The range of volume of kiwifruit handled by kiwifruit handlers is extremely broad with some handlers handling as few as 50 tray equivalents and others over 1 million tray equivalents. The majority of handlers fall in the middle and on average ship between 100,000 and 800,000 tray equivalents.

Therefore, the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

An interim final rule was issued on September 27, 1996, and published in the Federal Register (61 FR 51575, October 3, 1996), with an effective date of October 4, 1996. That rule amended § 920.160 (a) and (b), of the rules and regulations in effect under the order. That rule provided a 30-day comment period which ended November 4, 1996. No comments were received.

Under the terms of the order, fresh market shipments of California kiwifruit are required to be inspected and are subject to grade, size, maturity, and pack and container requirements. In addition, the order authorizes the Committee to collect information from kiwifruit handlers in order to efficiently operate the program.

The Committee met on June 12, 1996, and unanimously recommended reducing the reporting burden for handlers who ship less than 10,000 tray equivalents per season. Such handlers, if they qualified with the Committee, will no longer be required to complete biweekly inventory reports and will only be required to fill out a monthly shipment report twice per year.

Section 920.60 of the order authorizes the Committee, subject to the approval of the Secretary, to request information from handlers necessary to perform its duties under the order. Prior to the effective date of the interim final rule, section 920.160(a) of the order's rules and regulations required a report of shipments to be filed with the Committee by the fifth day of the month following such shipment, or such other later time established by the Committee. This report is used to compile statistical information on shipments and to calculate assessments owed under the marketing order. Pursuant to § 920.160(b) each handler had to file a Kiwifruit Inventory Shipment System (KISS) report on the fifth and twentieth day of each month. The information collected in the KISS report is used to track inventories of California kiwifruit and provide inventory statistics, in aggregate, to the industry. Both of these reports are also required under the authority of the California Kiwifruit Commission (State Commission), which administers a State program.

Prior to the 1995–96 season, the State Commission determined that the reporting burden of the KISS report and the shipment report was disproportionately impacting small volume handlers. As a result, the State Commission created an alternate reporting system, known as ''Reporting EZ.'' It allows handlers who ship less than 10,000 tray equivalents per season to file the shipment report twice per season instead of monthly and exempts handlers from filing the KISS report.

Similarly, this rule reduces the frequency that the shipment report is filed and eliminates the filing of a KISS report for those handlers that ship less than 10,000 trays or tray equivalents per fiscal year so that the ''Reporting EZ'' program is authorized under both the State program and the Federal order. Handlers shipping under 10,000 trays or tray equivalents per season only have to fill out the shipment report twice per year. The first report is due January 5 or such other later time established by the Committee and includes information on fresh shipments from the beginning of the fiscal year (August 1 through December 31). The second shipment report is due the fifth day of the month following each handler's last shipment for the season and includes shipments from January 1 until the end of shipping season.

In order for a handler to qualify for the ''Reporting EZ'' program, the Committee must make a determination prior to October 31 (near the beginning of the shipping season). The information that the Committee will use to determine whether a handler is qualified is available from the State Commission. The State Commission already requires handlers to submit information in order to determine whether a handler intends to ship under 10,000 tray equivalents per year. Thus, the Committee does not need to place any additional reporting burden on kiwifruit handlers in order to determine handler eligibility for the ''Reporting EZ'' program. The State Commission and the Committee have a written memorandum of understanding that provides for the sharing of information while keeping proprietary information confidential. Once the handler has qualified, the Committee will then notify handlers that they are eligible for the ''Reporting EZ'' program.

The information collection requirements contained in the referenced sections have been previously approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (Pub. L. 104–13) and have been assigned OMB number 0581–0149.

This final rule reduces the reporting burden on approximately 20 handlers of kiwifruit who have been spending approximately 240 hours completing the shipment reports and the KISS reports.

After consideration of all relevant material presented, the information and recommendation submitted by the Committee, and other information, it is found that finalizing the interim final rule, without change, as published in the Federal Register (61 51575, October 3, 1996) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

Accordingly, the interim final rule amending 7 CFR part 920 which was published at 61 FR 51575 on October 3, 1996, is adopted as a final rule without change.

Dated: December 4, 1996.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 96–31350 Filed 12–9–96; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AB59

Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending its assessment regulations by adopting interpretive rules pertaining to transactions in which an institution belonging to one insurance fund acquires deposits that are treated as insured by the other insurance fund (Oakar transactions). The FDIC is codifying and refining its procedures for determining the amount of the deposits so acquired and for attributing the deposits to the two insurance funds. In addition, recent merger and branch-sale cases have revealed certain weaknesses in the FDIC's procedures for computing the growth of the amounts so attributed.

The interpretive rules repair those weaknesses. The FDIC is also simplifying and clarifying the existing rule by making changes in nomenclature.

EFFECTIVE DATE: The final rule is effective January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Stephen Ledbetter, Chief, Assessments Evaluation Section, Division of Insurance, (202) 898–8658; Allan Long, Assistant Director, Division of Finance, (202) 416–6991; Jules Bernard, Counsel, Legal Division, (202) 898–3731, Federal Deposit Insurance Corporation, Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION: This interpretive regulation addresses the computation of assessments paid by Oakar institutions. An Oakar institution is one that is a member of one insurance fund (the institution's primary fund), but holds deposits that are treated as insured by the other fund (the institution's secondary fund). The regulation directly affects all Oakar institutions. The regulation also indirectly affects non-Oakar institutions, because it alters the business considerations that they must take into account when they transfer deposits to or from an Oakar institution (or to an institution that becomes an Oakar institution as a result of the transfer).

I. Background

Section 7(l) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1817(l), says that upon becoming insured, a depository institution becomes a member either of the Bank Insurance Fund (BIF) or of the Savings Association Insurance Fund (SAIF).

Section 5(d)(2) of the FDI Act, *id.* 1815(d)(2), maintains the separation between the BIF and the SAIF. Section 5(d)(2) says that no institution may participate in a ''conversion transaction'' without the FDIC's prior approval. *Id.* 1815(d)(2)(A)(i). A ''conversion transaction'' includes, *inter alia,* any inter-fund deposit-transfer transaction: that is, any merger, acquisition, or other transaction in which a BIF member assumes the obligation to pay deposits owed by a SAIF member (or conversely). *Id.* 1815(d)(2)(B) (ii), (iii) and (iv). Each institution that participates in such a transaction—whether as the acquiring or resulting institution (buyer) or as the transferring or merging institution (seller)—must pay an entrance fee to one insurance fund and an exit fee to the other fund. *Id.* 1815(d)(2)(F). The fees are substantial. *See* 12 CFR part 312.

When an institution acquires deposits pursuant to section 5(d)(2) and pays the requisite fees, the deposits so assumed become insured by the buyer's primary fund (primary-fund deposits). Until recently the SAIF assessment rate has been substantially higher than the BIF assessment rate. Some institutions that have assumed SAIF-assessable deposits have found it advantageous to pay the fees and convert the deposits to BIF-assessable ones.

There is also another avenue open to institutions that would like to engage in inter-fund deposit-transfer transactions. Section 5(d)(3) of the FDI Act, *id.* 1815(d)(3), known as the Oakar Amendment, allows institutions to participate in such transactions without paying entrance and exit fees, but only under certain conditions. The most prominent conditions are these:

—The buyer becomes subject to assessment by the seller's insurance fund, *see id.* 1815(d)(3)(B) and (D); and

—The acquired deposits remain insured by the seller's insurance fund, which is the secondary fund of the buyer (secondary-fund deposits). *Id.* 1815(d)(3) (B) and (H).

An inter-fund deposit-transfer transaction that proceeds under the authority of the Oakar amendment is called an Oakar transaction.

The Oakar Amendment introduces the concept of the ''adjusted attributable deposit amount'' (AADA). An AADA is an artificial construct: a number, expressed in dollars, that is generated in the course of an Oakar transaction, and that pertains to the buyer. When an AADA is first generated, its value is equal to the amount of the secondary-fund deposits that the buyer has acquired from the seller. The value remains constant until the end of the semiannual period in which the transaction occurs.

Thereafter the AADA increases or decreases at the same underlying rate as the buyer's overall deposit base—that is, at the rate of growth or shrinkage due to its ordinary business operations, not counting growth due to the acquisition of deposits from another institution (*e.g.,* in a merger or a branch purchase). *See id.* 1815(d)(3)(C).

An Oakar institution's AADA is used for the following purposes:

—*Assessments.* An Oakar institution pays two assessments: one for deposit in its secondary fund, and the other for deposit in its primary fund. The secondary-fund assessment is based on the portion of the assessment base that is equal to the AADA. The primary-fund assessment is based on the remaining portion of the assessment base.

—*Insurance.* The AADA fixes the amount of the institution's deposits that is to be ''treated as'' insured by an Oakar institution's secondary fund (secondary-fund deposits). The remaining portion of the institution's deposits is insured by the primary fund (primary-fund deposits). If an Oakar institution fails, and the failure causes a loss to the FDIC, the two insurance funds share the loss in proportion to the amounts of deposits that they insure.

An Oakar institution's AADA is used prospectively. That is to say, an Oakar institution's AADA for a current semiannual period is set at the start of that period, and is used to compute the institution's assessment for that current semiannual period.[1]

II. The Final Rule

The FDIC has issued a proposed rule asking for comment on the interpretations that are the subject of the final rule. 61 *FR* 34751 (July 3, 1996). The comment period remained open until September 4, 1996. The FDIC has received 20 comments: 10 from banks; eight from bank holding companies; and two from trade groups. After the comment period closed, however, Congress passed and the President signed the Deposit Insurance Funds Act of 1996 (Funds Act), Pub. L. 104–208, 110 Stat. 3009 *et seq.* The Funds Act has altered the economic environment for Oakar institutions, thereby mooting some of the comments.

The Funds Act makes two changes that, taken together, will cause the FDIC to lower SAIF rates substantially. The Funds Act requires the FDIC to capitalize the SAIF—that is, to raise the Savings Association Insurance Fund reserve ratio to the designated reserve ratio (DRR) [2]—as of October 1, 1996, by imposing a special assessment on all SAIF-assessable institutions. Funds Act, section 2702(a); *see* 61 *FR* 53834 (Oct.

[1] Technically, each Oakar transaction generates its own AADA. Oakar institutions typically participate in several Oakar transactions. Accordingly, an Oakar institution generally has an overall or composite AADA that consists of all the individual AADAs generated in the various Oakar transactions, plus the growth attributable to each individual AADA. The composite AADA can generally be treated as a unit, however, because all the constituent AADAs (except initial AADAs) grow at the same rate.

[2] The Savings Association Insurance Fund reserve ratio is the ratio of the SAIF's net worth to the aggregate amount of deposits insured by the SAIF. 12 U.S.C. 1817(l)(7). The designated reserve ratio (DRR) is a target ratio that has a fixed value for each year. The DRR is currently set by statute at 1.25 percentum; the FDIC may increase the ratio under certain conditions. *Id.* 1817(b)(2)(A)(iv).

16, 1996) (imposing the special assessment). When the SAIF is capitalized at the DRR, the FDIC may not (generally) impose higher SAIF assessments than necessary to maintain the SAIF's capitalization at that level. 12 U.S.C. 1817(b)(2)(A)(iii).[3] In addition, the Funds Act has separated the assessments imposed by the Financing Corporation (FICO) from those imposed by the SAIF.[4] Beginning on January 1, 1997, the FICO assessments will no longer serve to reduce the amounts that the FDIC is authorized to assess for the SAIF: accordingly, the SAIF rates will no longer include the FICO draw.

