FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AD49

Prepaid Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: Pursuant to Section 7(b) of the Federal Deposit Insurance Act, the FDIC is proposing to amend its assessment regulations to require insured 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. The FDIC would begin to offset prepaid assessments on March 30, 2010, representing payment for the fourth quarter of 2009.

DATES: Comments must be received on or before October 28, 2009.

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, NW., 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: Robert C. Oshinsky, Senior Financial Economist, Division of Insurance and Research, (202) 898–3813; Donna Saulnier, Manager, Assessment Policy Section, (703) 562–6167; Christopher Bellotto, Counsel, Legal Division, (202) 898–3801; Sheikha Kapoor, Senior Attorney, Legal Division, (202) 898–3960.

SUPPLEMENTARY INFORMATION:

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 its statutorily mandated minimum reserve ratio of 1.15 percent within eight years. At the same time, the FDIC adopted higher risk-based assessment rates effective beginning January 1, 2011.[1]

Liquidity Need Projections

While the Amended Restoration Plan and 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. At the beginning of this crisis, in June 2008, 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 June 30, 2009, while total assets had increased to almost $65 billion, cash and marketable securities had fallen to about $22 billion. The pace of resolutions continues to put downward pressure on cash balances. While 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 needs take into account recent trends in resolution methodologies, such as the increasing use of loss sharing—especially for larger institutions—which reduce the FDIC's immediate cash outlays, and 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.

These projections are subject to considerable uncertainty. Liquidity needs could exceed projected amounts if, for example, conditions affecting the national or regional economies, prove more severe than currently anticipated. Higher failure rates than projected would increase liquidity needs; lower failure rates would decrease liquidity needs. The liquidity needs projections are particularly influenced by assumptions regarding the types of resolution methods that will be employed and the rate at which retained assets can be sold and converted into liquid assets.

Strategy To Ensure Sufficient Liquidity

The FDIC has identified the following funding alternatives to meet its immediate liquidity needs: imposing additional special assessments; requiring prepaid assessments; or borrowing from the Treasury or Federal Financing Bank (FFB). To meet the FDIC's liquidity needs, without imposing additional burdens on the industry during a period of stress, and to ensure that the deposit insurance system remains directly industry-funded, the FDIC proposes 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. 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 offset by the amount prepaid until that amount is exhausted or until December 30, 2014, when any amount remaining would be returned to the institution. The FDIC estimates that total prepaid assessments would amount to approximately $45 billion.

II. 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).[2] Generally, the FDIC Board of Directors must establish, by regulation, a risk-based assessment system for insured depository institutions. 12 U.S.C. 1817(b)(1)(A).[3] 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

[1] 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)).

[2] 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)).

[3] 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.

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.[4] 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 when the industry is in a weakened condition, the FDIC seeks to address its upcoming liquidity needs through this notice of proposed rulemaking, by requiring institutions to prepay their regular risk-based assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012. The FDIC is relying on its section 7 authorities set forth above.

III. Proposed Prepaid Assessments

A. Calculation of Prepaid Assessment Amounts

For purposes of calculating an institution's prepaid amount, for the fourth quarter of 2009 and for all of 2010, that institution's assessment rate would be its total base assessment rate in effect on September 30, 2009.[5] That rate would be increased by 3 basis points for all of 2011 and 2012. Again for purposes of calculating the prepaid amount, an institution's third quarter 2009 assessment base would be increased quarterly at an estimated 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, would not affect an institution's prepayment amount.[6] [7] However, 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. The FDIC proposes to collect the prepaid assessments for the fourth quarter of 2009, and for all of 2010, 2011, and 2012 on December 30, 2009, along with the regular quarterly deposit insurance assessments for the third quarter of 2009.[8]

Requiring prepaid assessments would 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 would continue to be applied against quarterly assessments as they may be so revised.

B. Implementing Prepaid Assessments

The FDIC would 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. If the prepaid assessment is not exhausted by December 30, 2014, any remaining amount would be returned to the institution.

C. Accounting and Risk-Weight for Prepaid Assessments

1. Accounting for Prepaid Assessments

Each institution would record the entire amount of its prepaid assessment as a prepaid expense (asset) as of December 30, 2009. Notwithstanding the prepaid assessment, each institution would have to record the estimated expense for its regular risk-based assessment each calendar quarter. However, the offsetting entry to the expense for a particular quarter would depend on the method of payment for that quarter's expense. Therefore, 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 would 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 would record as a prepaid expense (asset). As of December 31, 2009, each institution would 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 would have been prepaid.

Each quarter thereafter, an institution would 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 would record an expense and an accrued expense payable each quarter for its regular assessment payment, which would be paid in arrears at the end of the following quarter. If the prepaid assessment is not exhausted by December 30, 2014, any remaining amount would be returned to the institution.

