

October 21, 2009  
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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'd like to extend to my comment submitted previously (it appears on the FDIC website as comment #28). It is clear the Federal Deposit Insurance Act prohibits the FDIC from collecting mandatory prepaid assessments from the banks.

***Definition of 'Deposit' is Limited by Federal Deposit Insurance Act***

Congress has clearly limited what a 'deposit' is under the Federal Deposit Insurance Act, found in Section 3(l). The definition of deposit is limited to "the unpaid balance of money or its equivalent received or held...". This definition is affirmed as the definition of a deposit in 12 CFR 327.8(a). The proposed rulemaking fundamentally changes the definition of 'deposit' to beyond what is allowed under section 3(l). It expands beyond "money or its equivalent received or held"; to implement this rule would change section 3(l) of the FDI Act to "money or its equivalent received or held... plus money or its equivalent projected to be held". There is no provision that a "deposit" includes money that will be held by a bank in the next 3 years. This section is unambiguous and clear.

***FDIC Has No Legal Authority to Modify the Law***

It is the right of the people to vote for and elect representatives to Congress in order to make the laws of this nation. If the FDIC goes forward with this rulemaking as is; it will clearly be a modification of the definition of deposit under Section 3(l) of the FDI Act. This is well beyond any authority the Act has bestowed upon the FDIC. To go forward is a clear Constitutional violation.

***Congressional Evidence Favors Use of Borrowing Authority***

Reading through the debate on S.896, it is clear that Congress favors use of the increased borrowing authority. In discussion of S.896 the following comments were made on the floor of the Congress.

"Chairman Sheila Bair has said those levels will allow the FDIC to reduce the special assessments on banks by as much as 50 percent, making credit more available in our communities. According to the Independent Community Bankers Association, which strongly supports this legislation--and I thank them for it--this will increase lending by some \$75 billion." (Senator Christopher Dodd, Congressional Record, "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009", April 30, 2009, S4945).

"Again, it is real relief. By doing so, there is the likelihood these institutions can provide additional lending because those assessments will not be too high, which helps small businesses and borrowers across the country." (Senator Christopher Dodd, Congressional Record, Senate, "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009 ". May 1, 2009. S5004.)

"We stretch out the payment of assessments to rebuild bank thrift and credit union deposit insurance funds to 8 years. This was a very important provision; for many of our lending institutions, that period

of assessment is absolutely essential. If it is too short, it obviously puts a huge financial burden on these institutions. I believe the 8 years was a provision that was very important to these institutions and one that they are very pleased our legislation includes. I hope that will work as well as we intend it to." (Senator Christopher Dodd. Congressional Record, Senate. "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009". May 4, 2009. S5053).

"It is important to note that this borrowing authority is not coming from taxpayer dollars. The levies and the assessments that are made on the participants in the financial industry themselves, the depository institutions, are the source of the dollars that would cover this loan authority. I think most people understand, but what happens in the case of a failing institution is the FDIC steps in immediately and protects all depositors so the depositors can have that assurance of the Federal guarantee of their deposits in these depository-protected institutions. Then the FDIC basically works out the resolution of the remaining assets of the failed institution and the banking institution itself. Other depositors, through their assessments, pay for the cost of the operation of this program. We are simply increasing the borrowing authority to make sure the FDIC and the NCUA have the resources necessary to deal with these very difficult and challenging times.

In addition, the borrowing authority would allow the FDIC and the NCUA to lower their recent special assessments that went out to the banking and credit industry. In other words, this would allow us to kind of smooth out that process by which the depository institutions themselves fund this process and not create huge liquidity and financial pressures on the banks that are not facing the potential of any kind of FDIC intervention but which are being looked to to bear the cost of these problems as we move forward." (Senator Mike Crapo. Congressional Record, Senate. "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009". May 5, 2009. S5093).

"Absent this bill, community banks would have been facing a very significant increase in their assessment. Because this bill gives the FDIC borrowing authority, standby authority in case it's needed, they will not have to raise the assessment. The FDIC has to be ready to act. And if there was not the borrowing authority, they would have to raise the assessment to have a pool of money available. They have been, under Sheila Bair's leadership, a very thoughtful and responsible organization. Borrowing authority we will do. It's in here." (Senator Barney Frank. Congressional Record, House of Representatives. "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009". May 19, 2009. H5760.)

"I rise today in support of one provision in particular of the underlying bill which allows for increased borrowing authority for the FDIC and the NCUA. Community financial institutions in Kansas are facing a sizable special assessment due to the deposit insurance funds being drawn down with the failure of numerous institutions across the Nation. Just last week I had a great opportunity to visit with several bankers from across the State who were in town with the Independent Community Bankers Association.

Growing up in rural Kansas, I know full well the close-knit communities in which these and other financial institutions operate across eastern Kansas, faithfully investing the hard-earned dollars of their neighbors to the betterment of the community and the depositors. These bankers impressed upon me the need for this borrowing authority. With the special assessment as it is today, banks and credit unions face further hardship meeting regulatory capital requirements and lending demands. However, the FDIC has indicated that passage of increased borrowing authority may result in a reduction of this special assessment by as much as half. This potential has my constituents asking this body and me to pass this provision.

It is clear that recent institutional failures have significantly increased losses of the insurance funds. However, by and large, the financial institutions in my district did not cause this economic trauma. We must be careful that these community institutions which serve so many folks are not unfairly saddled with higher premiums to compensate for the mistakes of others." (Representative Lynn Jenkins Congressional Record, House of Representatives. "HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009". May 19, 2009. H5763.)

In the deliberation of this law, Congress has clearly set out a number of expectations. First, there is clear expectation this loan authority will be used. Second, there is clear expectation the FDIC is to be averse to increasing assessments. This would preclude a suggestion of raising special assessments. The only conclusion with regards to the FDIC rulemaking is that Congress favors use of the loan authority. It is also clear that the loan authority will be repaid by the banking industry, through normal risk based assessments.

### ***Conclusion***

Shame on the FDIC for proposing such a blatant act well beyond statutory limits. There is no legal authority for the mandatory collection of prepaid assessments, as there is no legal authority to extend the definition of deposits to "money presumptively/assumptively/projected to be held", which is clearly what this rulemaking will do. Any such expansion of the definition of deposit, or even any calculation of how to project deposits would clearly remain with Congress, and not the agency. I may be incorrect in my reading of the law, and ask that my legal analysis be confirmed; I am confident no other conclusion can be drawn. Similarly, I'd ask an analysis of Congressional intent be completed with respect to S.896. It is clear Congress intended for the FDIC to use this loan authority in lieu of any disturbance to the collection of assessments (this may echo recommendation of previous comment). In no way is this public comment intended to replace what I have previously submitted to the FDIC.

Thank you for consideration in this matter,  
Matthew Furtek