

[6714-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064-AD35

ASSESSMENTS

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule with request for comment.

SUMMARY:

The FDIC is adopting an interim rule to impose a 20 basis point emergency special assessment under 12 U.S.C. 1817(b)(5) on June 30, 2009. The assessment will be collected on September 30, 2009. The interim rule also provides that, after June 30, 2009, if the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to zero or negative at the end of a calendar quarter, an emergency special assessment of up to 10 basis points may be imposed by a vote of the Board on all insured depository institutions based on each institution's assessment base calculated pursuant to 12 CFR § 327.5 for the corresponding assessment period. The FDIC seeks comment on the interim rule.

DATES: Comments must be received on or before [30 days from date of publication in the FEDERAL REGISTER].

ADDRESSES:

You may submit comments, identified by RIN number, 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 the RIN number in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: 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.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Munsell W. St. Clair, Chief, Banking and Regulatory Policy Section, Division of Insurance and Research, (202) 898-8967; and Christopher Bellotto, Counsel, Legal Division, (202) 898-3801 or Sheikha Kapoor, Senior Attorney, Legal Division, (202) 898-3960.

SUPPLEMENTARY INFORMATION:

I. Background

Recent and anticipated failures of FDIC-insured institutions resulting from deterioration in banking and economic conditions have significantly increased losses to the Deposit Insurance Fund (the fund or the DIF). The reserve ratio of the DIF declined from 1.19 percent as of March 31, 2008, to 1.01 percent as of June 30, 0.76 percent as of September 30, and 0.40 percent (preliminary) as of December 31. Twenty-five institutions failed in 2008, and the FDIC projects a substantially higher rate of institution failures in the next few years, leading to a further decline in the reserve ratio. Because the fund reserve ratio fell below 1.15 percent as of June 30, 2008, and was expected to remain below 1.15 percent, the Reform Act required the FDIC to establish and implement a Restoration Plan that would restore the reserve ratio to at least 1.15 percent within five years, absent extraordinary circumstances.¹

On October 7, 2008, the FDIC established a Restoration Plan for the DIF. The Restoration Plan called for the FDIC to set assessment rates such that the reserve ratio would return to 1.15 percent within five years. The plan also required the FDIC to update its loss and income projections for the fund and, if needed to ensure that the fund reserve ratio reaches 1.15 percent within five years, increase assessment rates.

Simultaneously with the adoption of this interim rule, the FDIC has amended the Restoration Plan and extended the time within which the reserve ratio must be returned to 1.15 percent to 7 years due to extraordinary circumstances. Also, again simultaneously with the adoption of this interim rule, the FDIC has adopted a final rule (the assessments

¹ Section 7(b)(3)(E) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(b)(3)(E)).

final rule) that, among other things, sets initial base assessment rates at 12 to 45 basis points.

However, given the FDIC's estimated losses from projected institution failures, the assessment rates adopted in the final rule are not sufficient to return the fund reserve ratio to 1.15 percent within 7 years and are unlikely to prevent the DIF fund balance and reserve ratio from falling to near zero or becoming negative this year.

II. Emergency Special Assessment

The FDIC believes that it is important that the fund not decline to a level that could undermine public confidence in federal deposit insurance. Even though the FDIC has significant authority to borrow from the Treasury to cover losses, a fund balance and reserve ratio that are near zero or negative could create public confusion about the FDIC's ability to move quickly to resolve problem institutions and protect insured depositors. The FDIC views the Treasury line of credit as available to cover unforeseen losses, not as a source of financing projected losses.

The FDIC projects that the reserve ratio will fall to close to zero or become negative in 2009 unless the FDIC receives more revenue than regular quarterly assessments will produce, given the rates adopted in the final rule on assessments. Therefore, the FDIC will impose an emergency special assessment equal to 20 basis points of an institution's assessment base on June 30, 2009.² The special assessment will

² 12 U.S.C. 1817(b)(5) provides:

Emergency special assessments.--In addition to the other assessments imposed on insured depository institutions under this subsection, the Corporation may impose 1 or more special assessments on insured depository institutions in an amount determined by the Corporation if the amount of any such assessment is necessary—

be collected on September 30, 2009, at the same time that the risk-based assessments for the second quarter of 2009 are collected. The assessment base for the special assessment shall be the same as the assessment base for the second quarter risk-based assessment.