2. Risk Weighting of Prepaid Assessments

The federal banking agencies' risk-based capital rules[9] permit an institution to apply a zero percent risk weight to claims on U.S. Government agencies. The FDIC believes the prepaid assessment would qualify for a zero risk weight.

Upon further consideration, for the same reasons, the FDIC believes that Temporary Liquidity Guarantee Program (TLGP) nondeposit debt obligations should also receive a zero percent risk weight consistent with the risk weight proposed for prepaid assessment assets. When the FDIC determined that a depository institution may 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. Insofar as insured deposits are fully backed by the full faith and

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[4] 74 FR 25639 (May 29, 2009).

[5] 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.

[6] Thus, for purposes of calculating the prepaid assessment, the FDIC would 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 e assessment for the acquired institution would be paid by the acquirer at the acquirer's rate.

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

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

[9] 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).

credit of the United States government and no insured depositor has ever or will ever take a loss, the FDIC will also review reducing the risk weight on insured deposits to zero percent consistent with the treatment of other government backed obligations. The FDIC requests commenters to provide their views on the appropriateness of a different risk weight and the effect that any change would have on risk-weighted assets.

D. Restrictions on Use of Prepaid Assessments

Under the proposal, prepaid assessments could only be used to offset regular quarterly risk-based deposit insurance assessments. For example, prepaid assessments could not be used 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 would apply an institution's remaining one-time assessment credits under Part 327 subpart B before applying its prepaid assessment to its quarterly deposit insurance assessments.[10]

E. Exemptions for Certain Insured Depository Institutions

Under the proposed rule, the FDIC would 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. The FDIC would consult with the institution's primary federal regulator in making this determination, but would retain the ultimate authority to exercise such discretion. The FDIC would notify any affected institution of its exemption by December 24, 2009.

In addition, 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. Based on currently available data, the FDIC does not expect the number of exemptions to significantly affect the amount of prepaid assessments that the FDIC would receive.

Written applications for exemption from the prepayment obligation would be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by fax or electronic mail.[11] 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 and include supporting documentation, such as current financial statements and cash flow projections, a description of management's plans to correct the circumstances that caused the inability to pay the assessment, and any other relevant information that the FDIC deems appropriate.

The FDIC would notify any insured depository institution that has made such a request by December 24, 2009, of the FDIC's determination whether the institution is eligible for exemption from the prepaid assessment. Determinations of eligibility for exemption made by the FDIC would be final and not subject to further agency review.

F. Transfer of Prepaid Assessments

An insured depository institution would be permitted to transfer any portion of its prepaid assessment to another insured depository institution, provided that the institutions notify the FDIC's Division of Finance and submit a written agreement signed by the legal representatives of both institutions. In their submission to the FDIC, the institutions must include documentation that each representative has the legal authority to bind the institution. Adjustments to the institutions' prepaid assessments would be made by the FDIC on the next assessment invoice that is made available via FDICconnect at least 10 days after the FDIC receives the written agreement. This aspect of the proposal 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, Public Law 109–171, 120 Stat. 9, and implemented by regulation. See 12 CFR 327.34(c).

In the event that an insured depository institution merged with, or consolidated into, another insured depository institution, the surviving or resulting institution would be entitled to use any unused portion of the disappearing institution's prepaid assessment not otherwise transferred.[12]

G. 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 assessment obligations not yet offset against the prepaid amount) would be refunded to the institution. In the event of failure of an insured depository institution, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy assessment obligations not yet offset against the prepaid amount) would be refunded to the institution's receiver.[13]

IV. Alternatives

A. Description of Alternatives

The FDIC has considered other alternative potential funding sources for purposes of restoring liquidity to the DIF. These alternatives include imposing additional special assessments or borrowing from Treasury or the FFB.[14] [15] These alternatives are set forth in some detail below.

1. Imposing Additional Special Assessments

The FDIC could meet its upcoming liquidity needs by imposing additional special assessments. To acquire enough cash to meet future liquidity needs, special assessments would be required in a much greater amount than the two special assessments provided for in the

[10] One-time assessment credits would not reduce an institution's prepaid assessment.

[11] The fax number and electronic mail address will be provided in the final rule.

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

[13] See 12 CFR 327.6 (2009).

[14] The FDIC's borrowings under 12 U.S.C. 1824 are subject to the maximum obligation limit set forth in section 15(c)(5), 12 U.S.C. 1825(c)(5).

