327.7 of subpart A.

(1) *Exception to ACH payment*. If an institution's prepaid assessment is greater than $99 million, the institution shall make payment by wire transfer to the FDIC, rather than

by funding its designated deposit account for payment via ACH as provided in §327.3 of subpart A.

(2) *One-time assessment credits*. The FDIC will not apply an institution's one-time assessment credit under subpart B of this part 327 to reduce an institution's prepaid assessment. The FDIC will apply an institution's remaining one-time assessment credits under Part 327 subpart B to its quarterly deposit insurance assessments before applying its prepaid assessments.

(e) *Use of prepaid assessments.* Prepaid assessments shall only be used to offset regular quarterly risk-based deposit insurance assessments payable under this subpart A. The FDIC will begin offsetting regular quarterly risk-based deposit insurance assessments against prepaid assessments on March 30, 2010. The FDIC will continue to make such offsets until the earlier of the exhaustion of the institution's prepaid assessment or June 30, 2013. Any prepaid assessment remaining after collection of the amount due on June 30, 2013, shall be returned to the institution. If the FDIC, in its discretion, determines that its liquidity needs allow, it may return any remaining prepaid assessment to the institution prior to June 30, 2013.

(f) *Transfers*. An insured depository institution may enter into an agreement to transfer, but not pledge, any portion of that institution's prepaid assessment to another insured depository institution, provided that the parties to the agreement notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The institution transferring its prepaid assessment shall submit the required notice and documentation through FDIC*connect*.

That information will be presented by the FDIC through FDIC*connect* to the institution acquiring the prepaid assessments for its acceptance. The adjustment to the amount of the prepaid assessment for each institution involved in the transfer will be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of acceptance by the institution acquiring the prepaid assessments.

(g) *Prepaid assessments following a merger*. In the event that an insured depository institution merges with, or consolidates into, another insured depository institution, the surviving or resulting institution will be entitled to use any unused portion of the acquired institution's prepaid assessment not otherwise transferred pursuant to paragraph (f) above.

(h) *Disposition in the event of failure or termination of insured status.* In the event of failure of an insured depository institution, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment obligations not yet offset against the prepaid amount) will be refunded to the institution's receiver. In the event that an insured depository institution's insured status terminates, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment obligations not yet offset against the prepaid amount) will be refunded to the institution, subject to the provisions of § 327.6 of subpart A.

(i) *Exemptions*.

(1) *Exemption without application*. The FDIC, after consultation with an institution's primary federal regulator, will exercise its discretion as supervisor and insurer to exempt an institution from the prepayment requirement under paragraph (a) if the FDIC determines that the prepayment would adversely affect the safety and soundness of that

institution. No application is required for this review and the FDIC will notify any affected institution of its exemption by November 23, 2009.

(2) *Application for exemption*. An institution may also apply to the FDIC for an exemption from the prepayment requirement under paragraph (a) if the prepayment would significantly impair the institution's liquidity, or would otherwise create extraordinary hardship. Written applications for exemption from the prepayment obligation must be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail (prepaidassessment@fdic.gov) or fax (202-898-6676). The application must contain a full explanation of the need for the exemption and provide supporting documentation, including current financial statements, cash flow projections, and any other relevant information, including any information the FDIC may request. The FDIC will exercise its discretion in deciding whether to exempt an institution that files an application for exemption. An application shall be deemed denied unless the FDIC notifies an applying institution by December 15, 2009, either that (1) the institution is exempt from the prepayment assessment or (2) the FDIC has postponed determination under paragraph (4). The FDIC's denial of applications for exemption will be final and not subject to further agency review.

(3) *Application for Withdrawal of Exemption.* An institution that has received an exemption under paragraph (i)(1) may request that the FDIC withdraw the exemption. Written applications for withdrawal of exemption must be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail (prepaidassessment@fdic.gov) or fax (202-898-6676). The application

must contain a full explanation of the reasons the exemption is not needed and provide supporting documentation, including current financial statements, cash flow projections, and any other relevant information, including any information the FDIC may request. The FDIC, after consultation with the institution's primary federal regulator, will exercise its discretion in deciding whether to withdraw the exemption. The FDIC will notify an institution of its decision to withdraw the exemption by December 15, 2009; that determination will be final and not subject to further agency review. An application shall be deemed denied unless the FDIC notifies an applying institution by December 15, 2009, that the exemption is withdrawn.

(4) *Postponement of determination.* The FDIC may postpone making a determination on any application for exemption filed under paragraph (i)(2) until no later than January 14, 2010. An institution notified by the FDIC of such postponement will not have to pay the prepaid assessment calculated under paragraph (b) on December 30, 2009. If the FDIC denies the application for exemption, the FDIC will notify the institution of the denial and of the date by which the institution must pay the prepaid assessment. The due date for payment of the prepaid assessment after such a denial will be no less than 15 days after the date of the notice of denial.

(5) *Obligation to pay third quarter 2009 assessment*. Any institution exempted from the prepayment requirement or any institution whose application for exemption has been postponed under this section shall pay to the Corporation on December 30, 2009, any amount due for the third quarter of 2009 as shown on the certified statement invoice for that quarter.