In light of these developments, the FDIC has proposed to lower the most favorable SAIF rate to zero, and to modify the rest of the SAIF rate schedule. The proposed SAIF rates are set at the same levels as the current BIF rates. 61 *FR* 53867 (October 16, 1996).

These changes would reduce—but not eliminate—the difference between the rates for BIF-assessable deposits and SAIF-assessable ones. The Funds Act gives the FICO authority to assess all insured institutions, and also temporarily requires the FICO to assess SAIF-assessable deposits at a higher rate than BIFassessable deposits. From 1997 through 1999 (or when the last savings association ceases to exist, if that happens before the end of 1999), institutions will pay roughly 6.4 basis points to the FICO on their SAIF-assessable deposits, and roughly 1.3 basis points to the FICO on their BIF-assessable deposits. 12 U.S.C. 1441(f)(2)(A); *see* Funds Act, section 2703(a)(1). Accordingly, institutions still have some incentive to ''game'' the assessment rules for the purpose of shifting deposits from SAIF-assessable status to BIF-assessable status, although the incentive is much less than before.

The final rule ends some of the anomalies that institutions can use to engage in ''gaming'' strategies. The final rule also strengthens the correlation between the assessment that an institution pays to an insurance fund and the risk that the institution poses to that fund, and helps preserve the balance in the insurance responsibilities of the two funds.

A. Attribution of Transferred Deposits

Neither section 5(d)(2) nor the Oakar Amendment explicitly addresses the case of an Oakar institution that transfers deposits to another institution. The FDIC has by interpretation developed a procedure for attributing the transferred deposits to the BIF and the SAIF. *See* FDIC Advisory Op. 90–22, 2 FED. DEPOSIT INS. CORP., LAW, REGULATIONS, RELATED ACTS 4452 (1990) (*Rankin* letter). The *Rankin* letter adopts the principle that an Oakar institution transfers its primary-fund deposits first, and only begins to transfer its secondary-fund deposits after its primary-fund deposits have been exhausted.

The FDIC has asked for comment on the relative merits of the *Rankin* principle and an alternative approach: treating the transferred deposits as a blend of primary-fund and secondary-fund deposits. Under the blended-deposits approach, the FDIC would attribute the transferred deposits to the insurance funds in the same ratio as the overall deposits of the transferring Oakar institution (seller) were attributed immediately prior to the transfer.

The FDIC has received 15 comments that address this issue. Eight commenters (including one of the trade groups) favor the *Rankin* principle over the blended-deposits rule. Three prefer the blended-deposits rule to the *Rankin* principle. The remaining four (including the other trade group) express no preference as between these alternatives. Several commenters suggest other options (discussed below).

Having considered the comments, the FDIC has determined that the *Rankin* approach is preferable both to the blended-deposits rule and to the other options suggested by the commenters.

As a preliminary matter, it should be noted that two commenters aver that there is no statutory foundation for either the *Rankin* principle or the blended-deposits approach. The FDIC rejects this contention. The FDIC considers that it has ample authority to adopt either one of these deposit-attribution plans, and more generally has ample authority to prescribe a method for attributing deposits that an Oakar institution transfers to another institution. The contrary view would render section 5(d)(2) and the Oakar Amendment meaningless. If the FDIC had no such power, a BIF-member buyer could acquire deposits from a SAIF-member seller without paying entrance and exit fees simply by passing the deposits through an intermediary BIF-member Oakar bank. The barrier between the insurance funds would effectively disappear. Moreover, the acquired deposits would be neither SAIF-assessed nor SAIF-insured: contrary to Congress' intent, the private capital of the banking system would not help to bolster the SAIF. *See* 135 Cong. Rec. H4970 (Aug. 3, 1989) (statement of Rep. Oakar).

The FDIC accepts the proposition that an Oakar institution is a member of its primary fund only, and is not a member of its secondary fund even though it holds secondary-fund deposits. The FDIC adopted this view in the context of the original version of the Oakar Amendment, which as in effect at the time when the FDIC adopted the *Rankin* principle, and which made it abundantly clear that a BIF-member bank continued to be a BIF member after acquiring deposits from a SAIF member in an Oakar transaction. The Amendment carefully avoided characterizing the buyer as a SAIF member. On the contrary, the Amendment emphasized the point that the buyer was a BIF member that happened to owe a payment to the SAIF. To be sure, the SAIF was obliged to insure some of the buyer's deposits—but the Amendment went out of its way to say that the deposits were only ''treated as'' SAIF insured, not simply ''insured'' by the SAIF. 12 U.S.C. 1815(d)(3)(B)(iii) (Supp. I 1989). The FDIC holds this view today. *See* Treatment of Assessments Paid by ''Oakar'' Banks and ''Sasser'' Banks on SAIF-Insured Deposits, General Counsel's Opinion No. 7, 60 *FR* 7059 (Feb. 6, 1995).

But the FDIC also takes the position that nominal fund membership is not the touchstone for determining whether a transaction is a conversion transaction within the meaning of section 5(d)(2), and accordingly does not determine whether a transaction comes within the scope of the Oakar Amendment. ''Membership'' is a label that denotes the formal relationship of an insured institution to the FDIC as insurer within the context of the two-fund system. Ordinarily—that is, in the case of non-Oakar institutions—membership correctly signifies the relationship between an institution and the FDIC. Membership entails a well-defined set of obligations that the institution and the FDIC have to each other. A member of a fund must pay assessments to the FDIC for deposit in that fund. The FDIC must use the resources of that fund to insure the member's deposits. The assessment that the FDIC imposes on the member is determined by the strength of the fund relative to the fund's insurance responsibilities.

But membership does not correctly express the relationship between Oakar institutions and the FDIC as insurer. Oakar institutions owe assessments to both funds, and both funds must share

[3] If the Savings Association Insurance Fund reserve ratio falls below the DRR, the FDIC may set rates that increase the reserve ratio to the DRR. *Id.* 1817(b)(2)(A)(iii).

[4] The FDIC must still approve the FICO's assessments, and the FICO must still impose its assessments ''in the same manner'' as the FDIC assesses institutions. 12 U.S.C. 1441(f)(2).

the loss that the FDIC would suffer if an Oakar institution were to fail.

The FDIC resolves these conflicting themes by focusing on the relationship of an Oakar institution to the FDIC—the set of obligations that the label ''BIF member'' or ''SAIF member'' ordinarily signifies—and not on nominal fund membership. The FDIC takes the position that the substance of the relationship, and the effect of a deposit-transfer on that relationship, is the touchstone for determining whether the deposit-transfer is a conversion transaction within the meaning of section 5(d)(2). Put another way, the FDIC considers that the label ''member'' must be given only that degree of significance that is appropriate to preserve the integrity of the two-fund structure.

In proposing the blended-deposits rule, the FDIC has suggested that institutions might adopt ''gaming'' strategies that use the *Rankin* principle to convert SAIF-assessed deposits into BIF-assessed ones. One commenter, a trade group, urges the FDIC to prevent ''gaming'' strategies, but has not endorsed any particular method of prevention. Three commenters express doubt that institutions will engage in ''gaming'' strategies. Finally, two commenters say that the FDIC cannot fairly oppose such strategies if the FDIC is willing to countenance tandem-banking plans and deposit-migration programs. These two commenters further urge the FDIC to view such ''gaming'' strategies as beneficial rather than pernicious, on the ground that the strategies are equivalent to the options available to non-Oakar thrifts, and that the strategies therefore place Oakar banks on an equal competitive footing with other institutions.

The FDIC considers that these comments have all been overtaken by events. On one hand, notwithstanding the doubts expressed by the commenters, the FDIC has found that, prior to enactment of the Funds Act, a number of institutions had begun to pursue ''gaming'' strategies. For example, some holding companies had proposed elaborate schemes to purge AADAs from their Oakar banks by means of linked deposit-transfer transactions and deposit-migration programs. But on the other hand, the Funds Act has considerably reduced the threat posed by ''gaming'' strategies. Institutions will have much less incentive to adopt such strategies once the SAIF rates have been reduced to the level that maintains the SAIF's capitalization at the DRR. In addition, the Funds Act gives the FDIC and the other federal banking agencies broad and flexible authority to interdict strategies that facilitate or encourage the shifting of deposits from SAIF-assessable deposits to BIF-assessable deposits. Funds Act, section 2703(d).

One reason the FDIC has decided to retain the *Rankin* principle rather than shift to the blended-deposits approach is that the *Rankin* principle has the virtue of simplicity. Sellers rarely transfer all their primary-fund deposits. A seller ordinarily has the same AADA after the transaction as before, and a buyer does not ordinarily become an Oakar institution. Six commenters agree that simplicity was one advantage of the *Rankin* principle.

The *Rankin* principle also has the virtue of being well established and well understood. Three commenters agree with this point. Two commenters take issue with it, however. They point out that the *Rankin* principle was first articulated in a staff opinion letter, not in a rulemaking with public notice and comment, and declare that it is implausible for the FDIC to assert that the *Rankin* principle is well established or well understood in these circumstances.

The FDIC considers that commenters' point is not well taken. The FDIC issued the *Rankin* letter more than six years ago, and has applied its principles on a consistent basis. The FDIC accordingly has had a consistent, well settled interpretation of section 5(d)(2) and the Oakar Amendment since 1990; the *Rankin* letter expresses that interpretation. Moreover, the FDIC has published the *Rankin* letter, thereby providing public notice of the interpretation.

One commenter points out that, under the *Rankin* principle, SAIF-insured deposits have a greater propensity to move from SAIF-member savings associations to BIF-member Oakar banks than the other way around. The *Rankin* principle therefore has the effect of reducing the store of deposits available for assessment by the FICO. The FDIC considers that the Funds Act has mooted this point, however, as the FICO now has authority to assess deposits held by BIF members. *See* 12 U.S.C. 1441(f)(2).

Another commenter objects to the *Rankin* principle on the ground that when a BIF-member Oakar bank buys a branch from a SAIF-member institution, and incurs an obligation to the SAIF as a result, the Oakar bank cannot escape the obligation merely by selling off the branch. This commenter—along with several others—also makes the more general point that the statutory rules for determining the AADA do not reflect practical business realities. These commenters say the branches and customers that they have acquired from SAIF-member institutions do not make a proportionate contribution to the overall growth of their deposits: as a result, the assessment base for their SAIF assessments is artificially large.

The FDIC considers, however, that these objections touch upon the structure and purposes of the Oakar Amendment, rather than upon the *Rankin* principle. The Oakar Amendment is specifically designed to avoid deposit-tracing—that is, keeping track of deposits based on their origin. An AADA's initial value may be equal to the amount of the secondary-fund deposits that the buyer acquires from the seller. But the Oakar Amendment does not connect the AADA to those particular deposits, or to the customers that hold them, or to the branches in which the deposits are located. The Oakar Amendment treats an Oakar institution as a unit. The Amendment uses the institution's overall rate of growth to compute the institution's AADA, thereby—in effect—applying that growth equally to the institution's primary-fund and secondary-fund deposits. In objecting to that effect, the commenters challenge the basic principles of the Oakar Amendment itself. The commenters' redress lies with Congress.

The blended-deposits approach, for its part, has certain attractions. It helps prevent ''gaming''. It also maintains the relative proportions of the seller's primary-fund deposit-base and the secondary-fund deposit base, just as those proportions are preserved in the ordinary course of business. By contrast, as one commenter has pointed out, the *Rankin* principle tends to inflate the AADA. When an institution buys branches from a member of the opposite fund, the buyer gains secondary-fund deposits and increases its AADA. But when it acts as the seller, it does not normally lose any secondary-fund deposits, because it does not normally sell off all its primary-fund deposits: its AADA remains the same.

