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FDIC
550 17th Street, NW.
Washington, DC 20429
Re: Prepaid Assessments.12 CFR Part 327 - RIN 3064-AD49

Dear Chairman Bair:
I appreciate the opportunity to comment on this rulemaking. I will begin by laying out my position, which is to object to this rule on the grounds that it is unconstitutional. I will follow through with suggestions on how to bring this rulemaking in-line with the will of Congress, who by extension have represented myself in their legislation and further suggestions on how to make up for the liquidity shortfall to the Fund.

Mandatory Prepayments of Assessments 3 years out is clearly Unconstitutional
As a US Citizen I object to mandatory prepayments for 2010, 2011, and 2012 because this is plainly unconstitutional. While I may not have standing in court to challenge (even if this rulemaking is a complete end-run around Congress, who represents my will), any banks negatively harmed by this rulemaking are likely to prevail in court.

Article I, Section 8 of my Constitution states Congress has authority: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article II, Section 3 of my Constitution states the President: "he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.". This extends to all those commissioned as officers of the United States, which include the Corporation board. There are some cases where Congress is not clear on how the executive branch shall govern, and with what latitude rulemaking is allowed. In some cases executive agencies have been given deference as subject matter experts; however in other cases agency rules have been struck down as abreast of Congressional intent. It is not clear from the proposed rule and legal analysis that Congressional intent was ever considered during this rulemaking process.

The Supreme Court has provided some guidance on determining if agency rules are entitled to deference (National Association of Home Builders v. Defenders of Wildlife, 2007). The Court ruled: "such deference is appropriate only where “Congress has not directly addressed the precise question at issue” through the statutory text; quoting Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 843 (1984) .

“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress… . [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” Id., at 842–843 (footnotes omitted)."

In this case, the question becomes; has Congress already provided for a remedy to the liquidity shortfall facing the FDIC? The the answer is clear, and it lies in S.896, "Helping Families Save their Homes Act of 2009". In that law, my Congressional representatives specifically codified their intentions on how to

approach DIF shortfalls. That section (204) is *specifically* and *unambiguously* titled "Enhancement of liquidity and stability of insured depository institutions to ensure availability of credit and reduction of foreclosures." Under Section 204(d), Congress specifically has stated: "The Corporation shall recover the loss to the Deposit Insurance Fund arising from any action taken or assistance provided with respect to an insured depository institution under clause (i) from 1 or more special assessments on insured depository institutions, depository institution holding companies (with the concurrence of the Secretary of the Treasury with respect to holding companies), or both, as the Corporation determines to be appropriate." Additionally the section: extends the restoration plan period, increases FDIC borrowing authority from the Treasury and the Federal Financing Bank.

It appears this is clear intent that special assessments or borrowing from Treasury or the Federal Financing Bank are to be used. These two options are the primary intent and will of Congress, and by extension the people. I must object to the logic in FDIC rulemaking, which asserts authority to go a way that Congress has not allowed in the current statute. By creating a third option outside of the statute, the FDIC is intentionally ignoring the will of my Congressional representatives. I also must challenge the fact that Congressional intent is to force banks to prepay their assessments for three years.

I would like to point out the testimony of then FDIC Chairman Powell in regards to the Deposit Insurance Reform Act of 2005, as considered in the House under HR 1185. This excerpt is from testimony delivered on March 17, 2005. "Deposit insurance reform is not about increasing assessment revenue from the industry or relieving the industry of its obligation to fund the deposit insurance system. Rather, the goal of reform is to distribute the assessment burden more evenly over time and more fairly across insured institutions. This is good for depositors, good for the industry and good for the overall economy." I fail to see how this rule falls in line with the clear goal of Congress to evenly distribute assessment burden over-time. To go forward with the rule as proposed to force banks to mandatory prepay assessment three years out consists of a clear unconstitutional taking. Everyone would object if the IRS were to require everyone to prepay taxes three years forward.

No Objection to Mandatory Prepayment Semi-Annually/Quarterly
I offer no objection that it is within the authority of the FDIC to force banks to prepay their risk-based assessment either quarterly or semi-annually. While it is unclear that Congress intended these assessments to be pre-paid, I believe there is some room for deference to the Corporation. In that case there is some balance between Congressional intent of distributing the assessment burden evenly overtime and the Corporation desire to cover up liquidity problem of the Deposit Insurance Fund. I would propose (assuming semi-annual prepayment), collecting 3Q2009 assessments on December 31, 2009 as scheduled, as well as 4Q2009 and 1Q2010 on that date. On March 31, 2010 2Q 2010 assessments would be prepaid in accordance with already known FDIC assessment payment schedule. Prepayment in this manner will also benefit in that it reduces some of the uncertainty in the deposit base calculation. However; it is clear there may still be an ongoing liquidity problem. In fact, it is unclear that Congressional mandates under the FDI Act do not ask the FDIC to increase assessment rates in order to maintain the Fund as industry funded.