The FDIC has extended the period of the Restoration Plan to seven years due to the extraordinary circumstances facing the banking industry—including the severe problems in the financial markets and the prospects of a lengthy recession. If the Restoration Plan period remained at its original five years, the FDIC estimates that initial assessment rates would have had to range from 20 to 45 basis points, compared to the actual initial assessment rates adopted in the assessments final rule, which range from 12 to 45 basis points.

A 20 basis point special assessment rate should increase the reserve ratio by approximately 32 basis points. According to the FDIC's projections, the 20 basis point special assessment combined with the rates adopted in the final assessments rule would return the reserve ratio to 1.15 percent by the end of 2015, consistent with the amended seven-year Restoration Plan period.

As part of the Restoration Plan, the FDIC has the authority to restrict credit use while the plan is in effect, providing that institutions may still apply credits against their assessments equal to the lesser of their assessment or 3 basis points.³ The FDIC has

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- (A) to provide sufficient assessment income to repay amounts borrowed from the Secretary of the Treasury under [12 U.S.C. 1824(a)] in accordance with the repayment schedule in effect under [12 U.S.C. 1824(c)] during the period with respect to which such assessment is imposed;
 - (B) to provide sufficient assessment income to repay obligations issued to and other amounts borrowed from insured depository institutions under [12 U.S.C. 1824(d)]; or
 - (C) for any other purpose that the Corporation may deem necessary.

³ Section 7(b)(3)(E)(iv) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(E)(iv)).

decided not to restrict credit use in the Restoration Plan. The FDIC projects that the amount of credits remaining at the time that the special assessment is imposed will be very small and that their use will have very little effect on the assessment revenue necessary to meet the requirements of the plan.⁴

Effect on Capital and Earnings

The FDIC has analyzed the effect of a 20 basis point special assessment on the capital and earnings of insured institutions. For this analysis, it relied on the projected range of industry earnings in 2009 described in Appendix 2 of the preamble to the final rule on assessments. Given the assumptions in the analysis, for the industry as a whole, the special assessment in 2009 would result in year-end 2009 capital that would be approximately 0.7 percent lower than in the absence of a special assessment. Based on the range of projected industry earnings, a 20 basis point special assessment would cause 9 to 13 institutions (with \$3 billion to \$5 billion in aggregate assets) whose equity-to-assets ratio would have exceeded 4 percent in the absence of such an assessment to fall below that percentage and 3 to 4 institutions (with about \$1 billion in aggregate assets) to fall below 2 percent.

For profitable institutions, the special assessment in 2009 would result in pre-tax income that would be between 10 percent and 13 percent lower than if the FDIC did not charge such the special assessment. For unprofitable institutions, pre-tax losses would increase by an average of between 3 percent and 6 percent.

⁴ For 2009 and 2010, credits may not offset more than 90 percent of an institution's assessment. Section 7(e)(3)(D)(ii) of the Federal Deposit Insurance Act (12 U.S.C. 1817(e)(3)(D)(ii)).

III. Further Special Assessments

The FDIC recognizes that there is considerable uncertainty about its projections for losses and insured deposit growth, and, therefore, of future fund reserve ratios. To further ensure that the fund reserve ratio does not decline to a level that could undermine public confidence in federal deposit insurance, the FDIC may impose an emergency special assessment of up to 10 basis points of an institution's assessment base whenever, after June 30, 2009, the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to zero or negative at the end of a calendar quarter. Any such special assessment will be imposed on the last day of a quarter (March 31, June 30, September 30 or December 31) and will be collected approximately three months later, at the same time that risk-based assessments are collected. The earliest possible date for such a special assessment is September 30, 2009 (which would be collected December 30, 2009).

The assessment base for any special assessment shall be the base for the risk-based assessment for the quarter ending the date the special assessment is imposed. Thus, for example, the assessment base for a special assessment imposed on September 30, 2009, would be the assessment base for the quarterly risk-based assessment for the third quarter of 2009 (collected December 30, 2009).

Near the end of each quarter, the FDIC will estimate the reserve ratio for that quarter from available data on, or estimates of, insurance fund assessment income, investment income, operating expenses, other revenue and expenses, and loss provisions (including provisions for anticipated failures). Because no data on estimated insured

deposits will be available until after the quarter-end, the FDIC will assume that estimated insured deposits will increase during the quarter at the average quarterly rate over the previous four quarters.