At the same time, however, the blended-deposits approach has a number of disadvantages. As nine commenters point out, the blended-deposits rule would cause Oakar institutions to proliferate. If a non-Oakar institution were to acquire deposits from an Oakar institution, the buyer would necessarily assume secondary-fund deposits, and would therefore become an Oakar institution in its own right. Six commenters observe that the blended-deposits rule would generate burdensome reporting and record-keeping obligations. Six commenters (not all the same ones) say further that the blended-deposit approach would result in higher costs for buyers and lost sales for sellers. Four commenters indicate that the blended-deposits rule could cause uncertainty or confusion in determining the assessment costs with respect to transferred deposits, particularly in light of the uncertain prospects for future assessment rates. One says the blended-deposits rule would impede banks in selling off branches in order to rationalize branch networks or for other corporate purposes.

These comments continue to have force despite the economic and legal changes made by the Funds Act. Buyers would have to bear the extra record-keeping and reporting burdens associated with secondary-fund deposits. Moreover, even though the disparity between BIF rates and SAIF rates will be reduced, the FICO's rates retain a differential: institutions will still have to pay higher rates to the FICO on SAIF-insured deposits than on BIF-insured deposits, at least temporarily. *Id*. 1441(d)(2); *see* Funds Act section 2703(c). The differential (roughly five basis points) is smaller than the recent differential between the BIF and SAIF assessment rates, and is short-lived as well. But so long as it persists, buyers will be less willing to assume SAIFassessable deposits.

One commenter objects to the blended-deposits rule on the ground that it would force banks that acquire deposits from an Oakar bank—and banks that purchase deposits from those subsequent acquirers, and so on, *ad infinitum*—to pay SAIF assessments. The commenter says this result is improper. The commenter asserts that a buyer always loses a significant portion of the acquired deposits soon after acquiring them, and that accordingly a third-generation or fourth-generation buyer does not assume any of the SAIF-insured deposits that changed hands in the original Oakar transaction. The FDIC does not agree with this point, however. As discussed above, the FDIC considers that the Oakar Amendment does not contemplate deposit-tracing. The FDIC further considers that the Oakar Amendment is designed to preserve precisely the obligation that the commenter seeks to end: namely, the buyer's duty to pay SAIF assessments on the SAIF-insured deposits it has acquired, and to do so an on-going basis, without regard for whether any particular customers of the buyer have withdrawn their funds after the Oakar transaction has taken place.

Several commenters offer deposit-attribution rules of their own. Three commenters propose that the parties to a transaction should be able to determine the attribution of the transferred deposits by agreement. One of the commenters says the attribution-by-agreement rule would minimize the creation of Oakar institutions, would reduce the incentive to engage in the ''gaming'' strategies that the FDIC had discussed in the proposed rule, and would not entail any heavier reporting or record-keeping obligations than the blended-deposits approach. A second commenter says this proposal would eliminate uncertainty in pricing deposits and, from the point of view of a BIF-member Oakar bank acting as the seller, would be fairer and more flexible than the *Rankin* principle. The third commenter does not give its reasons for supporting the proposal.

The FDIC declines to adopt the attribution-by-agreement rule, however. The FDIC recognizes that its assessment rules and procedures provide the environment within which parties negotiate transactions, and that as a matter of course, the parties consider the likely consequences of their agreements within that environment. But the FDIC rejects the proposition that parties should be able to determine, by agreement among themselves, which set of rules the FDIC will apply to them. The FDIC considers that, as a matter of principle, its relationship to the institutions that it insures and assesses derives from its supervisory and rule-making authority, and accordingly is not a fit subject for private negotiation. The FDIC also notes that, as a practical matter, parties do not always take the same view of their agreements after the agreements have been completed.

Another commenter proposes that the buyer's primary fund should determine which of the seller's deposits are transferred first. Under the buyer's-fund rule, any deposits transferred by the seller would be attributed to the buyer's primary fund until the seller has exhausted its store of such deposits; thereafter, transferred deposits would be attributed to the buyer's secondary fund. The chief advantages of the proposal, according to the commenter, are that it offers the simplicity of the *Rankin* principle while helping to preserve or increase the deposit-base subject to assessment by the FICO.

Here again, however, events have overtaken the comment. The FICO may now assess both BIF and SAIF members. 12 U.S.C. 1441(f)(2). Under these conditions, the buyer's-fund proposal has no material advantage over the *Rankin* principle, while the *Rankin* principle has the advantage of being a well-established precept.

B. FDIC Computation of the AADA; Reporting Requirements

In the past, every Oakar institution has prepared an annual growth worksheet for submission to the FDIC. The worksheet shows the growth or shrinkage of the institution's AADA during the prior calendar year, and the computations used to determine that growth or shrinkage. In addition, each institution that has acquired secondary-fund deposits in an Oakar transaction (Oakar buyer) has prepared and submitted a transaction worksheet for each such transaction. The FDIC has supplied the worksheet, and has also provided the name of the Oakar buyer, the name of the seller, and the date of the transaction. The Oakar buyer has provided the volume of the acquired deposits and the AADA so generated.

As part of the changeover to the quarterly adjustment of AADAs (see II.C. below), the FDIC is lifting the burden of computing AADA growth from Oakar institutions entirely. Oakar institutions will no longer prepare annual growth worksheets or transaction worksheets, and will not report their AADAs in their quarterly reports of condition. Instead, each Oakar institution will provide the following three pieces of information in its quarterly reports of condition:

—total deposits acquired during the quarter;
—secondary-fund deposits acquired in the quarter; and
—total deposits sold in the quarter.[5]

The FDIC will use this information to calculate the institution's AADA, and will show the AADA (and the way it has been computed) in the institution's quarterly assessment invoices.

The FDIC has received nine comments on this program. Four (including a trade group) favor it; five (including another trade group) are opposed. The supporters agree the program would reduce regulatory burden. The opponents say the program would not lighten the record-keeping burden of Oakar institutions, and could well increase that burden, because the institutions would have to verify the accuracy of the FDIC's figures. One of the opponents—the trade group—says

[5] The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the FDIC have issued a joint proposal calling for institutions to report the three items in their quarterly reports of condition. 61 *FR* 48687, 48693–48694 (Sept. 16, 1996). The Office of Thrift Supervision has issued a similar proposal with respect to the institutions it supervises. *Id*. 53262, 53263 (Oct. 10, 1996). The FDIC expects both proposals to be adopted. The alternative is for institutions to prepare and transmit quarterly worksheets with the requisite information directly to the FDIC.

further that the program's reporting requirements are burdensome. The commenter notes that Oakar institutions have not reported their deposit-sales in the past, and have reported their acquired secondary-fund deposits and their acquired total deposits annually, not quarterly.

The FDIC considers that the reporting burden associated with its program is minimal, however, especially as compared with the burden of preparing and filing the two worksheets. Indeed, the program may not constitute a net increase in burden at all in most cases. The items to be reported are zero in most quarters; and even in other quarters, the information should be readily available and easy to calculate. Moreover, Oakar institutions have already been providing two of the three items in their annual growth worksheets: only the last item is new.

As an alternative, the FDIC has considered replacing the annual growth worksheet with a more detailed quarterly worksheet, and retaining the transaction worksheet. The FDIC has determined that this approach would impose an additional and unnecessary burden on Oakar institutions, however. The FDIC has further determined that this approach could increase the frequency of errors associated with AADA calculations.

C. Quarterly Treatment of AADAs

The FDIC is adopting the view that an AADA for a semiannual period may be regarded as having two quarterly components. The increment by which an AADA grows during a semiannual period is the result of the growth of each quarterly component. Five commenters (including one trade group) generally support this interpretation.

Three commenters oppose quarterly determination of AADAs, chiefly on the ground that this procedure would cause increased recordkeeping and reporting burdens. The burdens the commenters cite are essentially the same as those discussed above (see II.B.) with respect to the FDIC's computation of the AADA. For the reasons presented in that discussion, the FDIC does not consider that the net increase in burden—if any—will be material.

1. Quarterly Components

a. In General. The FDIC's assessment regulation speaks of an institution's AADA ''for any semiannual period''. 12 CFR 327.32(a)(3). The FDIC has previously interpreted this phrase to mean that an AADA has a constant value throughout a semiannual period. Recent changes in the Oakar Amendment give the FDIC room to alter its view.

The constant-value concept derived from the 1989 version of the Oakar Amendment. *See* 12 U.S.C. 1815(d)(3) (Supp. I 1989). That version of the Amendment said that an Oakar bank's AADA measured the portion of the average assessment base that the SAIF could assess. *Id.* 1815(d)(3)(B). The FDI Act (as then in effect) defined the average assessment base as the average of the institution's assessment bases on the two dates for which the institution was required to file a call report. *Id.* 1817(b)(3). As a result, an AADA—even a newly created one, and even one that was generated in a transaction during the latter quarter of the prior semiannual period—served to allocate an Oakar bank's entire assessment base for the entire current semiannual period. The FDIC issued rules in keeping with this view. 54 FR 51372 (Dec. 15, 1989).[6]

Congress has decoupled the AADA from the assessment base as part of the changeover to a risk-based assessment system. *See* Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, section 302 (e) and (g), 105 Stat. 2236, 2349 (Dec. 19, 1991); *see also* Defense Production Act Amendments of 1992, Pub L. 102–558, section 303(b)(6)(B), 106 Stat. 4198, 4225 (Oct. 28, 1992); *cf.* 58 *FR* 34357 (June 23, 1993). The Oakar Amendment no longer expressly links the AADA directly to the assessment base. The Amendment now says that the AADA measures the amount of an Oakar institution's deposits that are to be treated as secondary-fund deposits. *See* 12 U.S.C. 1815(d)(3).

Accordingly, the FDIC is no longer compelled to retain the constant-value view of the AADA. Furthermore, as discussed below, the FDIC has found that the constant-value concept has certain disadvantages. The FDIC is therefore re-interpreting the phrase ''for any semiannual period'' as used in 12 CFR 327.32(a)(3) in the light of the FDIC's quarterly assessment program. The FDIC is taking the position that, consistent with this phrase, an Oakar institution's AADA for a semiannual period is to be determined on a quarter-by-quarter basis—just as the assessment base for a semiannual period is so determined—and is to be used to measure the portion of each quarterly assessment base that is assessed by the institution's secondary fund. The FDIC is also adopting the view that, if an AADA is generated in a transaction that occurs during the second calendar quarter of a semiannual period, the first quarterly component of the AADA for the current (following) semiannual period is zero; only the second quarterly component is equal to the volume of the secondary-fund deposits that the buyer has so acquired.

The FDIC considers that this view of the phrase ''for any semiannual period'' is appropriate because the phrase is the counterpart of, and is meant to interpret, the following language in the Oakar Amendment:

> (C) DETERMINATION OF ADJUSTED ATTRIBUTABLE DEPOSIT AMOUNT.—The adjusted attributable deposit amount which shall be taken into account for purposes of determining the amount of the assessment under subparagraph (B) for any semiannual period * * *.

12 U.S.C. 1815(d)(3)(C).

This passage speaks of the assessment—not the AADA—''for any semiannual period''. Insofar as the AADA is concerned, the statute merely specifies the semiannual period for which the AADA is to be computed: the period for which the assessment is due. The FDIC believes that the phrase ''for any semiannual period'' in its own regulation may properly be read to have the same meaning.

Moreover, while the Amendment says the AADA must ''be taken into account'' in determining a semiannual assessment, the Amendment does not prescribe any particular method for doing so. The FDIC considers that this language provides enough latitude for the FDIC to apply the AADA in a manner that is appropriate to the quarterly payment program.