No Objection to Optional Prepayment of Assessments for 3 years
I also offer no objection of the FDIC making long-term prepayments optional. From my research it appears optional quarterly/semiannually prepayments were available to institutions prior to rulemaking in 2006. My objection to the long-term prepayments as stated above is that they are mandatory.

Mandatory Prepayment Requires Congressional Action

I admit that even prepayment of up to two-quarters as I propose may require Congressional action. It is clear Congress has already provided two remedies to the liquidity issue; however prepayment may be within previously existing authority of statute. 12 USC 1817 states that assessments are made "in a manner, and at such times as the Board prescribes". I have some doubt that this statute is meant to cover insurance against a deposit base of the future. However, the Supreme Court has given some deference to agency action in the past. This is why I believe the line is very murky and recommend mandatory prepayments be limited to no more than two quarters. I understand this will not solve the problem addressed by the rulemaking and will include my comments. Given Supreme Court rulings and S.896, this rulemaking appears to be a clear end-run around the will of Congress. I believe it seems reasonable to assume that the assessments may be sufficient to cover insurance of deposits up to the next quarter or two; but beyond that seems to go against Congressional intent to reduce the uncertainty of assessments.

Request Legal Analysis re: Constitutional Issues
I request that final rulemaking include a legal analysis as to why the length of prepaid assessments proposed is within Congressional intent. I have not found much comment from Congress on the prepayment of assessments in the Congressional Record archives going back to 1990 (via http://thomas.loc.gov). As mentioned in the first paragraph of my objection, it appears that Congress has unambiguously expressed their intent via passage of S. 896, specifically Section 204. Congress was plainly aware of the liquidity issues with the FDIC Fund and nowhere in debate is prepayment of assessments mentioned as an option. Thus, I do not believe Congress has given the issue of such a long assessment prepayment the deliberation needed for the FDIC to assume this authority. I would be interested in any official Congressional action (hearings in committees or on the floor)as a result of the previous prepayment of assessments mentioned elsewhere. It is my understanding that ranking member of the House Financial Services Committee has supported this rule; however, I do not believe letters from single Congressmen or even Congressional committees constitute much weight, legally speaking.

While the line in the sand regarding how long mandatory prepayment of assessments is allowed, by law; there is no line regarding Congressional intent of S. 896, Section 204. Congress unambiguously approved additional special assessments, borrowing from the Treasury or borrowing from the Federal Financial Bank. Thus I believe the FDIC doesn't have authority to consider an unprecedented mandatory prepayment of the risk-based assessment. I believe such a lengthy prepayment to be a clear unconstitutional taking. There are additionally inherent problems in projecting Fund needs out to 2012.

I appreciate the FDIC Staff thoughtfulness and flexibility in this rulemaking. I will now segue my comment from the legal objection portion to a discussion of how the FDIC can move forward and provide myself, and other citizens with FDIC service mandated by law of making sure we don't lose one cent in insured deposits. It is clear that there are various competing goals at play; a) the goal to be 100% industry-funded; b) the statute to restore a 1.15 reserve ratio by 2015; c) ensuring risk based assessments don't "do more harm" and d) guarantee that no one loses money on insured accounts. Even with mandatory prepayment out to three years, it is quite questionable that this is enough to ensure all of these competing goals are met.

Prepayment Burden will be Passed on to Customers
I believe any burden of prepayments will be inherently passed on to banking customers in the form of increased fees. However, increased risk-based assessments and special assessments likely will be passed on to the customer as well. In a time of crises this is necessary, although banking customers do not have the authority to fail banks nor oversight of their activities and risk levels.

If You Can't Afford Car Insurance, Don't Own a Car

I'll postulate that inspite of the monumental efforts undertaken by Congress, the Treasury, and the Federal Reserve, and the Corporation over the past year, the banking industry remains in a crises situtation, ie. "the banks are on fire". In an effort to deal with the effects of the fire (ie. insured deposits are being put at risk) the path the FDIC has taken is one that doesn't want to raise the alarm. I don't believe this is the correct path; in fact by not acting fervently to contain the crises situation, the Corporation risks creating a larger crises. I will argue that action by Congress in other legislation has relieved the FDIC of of one of the competing goals mentioned in the above paragraph, "ensuring risk based assessments don't, 'do more harm'." Of course, I am speaking of the Troubled Asset Relief Program (TARP). I don't believe the current plan is sufficient to ensure restoration of the reserve ratio as well as remaining 100% industry funded. If the Corporation would like to avoid getting direct loans from Treasury, I believe one viable path is to raise special assessments, and raise the quarterly risk-based assessments to levels that will provide for restoration of the reserve ratio.