[15] The FDIC also has the authority to borrow from insured depository institutions under section 14(d) of the FDI Act and from Federal Home Loan Banks under Section 14(e) of the FDI Act. 12 U.S.C. 1824(d) and (e). However, prepaying assessments would be simpler than borrowing from these sources because the assessment system already exists and requires only minor modifications to accommodate prepayment of assessments. Furthermore, borrowing from the industry would be voluntary and would not ensure that the DIF collects enough cash to fund future failures.

May 2009 final rule. Any special assessment would require insured depository institutions to expense immediately the amount of the assessment at the time imposed. The FDIC specifically seeks comment as to whether it should impose additional special assessments in lieu of mandatory prepaid assessments.

2. Borrowing From Treasury

Under section 14(a) of the FDI Act, the FDIC may borrow up to $100 billion from the Treasury Department, subject to approval by the Secretary of the Treasury. The statute also provides for a temporary increase in borrowing authority for up to $500 billion, which expires December 31, 2010. 12 U.S.C. 1824(a). This temporary authority would require the concurrence of the FDIC's Board, the Federal Reserve Board, and the Secretary of the Treasury in consultation with the President. Regardless of the amount actually borrowed under section 14(a), the industry must repay such borrowings through assessments (possibly including special assessments) pursuant to a repayment schedule agreed to by the Secretary and the FDIC after consultation with the Financial Services Committee of the House of Representatives and the Committee on Banking, Housing and Urban Affairs of the Senate.

3. Borrowing From the Federal Financing Bank

Section 14(b) of the FDI Act permits the FDIC to obtain financing from the FFB. 12 U.S.C. 1824(b). Lending documents in place between the FDIC and the FFB have a current stated limit of $100 billion and do not allow the FDIC to borrow until the FDIC's cash balance is below $500 million. The industry also must repay such borrowings through assessments (possibly including special assessments).

B. Advantages of FDIC Proposal

The FDIC is proposing prepaid assessments as a means of collecting enough cash to meet upcoming liquidity needs to fund future resolutions. The FDIC believes that this proposal has significant advantages compared to additional or higher special assessments. Additional or higher special assessments could severely reduce industry earnings and capital when the industry is under stress. In addition, the FDIC believes that most of the prepaid assessment would be drawn from available cash and excess reserves, which should not significantly affect depository institutions' current lending activities.

Requiring that institutions prepay assessments is also preferable to borrowing from the U.S. Treasury or the FFB. Prepayment of assessments ensures that the deposit insurance system remains directly industry-funded. Additionally, unlike borrowing from the Treasury or the FFB, requiring prepaid assessments would not count toward the public debt limit. Furthermore, collecting prepaid assessments would be the least costly option to the Fund for raising liquidity, as there would be no interest costs.

The FDIC has carefully weighed the available options in reaching this proposal to require prepaid assessments. It is the FDIC's view that the proposal reflects an appropriate balancing of the goal of keeping the DIF directly industry-funded, while recognizing the near-term continued weakness in overall earnings and capital of insured depository institutions. Nonetheless, the FDIC seeks comments as to whether it is striking the appropriate balance or whether it should reconsider some of the alternatives.

V. Request for Comments

The FDIC seeks comment on every aspect of this proposed rulemaking. In particular, the FDIC seeks comment on the issues set out below, including the reasoning for their positions.

1. As an alternative to prepaid assessments, should the FDIC meet its liquidity needs by imposing one or more special assessments?
2. Should the FDIC pursue one or more of the other alternatives to the prepaid assessments, such as borrowing from Treasury or the FFB?
3. Should prepaying assessments be voluntary rather than mandatory as currently contemplated, and, if so, how would the FDIC ensure that it receives sufficient cash to fund resolutions of failed insured depository institutions? (If prepayment of assessments were optional, the FDIC believes that it would affect the accounting treatment as a prepaid expense.)
4. For purposes of calculating the prepaid assessment, should the FDIC estimate the growth in the assessment base at a rate other than 5 percent for 2009, 2010, 2011 and 2012? Should the FDIC use different assessment rate assumptions than those proposed?
5. As proposed, the FDIC would require prepayment of estimated assessments for the fourth quarter of 2009 and for all of 2010, 2011 and 2012 based on its current liquidity needs projections. Should the FDIC require prepayment of estimated assessments over a different period or in installments?
6. Should the FDIC's Amended Restoration Plan incorporate a provision requiring a special assessment or a temporarily higher assessment rate schedule that brings the reserve ratio back to a positive level within a specified time frame (one year or less) from January 1, 2011, when the FDIC projects industry earnings will have recovered?

VI. Effective Date

The FDIC proposes that a final rule following this proposed rule would become effective immediately upon adoption.

VII. Regulatory Analysis and Procedure

A. 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 proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed 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?