The FDIC's existing regulation is compatible with this interpretation. The regulation speaks of an assessment base for each quarter, not of an average of such bases. The regulation further says that an Oakar institution's AADA fixes a portion of its ''assessment base''. *See* 12 CFR 327.32(a)(2) (i) and (ii). Accordingly, the FDIC is not modifying the text that specifies the method for computing AADAs.

One commenter urges the FDIC to apply the revised interpretation on a retroactive basis, effective either as of January 1, 1994 (when the statutory changes took effect) or as of June 1, 1995 (when the BIF was capitalized, and the most favorable BIF rate dropped substantially). To apply the revised interpretation retroactively could cause considerable difficulties for the FDIC, however, and perhaps for some institutions. The FDIC would have to

[6] The FDIC revised its collection procedure late in 1994, and began collecting the semiannual assessment in two quarterly installments. 59 FR 67153 (Dec. 29, 1994). The new procedure did not affect the relationship between an Oakar institution's AADA and its assessment base.

identify every Oakar transaction occurring after the effective date of the revision, and the amount of the assumed deposits; redetermine every Oakar institution's initial AADA in such a transaction; recompute the assessments payable to each insurance fund for every semiannual assessment; restate the balance of each insurance fund; re-allocate the insurance funds' earnings and expenses; and redetermine each insurance fund's reserve ratio. A retroactive revision could even affect the data used for determining the recent special assessment that recently capitalized the SAIF. The FDIC has accordingly determined to apply the revised interpretation only on a prospective basis.

b. Need for Quarterly Components: Appearance of Double-Counting Under certain conditions, the FDIC's constant-value view of the AADA appears to be tantamount to double-counting transferred deposits for a calendar quarter. The appearance of double-counting occurs when an Oakar institution acquires secondary-fund deposits in the latter half of a semiannual period—*i.e.*, in the second or fourth calendar quarter. The seller has the deposits at the end of the first (or third) quarter; its first payment for the upcoming semiannual period is based on them. At the same time, the buyer's secondary-fund assessment is approximately equal to an assessment on the transferred deposits for both quarters in the semiannual period.

The source of this apparent effect is that, under the FDIC's constant-value interpretation, an AADA—even a newly generated one—applies to an Oakar institution's entire assessment base for the entire semiannual period. The following example illustrates the point: [7]

	Seller (SAIF)	Buyer (BIF)	Industry total
Before the transaction:			
Starting assessment bases (ignoring float, &c.):			
SAIF	$200	0	$200
BIF	0	$100	$100
	$200	$100	$300
The transaction (May 1):			
March call report	$200	$100	$300
Deposits sold	($100)	+$100 (AADA)	([1])
June call report	$100	$200	$300
After the transaction:			
Ending assessment bases (ignoring float, &c.):			
SAIF	$100	$100 (AADA)	$200
BIF	0	$100	$100
	$100	$200	$300
Average assessment bases:			
(ignoring float, &c.):			
SAIF	$150	$100 (AADA)	$250
BIF	0	$50	$50
	$150	$150	$300

[1] Neutral.

In this illustration, the buyer is a BIF member with $100 in deposits, all insured by the BIF. The seller is a SAIF member with $200 in deposits, all insured by the SAIF. The buyer acquires $100 from the thrift. The transaction takes place in May (the second half of the first semiannual period).

The transaction generates an AADA for the buyer; the value of the AADA is $100. The buyer's SAIF assessment is based on that amount (more exactly, on the portion of its assessment base that is equal to that amount). But the average of the buyer's SAIF insured deposits for the prior two quarters is only $50. The buyer's SAIF assessment base—and its SAIF assessment—is twice as large as it would have been had it been computed in the ''usual'' way (that is, in the manner that applies to non-Oakar institutions). The difference is roughly equivalent to ''double counting the acquired deposits'': counting the transferred $100 in the buyer's deposit-base for both quarters rather than just for the second one.[8]

The anomaly is most apparent from the standpoint of the industry as a whole. The aggregate amount of the SAIF-assessable deposits temporarily balloons to $250, while the aggregate amount of the BIF-assessable deposits shrinks to $50. But the anomaly only lasts for one semiannual period. In the following period, the seller's assessment base is $100 for both quarters, making its average assessment base $100. The buyer's AADA remains $100. Accordingly, the aggregate amount of SAIF-assessable deposits retreats to $200 once more; and the aggregate amount of BIF-assessable deposits is back to the full $100.

Broadening the focus to include both insurance funds also brings out a more subtle point: the anomaly is not tantamount to double-counting the

[7] In order to bring out the relationship between the AADA and the assessment base more clearly, the table refers to the average assessment base of an institution. The average assessment base is derived from the average of the deposits that the institution has reported in its two reports of condition for the prior semiannual period. The FDIC has used the average assessment base to compute the semiannual assessment for most of the time that Oakar institutions have existed. The FDIC has collected the semiannual assessments in a single payment.

The FDIC has recently changed its collection procedures, however. Beginning with the second semiannual period of 1995, the FDIC collects the semiannual assessment in two installments. The first installment is computed using the assessment base that derives from the deposits reported in the institution's first report of condition for the prior quarter; the second installment is computed using the assessment base derived from the second such report of condition. 59 FR 67153 (Dec. 29, 1994).

The new collection procedure does not affect the amount that an institution owes for a semiannual period. Accordingly, the effect described in the example remains valid.

[8] The equivalence is not so close as it appears. For one thing, an Oakar institution's secondary-fund assessment base is not a proportional part of the overall base, but rather is equal to the full value of its AADA. *See id.* 327.32(a)(2). For another, an initial AADA remains fixed during the semiannual period in which it is generated, even though the Oakar institution's total deposits rise or fall between the time of the transaction and the end of the period.

transferred deposits for a quarter, but rather to re-allocating the buyer's assessment base from the BIF to the SAIF. The BIF-assessable portion of the buyer's average assessment base is $50, not $100. The difference is equivalent to cutting the buyer's BIF assessment base by $100 for half the semiannual period.

The FDIC's quarterly-payment procedure has brought attention to these anomalous effects. The quarterly-payment schedule is merely a new collections schedule, not a new method for determining the amount due. *See* 59 *FR* 67153 (Dec. 29, 1994). Accordingly, under current procedures, the buyer and the seller in the illustration would pay the amounts specified therein even under the quarterly-payment schedule.

When an Oakar transaction occurs in the latter half of a semiannual period, however, the buyer's call report for the prior quarter does not show an AADA. The buyer's first payment for the current semiannual period is therefore based on its assessment base for that quarter, not on its AADA. Moreover, the entire payment is computed using the assessment rate for the institution's primary fund. The FDIC therefore adjusts (and usually increases) the amount to be collected in the second quarterly payment in order to correct these defects.

Interpreting the semiannual AADA to consist of two quarterly components eliminates this anomaly. Three commenters endorse the quarterly determination of AADAs for that reason.

2. Quarterly Growth

a. In General. The Oakar Amendment says that the growth rate for an AADA during a semiannual period is equal to the ''annual rate of growth of deposits'' of the Oakar institution. The FDIC has previously interpreted the phrase ''annual rate'' to mean a rate determined over the interval of a full year. Under the procedures prescribed by the FDIC, each Oakar institution has computed its ''annual rate of growth'' at the end of each calendar year, and has used this figure to calculate the AADA for use during the following year.

This procedure has a weakness. An Oakar institution's AADA has tended to drift out of alignment with its deposit base, because the AADA remains constant while the deposit base changes. At the end of the year, when the institution computes its AADA for the next year, the AADA suddenly—but only temporarily—snaps back into its proper proportion.

The FDIC does not believe that Congress intended to cause such a fluctuation in the relation between an institution's AADA and its deposit base. Moreover, from the FDIC's standpoint as insurer, it is appropriate to maintain a relatively steady correlation between the AADA and the total deposit base. The FDIC is therefore revising its view, and is taking the position that-after the end of the semiannual period in which an institution's AADA has been established—the AADA grows and shrinks at the same underlying rate as the institution's domestic deposit base (that is, excluding acquisitions and deposit sales), measured contemporaneously on a quarter-by-quarter basis. Over a full semiannual period, any increase or decrease in the AADA automatically occurs at a rate equal to the ''rate of growth of deposits'' during the semiannual period, thereby satisfying the statutory requirement.

The FDIC considers that the statutory reference to an ''annual rate'' does not foreclose this approach. In ordinary usage, ''annual rate'' can refer to a rate that is expressed as an annual rate, even though the interval during which the rate applies, and over which it is determined, is a shorter interval such as a semiannual period (*e.g.*, in the case of six-month time deposits). For example, until recently, the FDIC's rules regarding the payment of interest on deposits spoke of ''the annual rate of simple interest''—a phrase that pertained to rates payable on time deposits having maturities as short as seven days. See 12 CFR 329.3 (1993).

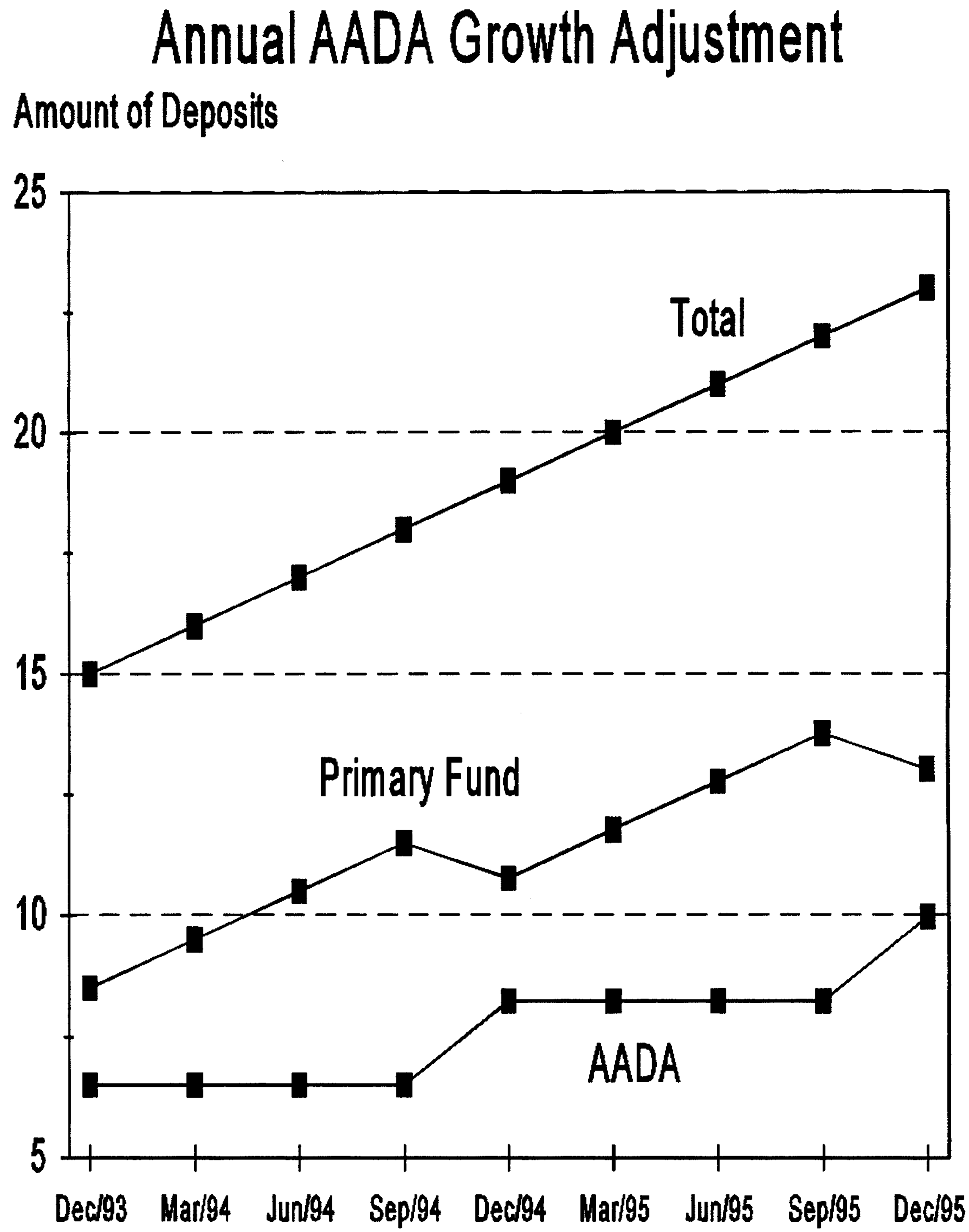
One commenter agrees with the FDIC that the statutory phrase permits the computation of growth on a quarter-by-quarter basis. No commenter takes the opposite view.