If the FDIC estimates that the reserve ratio will fall to a level that the Board believes would adversely affect public confidence or to a level close to zero or negative at the end of a calendar quarter, and the Board decides to impose an emergency special assessment of up to 10 basis points, the FDIC will announce the imposition and rate of the special assessment no later than the last day of the quarter. As soon as practicable after any such announcement, the FDIC will have a notice published in the Federal Register of the imposition of the special assessment.

Thus, for example, if in late September 2009, the FDIC estimates that the reserve ratio on September 30, 2009, will fall to zero, and the FDIC's Board votes to impose a special assessment of up to 10 basis points, the FDIC will announce no later than September 30 that it is imposing a special assessment on September 30, 2009, and the rate of the assessment, and will collect the special assessment, along with the usual quarterly deposit insurance assessment, on December 30, 2009.

The FDIC currently projects that the combination of regular quarterly assessments and the 20 basis point special assessment will prevent the fund reserve ratio from falling to a level that that the Board believes would adversely affect public confidence or to a level close to zero or negative during the period of the Restoration Plan. For this reason, the FDIC does not expect to impose a special assessment of up to 10 basis points. However, the FDIC will not make its estimates of quarter-end reserve ratios for purposes of any such special assessment, nor will the Board determine whether to impose such a

special assessment, until shortly before the end of each quarter, in order to take advantage of the most recently available data.

IV. Requests for Comments

The FDIC seeks comment on every aspect of this rulemaking. In particular, the FDIC seeks comment on the issues set out below. The FDIC asks that commenters include reasons for their positions.

1. Should the June 30, 2009 special assessment be at a rate other than 20 basis points?
2. Should there be a maximum rate that the combination of an institution's regular quarterly assessment rate and a special assessment could not exceed? For example, an institution in Risk Category IV could possibly be charged a regular quarterly assessment at the annual rate of 77.5 basis points beginning in the second quarter of 2009. A 20 basis point special assessment would effectively increase the maximum possible annual rate to nearly 100 basis points. Should the rate be capped at a smaller amount?
3. Should weaker institutions be exempted, in whole or in part, from the special assessment? For example, should institutions with CAMELS ratings of 4 or 5 be exempted? Should adequately or undercapitalized institutions be exempted? Should institutions that would become undercapitalized (or critically undercapitalized) as the result of the special assessment be exempted?
4. Should special assessments be assessed on assets or some other measure, rather than the regular risk-based assessment base?

5. Should there be special assessments of up to 10 basis points? Should some other rate be used? For example, should the rate be the rate needed to maintain the fund reserve ratio at particular value for the reserve ratio?
6. Should FDIC assessments, including emergency special assessments, take into account the assistance being provided to systemically important institutions?

V. Effective Date

This interim rule will take effect April 1, 2009.

VI. Regulatory Analysis and Procedure

A. Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act (APA), notice and comment are not required prior to the issuance of a final rule if an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The FDIC finds good cause to adopt this interim rule without prior notice and comment.

The FDIC believes that it is important that the fund not decline to a level that could undermine public confidence in federal deposit insurance. A fund balance and reserve ratio that are near zero or negative could create public confusion about the FDIC's ability to move quickly to resolve problem institutions and protect insured depositors. Without additional revenue other than quarterly risk-based assessments based on the rates adopted in the Final Rule, the FDIC projects the reserve ratio will fall close to zero or become negative in 2009. Therefore, it is important for public confidence to have the interim rule in place quickly. Nevertheless, the FDIC desires to have the benefit

of public comment and thus invites interested parties to submit comments during a 30-day comment period. The 30-day comment period will allow the FDIC to receive comments in a timely manner, given that the interim rule will be on April 1, 2009. The FDIC will revise the interim rule, if appropriate, in light of the comments received.

B. 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 invites your comments on how to make this proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could the FDIC do to make the regulation easier to understand?

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a final rule would not 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.⁵ 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.⁶ The interim rule relates directly to the rates imposed on insured depository institutions for deposit insurance. In addition, this interim rule does not involve the issuance of a notice of proposed rulemaking. For these reasons, the requirements of the RFA do not apply. Nonetheless, the FDIC is voluntarily undertaking a regulatory flexibility analysis and is seeking comment on it.