Currently there is still greater than $300B in TARP funding available. By imposing special assessments now (prior to the potential of TARP expiration, although its clear Secretary Geithner has no intention of not extending the TARP) banks that are severely impacted cannot simply point the finger of the FDIC, as Congress has allowed those financial institutions (clearly everyone paying risk-based assessments is covered by statute) to participate in the TARP program. The availability of the TARP clearly frees the FDIC of some pressure not to raise risk-based assessments or impose further special assessments. Additionally, anyone lucent enough to understand what is going on will agree that the proposed rulemaking is clearly shouting "current levels of assessment are not high enough for the FDIC to maintain Insurance Funds!". I'll simply state, if banks cannot afford to pay the assessments on their insured deposits, even special assessments, they simply should not be in the banking industry anymore. In fact, it is the banks themselves by their own mistakes that have put them in the current weakend position. I find it appalling that these same banks are lobbying against any increase in special assessments (even though part of a Congressional mandate); do they also cut off their noses to spite their face? The remaining TARP funds, even a small fraction will be enough to cover any harm done by increased assessments. By implicitly asking the banks to use TARP funds the FDIC can be relieved of the direct burden of utilizing the authority to get loans from Treasury.

How Deep Is the Water?

I believe one or more special assessment, plus a greater than 3 basis point increase to the risk based assessments (or a combination) will be sufficient to meet the reserve ratio requirement in the mandated timeframe. FDIC documents did not indicate how much higher than 3 basis points will meet the timeframe, however Any banks adversely affected can get the TARP money to cover up balance sheet or their own liquidity issues. This may be enough to satisfy the requirements; however I'm not convinced this will solve the bigger problem.

My picture of an insolvent bank is that it is like a boat traveling away from land into deeper water. Once the boat sinks, the FDIC retrieves the passengers and salvages some wreckage off the bottom. The longer a boat is allowed to continue getting into deeper water, the greater the cost to the FDIC. I will point out to the recent examples of Corus, Guaranty Bank, and United Bank which had 20%+ losses.

In order to prevent further industry weakness and devastation of failed institutions; I think it may be worthwhile for the FDIC to draw on the loan authority in order to take down some of the larger institutions. Looking at the unofficial troubled bank list; segregating banks with assets greater than $3B results in a conservative estimate of $120B in assets. Assuming all of these banks "fail", 20%,

30%, or 40% losses could turn out to be $24B, $36B, or even as high as $48B. More troubling is that there was a recent bank failure (Georgian Bank) that did not appear on the troubled bank list. FDIC Working Paper 2005-03, "Troubled Banks: Why Don't they All Fail?" states, "between 1990 and 2002, 96 percent of all banks that failed had first been troubled banks." While this paper seems to indicate the assumption above is rather conservative, the current crises situation may be a model-buster. FDIC staff indicate that "most losses are expected prior to year-end 2010". Shouldn't this dictate that the Corporation expect to cover up the shortfall now? Furthermore, by not raising the assessments the Funds become less industry funded and risk becoming more taxpayer funded.

Conclusion / Recommendations

I will sum up recommendations regarding this rule-making above. I believe Congress needs to provide either clarification of FDIC authority or extension of authority to go forward with the rule as suggested. It seems reasonable to be within FDIC authority to force mandatory prepayment of assessments up to a semi-annual basis (although I don't believe statue was ever meant to insure future deposits); however it does not appear to be within statute (in regards to ensuring assessments are stable and the provisions of S.896) to regulate mandatory prepayment for three years. Congress has specifically increased FDIC borrowing authority and specifically allowed for special assessments as a way to "enhance liquidity"; they were silent on long-term prepayment of assessment. I ask the Corporation to show a record of Congressional intent that allows long-term prepayments over the provisions of S.896, as the Supreme Court has held the Corporation must follow the unambiguous will of Congress.

While special assessment or increased risk-based assessment may seem onerous to the banking industry, Congress has provided for relief via the TARP. Because of the TARP, the FDIC should not fear causing further weakening of the banking industry in order to carry out its mandate of insuring deposits. Additionally, the FDIC should consider use of loan authority in order to make up liquidity shortfall in the face of unprecedented crises.

1) I ask the Corporation for further legal analysis on why it believes it has authority to ask for risk-based assessments against future deposits at all (there must be further from the 1991 prepayments). I ask the corporation to further provide legal analysis on authority to force mandatory prepayment of risk based assessments beyond two-quarters and up to three years. In this instance I ask for evidence that a long-term prepayment (I am calling beyond 2Q, "long term") is the unambiguous intent of Congress.
2) Absent further Congressional deliberation, I ask the Corporation to limit mandatory prepayment of assessments to no more than two-quarters; this falls in line with precedent. Additionally this will protect the Fund and industry from uncertainty in long-term predictions.
3) I propose the Corporation impose special assessment in order to make up for liquidity problems or increase risk-based assessments. There is no other solution if the goal is to remain 100% industry funded.
4) I propose banking industry make-up for any weakness by use of TARP program. This is the Congressionally intended use of TARP and FDIC special assessment authority.
5) I ask Corporation consider using loan authority in order to make up for liquidity shortfalls in 2010 and 2011. I fear it is better to exercise this authority sooner rather than later.

Thank you for consideration in this matter,
Matthew Furtek