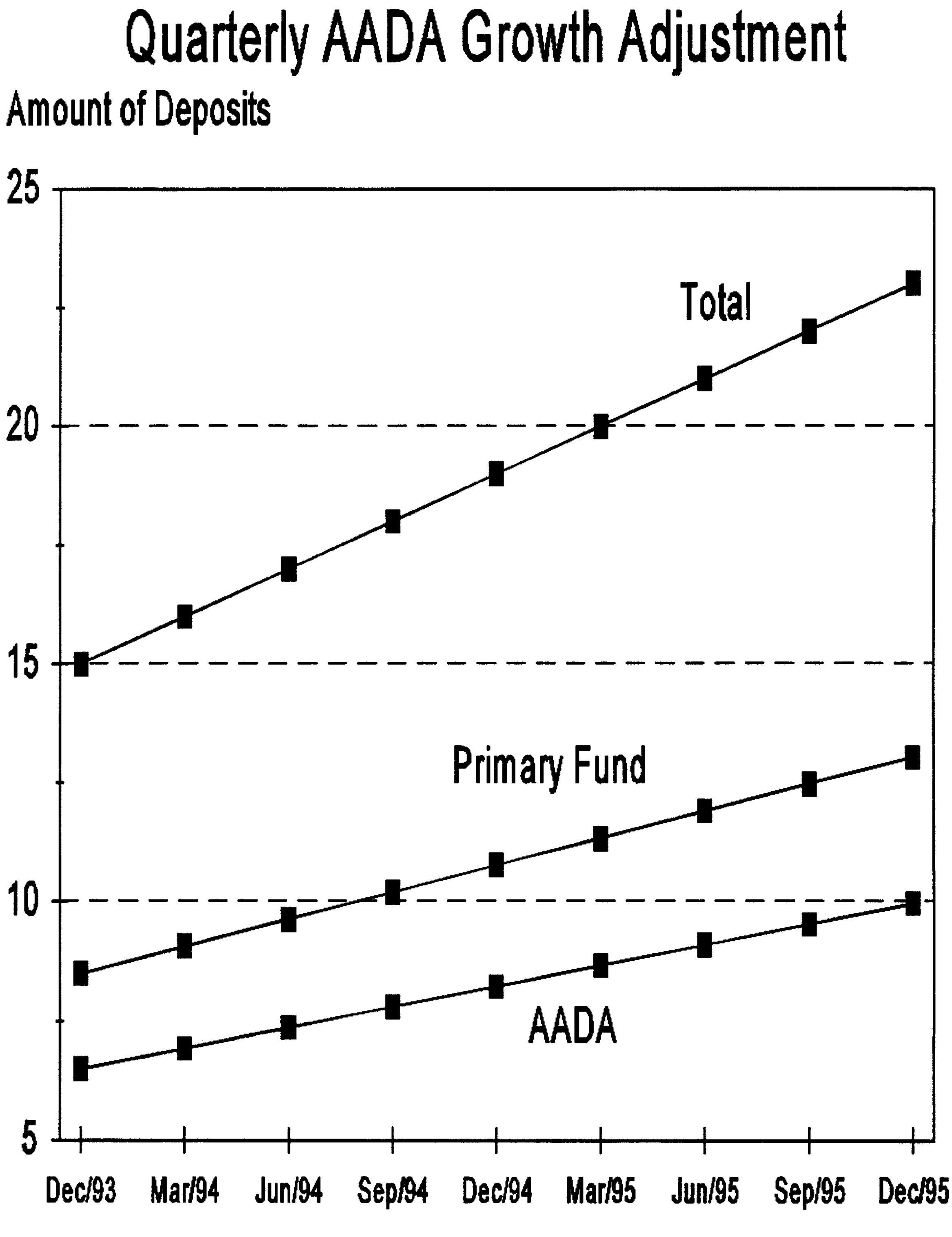
b. Annual vs. Quarterly Growth Adjustment

An AADA remains fixed until a growth adjustment is applied. Total deposits fluctuate from day to day in the normal course of business, however. These fluctuations are reflected entirely in an institution's primary-fund deposits until the growth adjustment occurs. That adjustment has hitherto been made on an annual basis: Accordingly, the relationship between an institution's total deposits on one hand, and its primary-fund deposits and its AADA on the other, has often varied significantly. By contrast, the quarterly-adjustment method causes primary-fund deposits and the AADA vary together with total deposits. Three commenters cite this result as a reason for supporting the quarterly determination of AADAs.

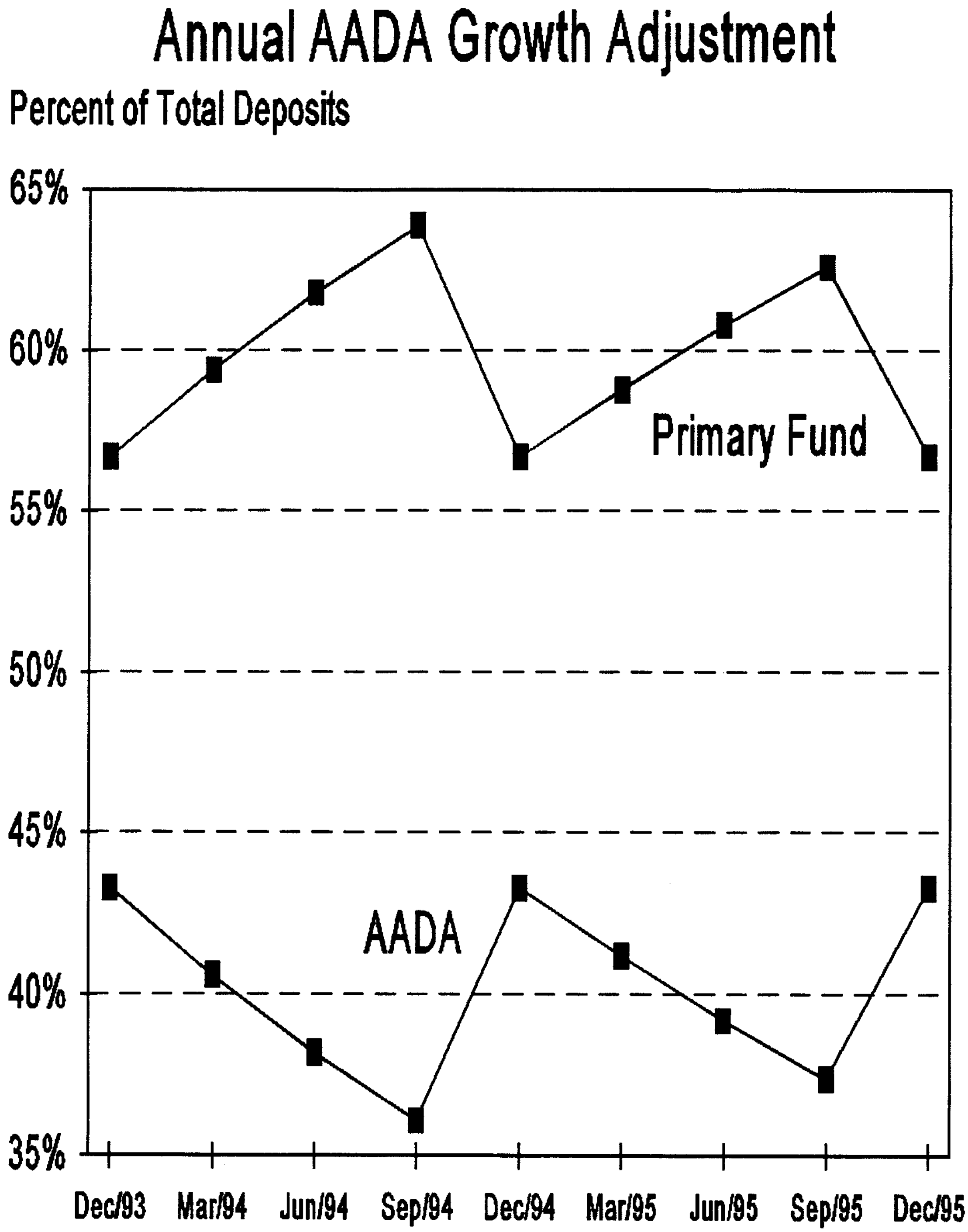
Consider an Oakar institution that has total deposits of $15 as of 12/31/93, with an AADA of $6.5. Further assume that the institution's total deposits grow by $1 every quarter, and that the institution does not participate in any additional acquisitions or deposit sales. The following graphs show the effects of making growth adjustments to the institution's AADA on an annual basis versus a quarterly basis:

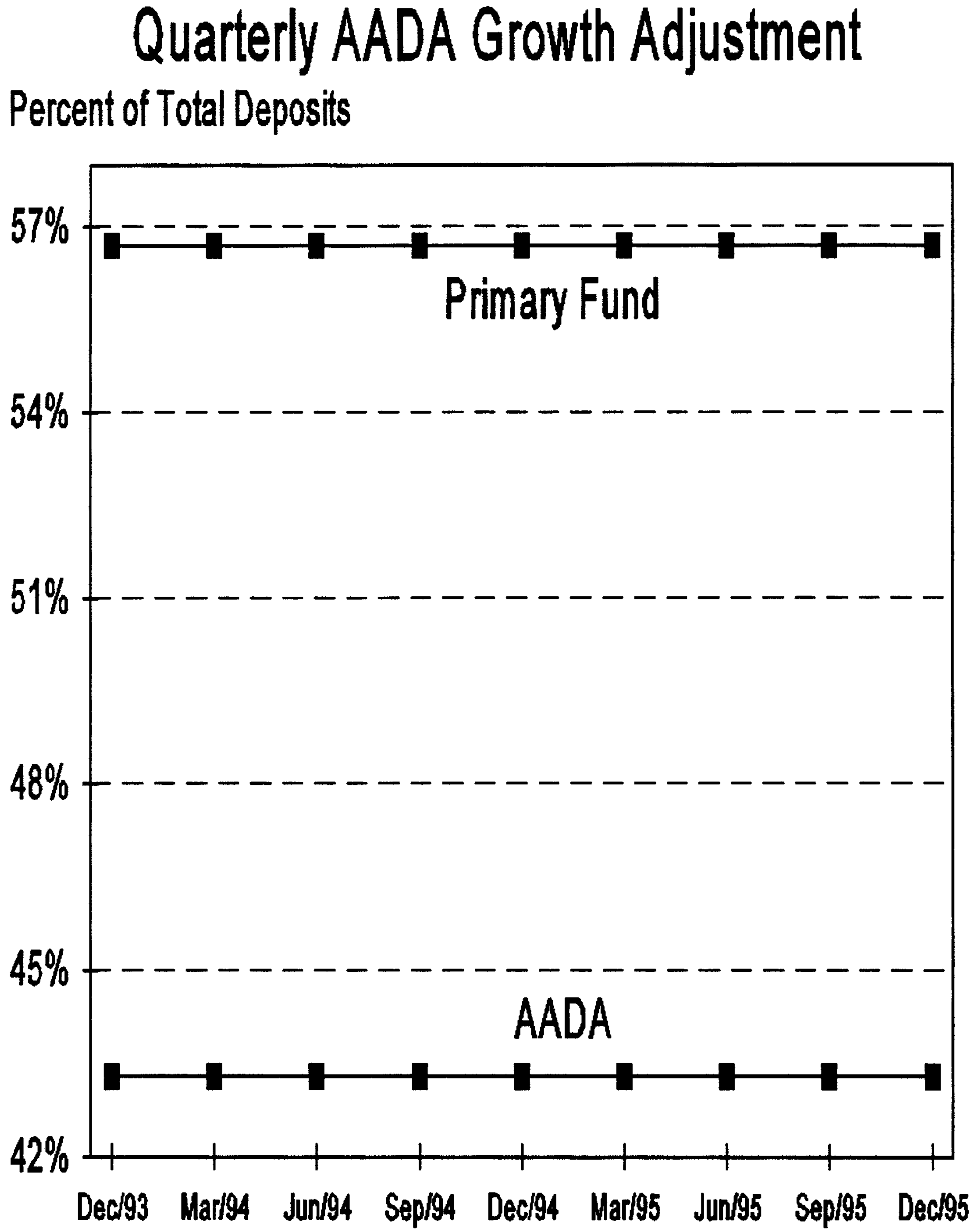
BILLING CODE 6714–01–P


Annual AADA Growth Adjustment
Amount of Deposits
25
20
15
10
5
Total
Primary Fund
AADA
Dec/93
Mar/94
Jun/94
Sep/94
Dec/94
Mar/95
Jun/95
Sep/95
Dec/95


Quarterly AADA Growth Adjustment
Amount of Deposits
25
20
15
10
5
Total
Primary Fund
AADA
Dec/93
Mar/94
Jun/94
Sep/94
Dec/94
Mar/95
Jun/95
Sep/95
Dec/95

The following graphs express this difference in terms of percents of total deposits:



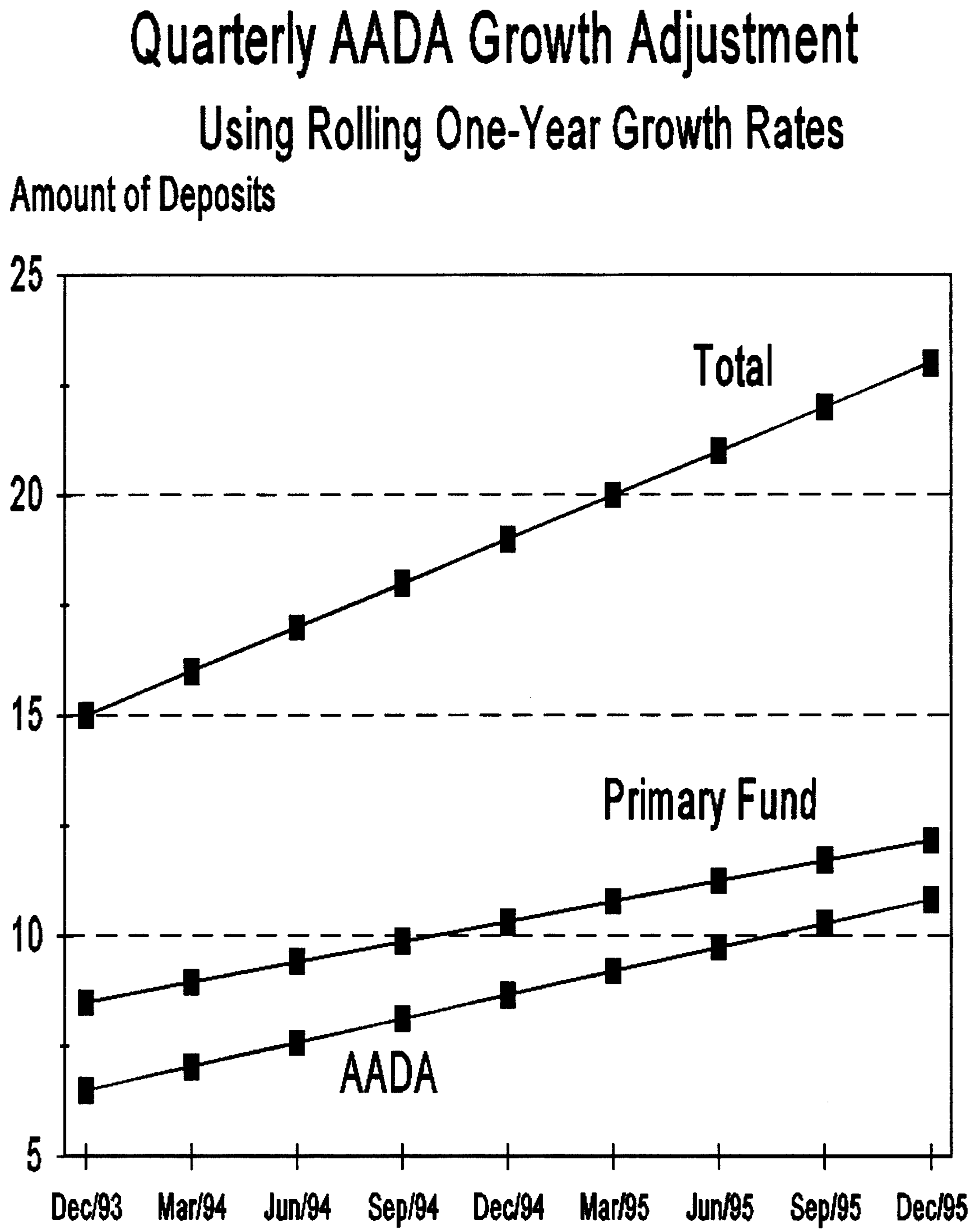

Quarterly AADA Growth Adjustment
Percent of Total Deposits
57%
54%
51%
48%
45%
42%
Primary Fund
AADA
Dec/93
Mar/94
Jun/94
Sep/94
Dec/94
Mar/95
Jun/95
Sep/95
Dec/95

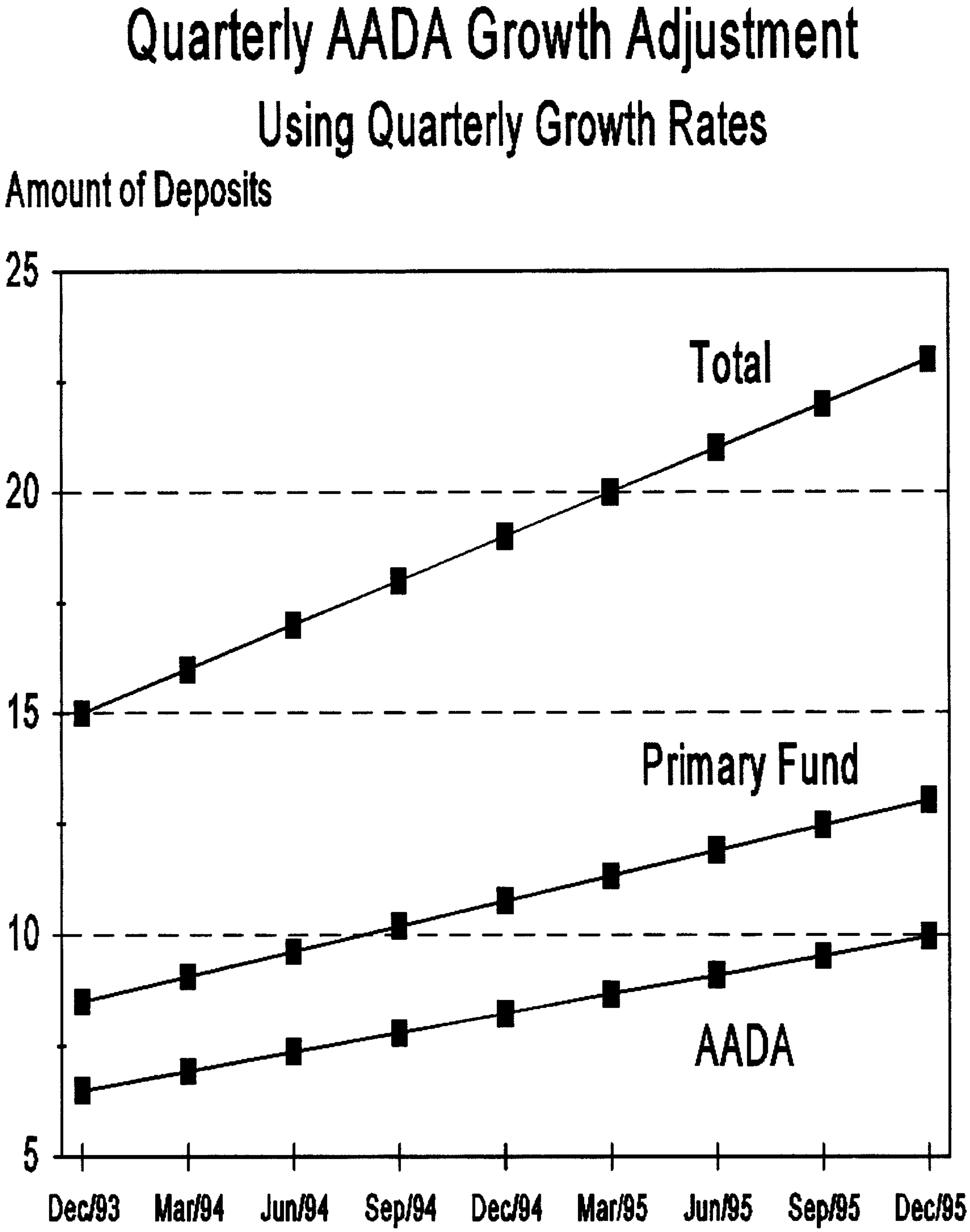
In the annual-adjustment method, the AADA becomes a smaller percent of total deposits as the total grows. In the quarterly-adjustment method, the AADA and the primary-fund deposits remain constant percents of total deposits.