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a proposed 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.[16] 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

[16] See 5 U.S.C. 603, 604 and 605.

the definition of ''rule'' for purposes of the RFA.[17] The proposed rule relates directly to the rates imposed on insured depository institutions for deposit insurance. Nonetheless, the FDIC is voluntarily undertaking an initial regulatory flexibility analysis of the proposal and seeking comment on it.

As of June 30, 2009, of the 8195 insured commercial banks and savings institutions, there were 4597 small insured depository institutions as that term is defined for purposes of the RFA (i.e., those with $175 million or less in assets).[18]

The proposal has no significant effect on capital and earnings, although there could be a small loss of interest earned by some small institutions. In addition, the proposal 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 proposal includes a mechanism for exempting those institutions that cannot prepay their assessments without posing safety and soundness concerns or imposing undue hardship. Finally, the effect on liquidity is further mitigated by the institutions' ability to transfer their prepaid assessments. The FDIC invites comment on this analysis.

C. Paperwork Reduction Act

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

D. 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.

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:

[17] 5 U.S.C. 601.

[18] 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.

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, Public Law 109–171, 120 Stat. 9–21, and Sec. 3, Public Law 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) *Prepaid assessment.* On December 30, 2009, each insured depository institution shall prepay 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) An institution's estimated prepaid assessment for the fourth quarter of 2009 and for all of 2010 shall be determined by multiplying its total base assessment rate for the third quarter of 2009, calculated using the institution's CAMELS rating and, where applicable, long-term debt issuer rating(s), in effect on September 30, 2009, times the corresponding assessment base for each quarter, determined pursuant to paragraph (b)(2) of this section.

(ii) An institution's estimated prepaid assessment for all of 2011 and 2012 shall be determined by multiplying the sum of its total base assessment rate for the third quarter of 2009, calculated using the institution's CAMELS rating and, where applicable, long-term debt issuer rating(s), in effect on September 30, 2009, plus 3 basis points, times the corresponding assessment base for each quarter, determined pursuant to paragraph (b)(2) of this section.

(2) *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.

(3) *Finality of prepaid assessment amount.* Changes to data underlying an institution's prepaid assessment rate or base received by the FDIC after December 24, 2009, shall not affect an institution's prepayment amount.. The September 30, 2009 assessment rate and assessment base used in paragraphs (b)(1) and (2) of this section shall be determined based upon data in the FDIC's computer systems as of December 24, 2009. Changes to underlying data after that date, whether by amendment to a report of condition or otherwise, shall not affect the amount of an institution's prepaid assessment.

(4) *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 assessment rate used to determine an acquired institution's prepaid assessment under paragraphs (b)(1) and (2) of this section shall be the 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 amount at the same time the FDIC provides the institution's quarterly certified statement invoice for the third quarter of 2009. However, the amount will be updated through December 24, 2009, based upon any changes to data in the FDIC's computer systems used to calculate an institution's September 30, 2009, assessment rate and assessment base. Changes to data underlying an institution's prepaid assessment rate or base received by the FDIC after December 24, 2009, shall not affect an institution's prepayment amount.

(d) *Payment of prepaid assessment.* Each insured depository institution shall pay to the Corporation the amount of its prepaid assessment as provided under paragraph (a) of this section in compliance with and subject to the provisions of §§ 327.3 and 327.7 of subpart A. The FDIC will not apply an institution's one-time assessment credit under subpart B of this part 327 to reduce that institution's prepaid assessment.

(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 December 30, 2014. Any prepaid assessment remaining after December 30, 2014, shall be promptly returned to the institution. 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.

(f) *Transfers.* An insured depository institution may enter into an agreement to transfer 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 adjustment to the amount of the prepaid assessment will be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement. 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.

(g) *Exemptions*—(1) *Exemption without application.* The FDIC, after consultation with the primary Federal regulator, will exercise its discretion as supervisor and insurer to exempt an institution from the prepayment requirement under paragraph (a) of this section 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 institutions of its exemption by December 24, 2009.

(2) *Application for exemptions.* An institution may also apply to the FDIC for an exemption from all or part of the prepayment requirement under paragraph (a) of this section if the prepayment would significantly impair the institution's liquidity, or would otherwise create significant 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 fax ((202) XXX–XXXX) or electronic mail (XXX@XXX). The application must contain a full explanation of the need for the exemption and include supporting documentation, such as current financial statements and cash flow projections, a description of management's plans to correct the circumstances that caused the inability to pay the assessment, and any other relevant information, including any information the FDIC may request. The FDIC will notify the insured depository institution of its determination by December 24, 2009; that determination will be final and not subject to further agency review.

By order of the Board of Directors.

Dated at Washington, DC, this 29th of September, 2009.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

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