As of December 31, 2008, of the 8,305 insured commercial banks and savings institutions, 4,567 were small insured depository institutions as that term is defined for purposes of the RFA (i.e., those with \$165 million or less in assets).

The FDIC's total assessment needs are driven by the statutory requirement that the FDIC adopt a Restoration Plan that provides that the fund reserve ratio reach at least 1.15 percent within five years absent extraordinary circumstances and by the FDIC's aggregate insurance losses, expenses, investment income, and insured deposit growth, among other factors. Under the interim rule, each institution would be subject to a special assessment at a uniform rate to help meet FDIC assessment revenue needs. Apart from the uniform special assessment on all institutions to help meet the FDIC's total revenue needs, the interim rule makes no other changes in rates for any insured institution, including small insured depository institutions. In effect, the interim rule would uniformly increase each institution's assessment rate by 20 basis points for one assessment collection (including each small institution's assessment rate, as a small

⁵ See 5 U.S.C. 603, 604 and 605.

⁶ 5 U.S.C. 601.

institution is defined for RFA purposes), and would not alter the present distribution of assessment rates.⁷ The interim rule does not directly impose any “reporting” or “recordkeeping” requirements within the meaning of the Paperwork Reduction Act. The compliance requirements for the interim rule would not exceed existing compliance requirements for the present system of FDIC deposit insurance assessments, which, in any event, are governed by separate regulations. The FDIC is unaware of any duplicative, overlapping or conflicting federal rules.

D. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the interim rule is not a “major rule” within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) Pub. L. No. 110-28 (1996). As required by law, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the interim rule may be reviewed.

E. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the interim rule.

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

The FDIC has determined that the interim 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).

⁷ Additional special assessments of up to 10 basis points could uniformly increase each institution’s assessment rate up to 10 basis points for additional assessment collections.

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 proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

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 § 327.15 to Subpart A to read as follows:

§ 327.11 Emergency special assessments.

(a) *Emergency special assessment imposed on June 30, 2009.* On June 30, 2009, the FDIC shall impose an emergency special assessment of 20 basis points on each insured depository institution based on the institution's assessment base calculated pursuant to § 327.5 for the second assessment period of 2009.

(b) *Emergency special assessments after June 30, 2009.* After June 30, 2009, if the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to zero or negative at the end of a calendar quarter, an emergency special assessment of up to 10 basis points may be imposed by a vote of the Board on all insured

depository institutions based on each institution's assessment base calculated pursuant to § 327.5 for the corresponding assessment period.

(1) *Estimation process.* For purposes of any emergency special assessment under this paragraph (b), the FDIC shall estimate the reserve ratio of the Deposit Insurance Fund for the applicable calendar quarter end from available data on, or estimates of, insurance fund assessment income, investment income, operating expenses, other revenue and expenses, and loss provisions, including provisions for anticipated failures. The FDIC will assume that estimated insured deposits will increase during the quarter at the average quarterly rate over the previous four quarters.

(2) *Imposition and announcement of emergency special assessments.* Any emergency special assessment under this paragraph (b) shall be on the last day of a calendar quarter and shall be announced by the end of such quarter. As soon as practicable after announcement, the FDIC will have a notice published in the Federal Register of the emergency special assessment.

(c) *Invoicing of any emergency special assessments.* The FDIC shall advise each insured depository institution of the amount and calculation of any emergency special assessment imposed under paragraph (a) or (b). This information shall be provided at the same time as the institution's quarterly certified statement invoice for the assessment period in which the emergency special assessment was imposed.

(d) *Payment of any emergency special assessment.* Each insured depository institution shall pay to the Corporation any emergency special assessment imposed under paragraph (a) or (b) in compliance with and subject to the provisions of §§ 327.3, 327.6 and 327.7 of subpart A, and the provisions of subpart B. The payment date for any emergency

special assessment shall be the date provided in § 327.3(b)(2) for the institution's quarterly certified statement invoice for the calendar quarter in which the emergency special assessment was imposed.

By order of the Board of Directors.

Dated at Washington, D.C., this 27th day of February, 2009

Federal Deposit Insurance Corporation

Robert E. Feldman

Executive Secretary

(SEAL)

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