c. Rolling One-Year Adjustments vs. Quarterly Adjustments

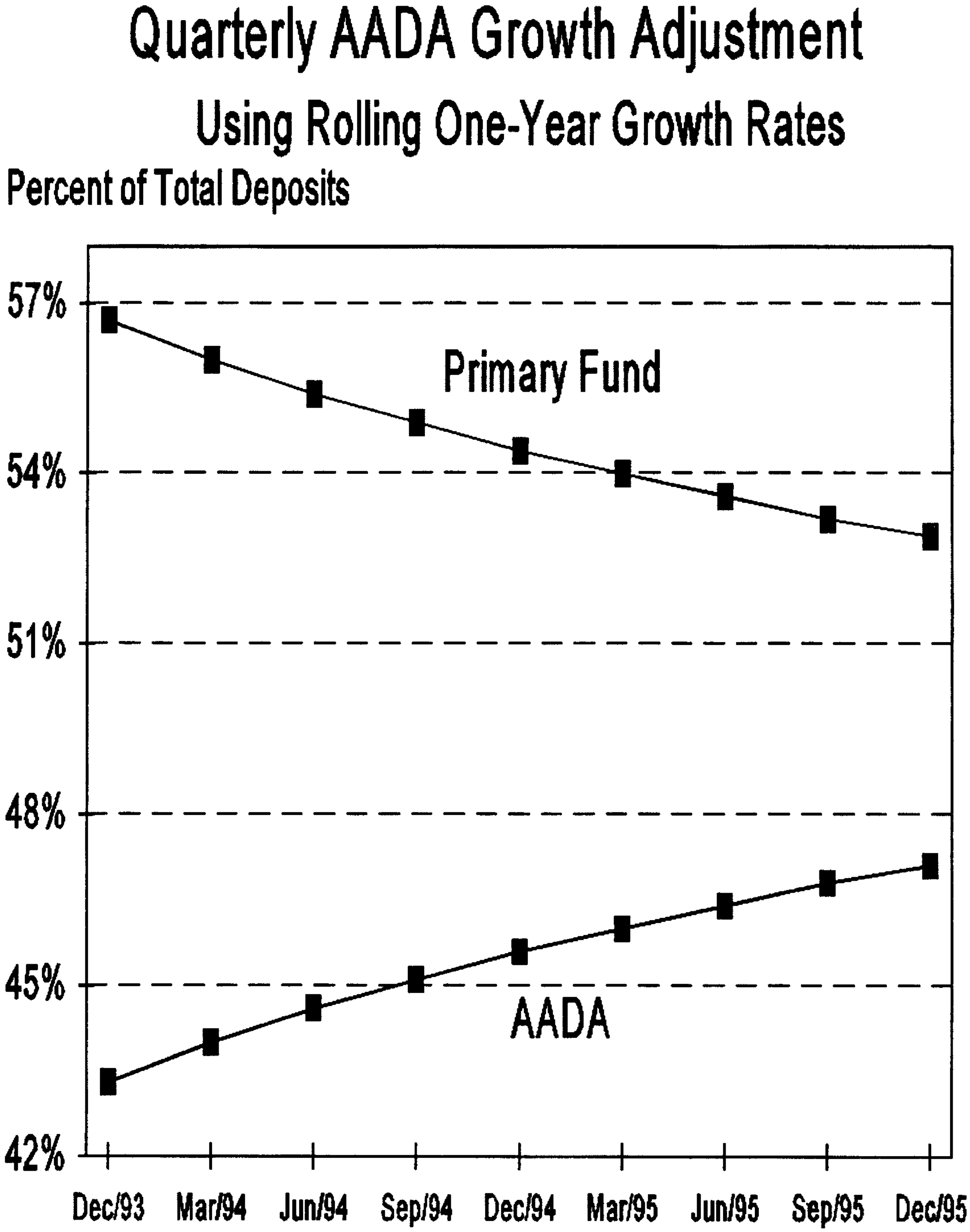
The FDIC also considered an alternative approach: Using the rate of growth in the institution's deposit base for the prior four quarters, measured from the current quarter. This technique would be as consistent with the letter of the statute as the current method. But the four-prior-quarters method would retain the lag between the AADA and the deposit base.

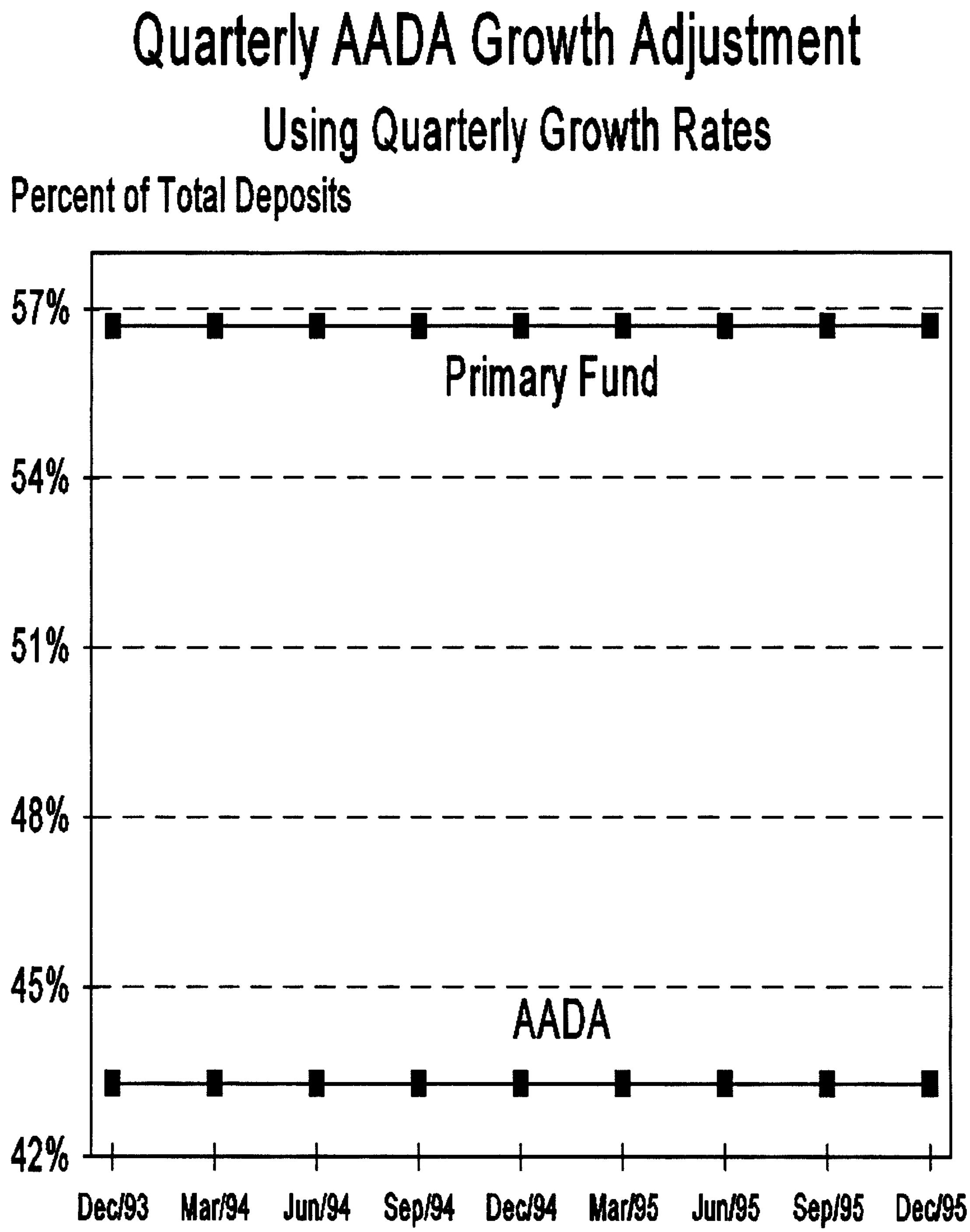
Consider the same Oakar institution with beginning total deposits of $15 and constant growth of $1 per quarter. The following graphs illustrate the effects on deposits of using total-deposit growth rates on two different bases—namely, rolling one-year growth rates, and quarter-to-quarter growth rates:


Quarterly AADA Growth Adjustment
Using Rolling One-Year Growth Rates
Amount of Deposits
25
20
15
10
5
Total
Primary Fund
AADA
Dec/93
Mar/94
Jun/94
Sep/94
Dec/94
Mar/95
Jun/95
Sep/95
Dec/95


Quarterly AADA Growth Adjustment
Using Quarterly Growth Rates
Amount of Deposits
25
20
15
10
5
Total
Primary Fund
AADA
Dec/93
Mar/94
Jun/94
Sep/94
Dec/94
Mar/95
Jun/95
Sep/95
Dec/95

In both cases, the primary-fund deposits and the AADA appear to vary together with total deposits, but it is difficult to discern their precise relationship. Graphs of the same effects in terms of percents of total deposits are more illustrative:





BILLING CODE 6714–01–C

In the percent-of-deposits graphs, the AADA and the primary-fund deposits are shown to converge when the AADA growth adjustment is based on rolling one-year growth rates. In this particular example, the effect occurs because the institution's constant growth of $1 per quarter results in a steadily decreasing rate of growth of total deposits. Therefore, a rolling one-year growth rate of those total deposits at any point in time will be more than the actual rate of growth over the quarter to which the rolling rate is being applied. While different growth characteristics for total deposits would yield different relationships between the AADA and the primary fund over time, the general point is that the relationships of the AADA and the primary-fund deposits can vary when the AADA is adjusted, unless the total-deposit rate of growth used for the adjustment is drawn from the same period for which the rate is applied to the AADA.

As the latter graph shows, applying the actual quarterly growth rate for total deposits to the AADA results in stable percents of total deposits for the AADA and primary fund deposits.

In sum, the FDIC considers that the quarterly approach is permissible under the statute, and is preferable to any approach that relies on a yearly interval to determine growth in the AADA.

D. Negative Growth of the AADA

One element of an Oakar institution's AADA for a current semiannual period is ''the amount by which [the AADA for the preceding semiannual period][9] would have increased during the preceding semiannual period if such increase occurred at a rate equal to the annual rate of growth of [the Oakar institution's] deposits''. 12 U.S.C. 1815(d)(3)(C)(iii). The FDIC is codifying its view that the terms ''growth'' and ''increase'' encompass negative growth (shrinkage). But the FDIC is changing its interpretation by excluding shrinkage due to deposit sales.

1. Negative Growth in General

The 1989 version of the Oakar Amendment focused on an Oakar bank's underlying rate of growth for the purpose of determining the Oakar bank's AADA. The 1989 version of the Amendment set a minimum growth rate for an AADA of seven percent. The Amendment then specified that, if an Oakar bank's deposit base grew at a higher rate, the AADA would grow at the higher rate too. But the Amendment excluded growth attributable to mergers, branch purchases, and other acquisitions of deposits from other BIF members: the deposits so acquired were to be subtracted from the Oakar bank's total deposits for the purpose of determining the growth in the Oakar bank's deposit base (and therefore the rate of growth of the AADA). *See* 12 U.S.C. 1813(d)(3)(C)(3)(iii) (Supp. I 1989).

The 1989 version of the Oakar Amendment spoke only of ''growth'' and ''increases'' in the AADA. *Id.* The statute was internally consistent in this regard, because AADAs could never decrease.

Congress eliminated the minimum growth rate as of the start of 1992. FDICIA section 501 (a) and (b), 105 Stat. 2389 and 2391. As a result, the Oakar Amendment now specifies that an Oakar institution's AADA grows at the same rate as its domestic deposits (excluding mergers, branch acquisitions, and other acquisitions of deposits). 12 U.S.C. 1813(d)(3)(C).

The modern version of the Oakar Amendment continues to speak only of ''growth'' and ''increases'', however. Congress has not—at least not explicitly—modified it to address the case of an institution that has a shrinking deposit base. Nor has Congress addressed the case of an institution that transfers deposits in bulk to another insured institution.

The FDIC regards this omission as a gap in the statute that requires interpretation. The FDIC does so because, if the statute were read to allow only increases in AADAs, the statute would generate a continuing shift in the relative insurance burden toward the SAIF. Most Oakar institutions—and nearly all large Oakar institutions—are BIF-member Oakar banks. If an Oakar bank's deposit base were to shrink through ordinary business operations, but its AADA could not decline in proportion to that shrinkage, the SAIF's share of the risk presented by the Oakar bank would increase. But the reverse would not be true: if an Oakar bank's deposit base increased, its AADA would rise as well, and the SAIF would continue to bear the same share of the risk. The result would be a tendency to displace the insurance burden from the BIF to the SAIF.[10]

The FDIC further considers that the main themes of the changes that Congress made to the Oakar Amendment in 1991 are those of simplification, liberalization, and symmetry. Congress allowed savings associations to acquire banks, as well as the other way around. Congress allowed institutions to deal with one another directly, eliminating the requirement that the institutions must belong to the same holding company (and the need for approval by an extra federal supervisor). Congress established a mirrorimage set of rules for assessing Oakar banks and Oakar thrifts. As noted above, Congress repealed the seven percentum floor on AADA growth, thereby removing the most prominent cause of divergence between an Oakar institution's assessment base and its deposit base. Congress expanded the scope of the Oakar Amendment and made it congruent with the relevant provisions of section 5(d)(2). See FDICIA section 501(a), 105 Stat. 2388–91.

In keeping with this view of the 1991 amendments, the FDIC interprets the growth provisions of the Oakar Amendment symmetrically: that is, to encompass negative growth rates as well as positive ones. Nine commenters support this view; none oppose it. Accordingly, the FDIC is taking the position that an Oakar institution's AADA grows and shrinks at the same underlying rate of growth as the institution's domestic deposits.

The FDIC considers that this interpretation is appropriate because it accords with customary usage in the banking industry, and because it is consistent with the purposes and the structure of the statute. Under the FDIC's interpretation, each fund continues to bear a constant share of the risk posed by the institution, and continues to draw assessments from a constant proportion of the institution's deposit base.

Moreover, the FDIC's interpretation encourages banks to make the investment that Congress wished to promote. If ''negative increases'' were disallowed, Oakar banks would see their SAIF assessments (which currently carry a much higher rate) grow disproportionately when their deposits shrank through ordinary business operations.

Finally, the interpretation is designed to avoid—and has generally avoided—the anomaly of an institution having an AADA that is larger than its total deposit base.

2. Negative Growth due to Deposit-Transfers

The FDIC considers that—consistent with the principle of separation between the insurance funds embodied in section 5(d)(2)—a deposit-transfer from

[9] Theoretically, the growth is not applied directly to the prior AADA, but rather to an amount that is computed afresh each time—which amount is the sum of the various elements of the prior AADA.

[10] A shrinking Oakar thrift would have the opposite effect: the BIF's exposure would increase, and the SAIF's exposure would decrease. Oakar thrifts are comparatively rare, however. The net bias would run against the SAIF.

an Oakar institution to another institution should have no effect on the industry-wide stock of BIF-insured and SAIF-insured deposits.

The FDIC's procedure for calculating the growth of the AADA has upset that balance, however. A deposit sale reduces the Oakar bank's total deposit base by a certain percentage: accordingly, the Oakar bank's AADA—and therefore its volume of SAIF-insured deposits—has been reduced by the same percentage. Its BIF-insured deposits have increased correspondingly. In effect, SAIF deposits have been converted into BIF deposits, in violation of the moratorium, and without generating any entrance or exit fees for the insurance funds.[11]

The FDIC is curing this defect by excluding deposit sales from the growth computation. The FDIC continues to believe that the terms ''growth'' and ''increase'' as used in the statute are broad enough to refer to a negative rate as well as a positive one. But the FDIC does not consider that it is required to extend these terms beyond reasonable limits. In particular, the FDIC does not believe that it must necessarily interpret these terms to include a decrease that is attributable to a bulk transfer of deposits. The statute itself excludes the effect of an acquisition or other deposit-assumption from the computation of growth. The FDIC considers that it has ample authority to make an equivalent exclusion for deposit sales.

The FDIC believes its interpretation is sound because deposit sales do not—in and of themselves—represent any change in the industry-wide deposit base of each fund. It is inappropriate for the FDIC to generate such a change on its own as a collateral effect of its assessment procedures. Moreover, the interpretation is in accord with the tenor of the amendments made by the FDICIA, because it treats deposit sales symmetrically with deposit-acquisitions.

Two commenters—both trade groups—support the FDIC's position. Five commenters oppose the deposit-sale exclusion rule. Four of them do so for the very reason that the FDIC is adopting it: when the *Rankin* principle is in force, the deposit-exclusion rule prevents an institution's store of secondary-fund deposits from shrinking except insofar as the seller transfers the deposits to the buyer. One commenter also objects to the deposit-sale exclusion rule on the ground that the rule treats SAIF-member Oakar institutions (whose AADA represents BIF-assessable deposits) more favorably than BIF-member Oakar institutions, based on the higher rates in effect for SAIF-assessable deposits at the time the comment was filed. The FDIC considers that the Funds Act has deprived this comment of much of its force. The SAIF rates are to be reduced significantly. The remaining differential between the rates on SAIF-assessable and BIF-assessable deposits is relatively small, and will soon expire.

One commenter, which opposed the deposit-sale exclusion rule if the FDIC retained the *Rankin* principle, said further that the FDIC should not apply the deposit-sale exclusion rule to sales that occur prior to the effective date of the final rule. The commenter declared that the FDIC should not expect institutions to make business decisions based upon proposed rules. As a technical matter, of course, the FDIC is not adopting the deposit-sale exclusion rule retroactively: rather, the FDIC is changing the method for computing future assessments, beginning with the assessment due for the first semiannual period of 1997. At the same time, the FDIC acknowledges that the change would affect the business decisions of institutions prior to that time, because institutions must look ahead to consider the consequences of their actions. The FDIC considers that institutions have had ample advance notice of the deposit-sale exclusion rule, however. Moreover, the rule repairs a significant weakness in the growth calculation. The adverse effects resulting from that weakness must be eliminated without delay. The FDIC will therefore apply the deposit-sale exclusion rule when computing assessments for the first semiannual period of 1997.

E. Value of an Initial AADA

By statute, an Oakar institution's initial AADA is equal to ''the amount of any deposits acquired by the institution in connection with the transaction (as determined at the time of such transaction)''. *Id.* 1815(d)(3)(C). The FDIC has interpreted and explained three aspects of this phrase.

1. The Nominal-Amount Principle

The FDIC has adopted an interpretive regulation specifying that the ''amount of any deposits acquired'' by the buyer—and therefore the value of the buyer's initial AADA—is (generally) equal to the full nominal amount of the deposits that the buyer assumes from the seller. 12 CFR 327.32(a)(3)(4). The FDIC is retaining the substance of this provision. The final rule continues to emphasize the point that the amount of the transferred deposits is measured by focusing on the volume divested by the seller. The FDIC's purpose is to make it clear that post-transaction events—such as deposit run-off—have no bearing on the calculation of the buyer's AADA.

Two commenters (including one trade group) support the nominalvalue principle; two oppose it. The opposing commenters point out that the FDIC discounts the transferred deposits when it serves as conservator or receiver for a seller (troubled-seller cases). The FDIC provides the discount on the ground that the buyer can expect to sustain a substantial run-off of deposits after the transaction. The opposing commenters contend that buyers sustain run-off even when the seller is a healthy institution. The commenters therefore urge the FDIC to provide for a discount in healthy-seller cases as well as in troubled-seller ones.[12]

The FDIC does not believe the commenters' point is well taken. As discussed in more detail at II.E.2. below, the FDIC has established the discount for troubled-seller cases because, as a historical matter, the cases have arisen in the context of unusual economic conditions, and presented special supervisory issues. These special circumstances do not apply to healthy-seller transactions in the current economic environment. Buyers and sellers negotiate the terms of their transactions at arms' length, and take the effects of deposit run-off into account in arriving at a price. The FDIC does not believe it necessary or appropriate to contribute the resources of the seller's insurance fund, in the form of foregone assessments, to assist such transactions.

The FDIC is retaining the nominal-value principle for two chief reasons. Most importantly, the principle reflects the manifest intent of the statute, which specifies that the volume of the acquired deposits are to be ''determined at the time'' of the transaction. Second, the principle has the virtues of clarity and precision. Both the buyer and a seller will know precisely the value of an AADA that is generated in an Oakar

[11] The effect has occurred whenever an Oakar institution transfers deposits, without regard for whether the transferred deposits have been primary-fund or secondary-fund deposits. Any deposit-transfer has shrunk the seller's overall deposit-base, and has therefore reduced its AADA.

[12] These two commenters further note that they, along with nine other institutions, have petitioned the FDIC to amend its regulations to provide for such a discount. The 11 petitioners have provided data indicating that they have experienced run-off in healthy-seller cases, although the methods used to identify and measure run-off varied from institution to institution.

The FDIC has determined that it is appropriate to address the subject matter of the petition in this rulemaking proceeding together with other issues related to the computation of the AADA. For the reasons given herein, the FDIC declines to adopt the position that the petitioners have proposed.

transaction. The buyer's expected secondary-fund assessments can be an important cost for the parties to consider when deciding on an acceptable price. The FDIC considers that the nominal-value principle reduces uncertainty on this point.

The final rule updates the regulation in two minor ways. The regulation has presumed that the buyer will assume all the seller's deposits, and that all such deposits will be insured by the buyer's secondary fund. The reason for these presumptions is purely historical. At the time the regulation was adopted, the Oakar Amendment only spoke of cases in which the seller merged into or consolidated with the buyer, or in which the buyer acquired all the seller's assets and liabilities. *See* 12 U.S.C. 1815(d)(3)(A) (Supp. I 1989). The Amendment did not allow for less comprehensive Oakar transactions (*e.g.*, branch sales). Nor did it contemplate a transaction in which the seller was an Oakar institution in its own right.

The final rule makes it clear that the nominal-amount principle applies to all deposit-transfer transactions in which the buyer acquires secondary-fund deposits. The final rule also specifies that the AADA is only equal to the nominal amount of the secondary-fund deposits, not necessarily all the transferred deposits. Each point represents the current view of the FDIC.

2. Deposits Acquired in Troubled-Seller Cases

As noted above, the FDIC has discounted the nominal amount of the transferred deposits in troubled-seller cases. The discount is two-fold:

—*Brokered deposits:* All brokered deposits have been subtracted from the nominal volume of the transferred deposits.
—*The ''80/80'' principle:* Each remaining deposit has been capped at $80,000. The buyer's AADA has been equal to 80 percent of the aggregate of the deposits as so capped.

See 12 CFR 327.32(a)(3)(4). The FDIC is ending these discounts for future transactions, on the ground that they are no longer needed. The FDIC is making the change effective as of July 1, 1997, in order to avoid disrupting any negotiations that may currently be under way.

The FDIC adopted the discounts because the funding decisions for troubled-seller cases—and particularly for troubled-thrift cases—were subject to constraints and considerations that fell outside the normal range of factors influencing such decisions in the market place for healthy institutions. The sellers had often been held in conservatorship for some time. In order to maintain the assets in such institutions, the conservator had often found it necessary to obtain large and other high-yielding deposits. The FDIC determined that, while any bidder had to evaluate and price all aspects of a transaction, it would be counterproductive to require bidders to price the contingencies related to volatile deposits in assisted transactions, given that these deposits were primarily artifacts of government conservatorships. Considering the objective of attracting private capital in order to avoid additional costs to the taxpayer, the FDIC sought to avoid the potential deterrent effect of including these artificial elements in the pricing equation.

The FDIC recognized that healthy sellers sometimes relied upon volatile deposits for funding as well. But the FDIC regarded their funding decisions as a normal part of a strategy to maximize the profits of a going concern. The comparable decisions for troubled sellers were made by managers of government conservatorships that were subject to funding constraints, relatively inflexible operating rules (necessary to control a massive government effort to sell failed thrifts), and other considerations outside the scope of the typical private transaction.

The FDIC adopted this interpretive rule at a time when troubled and failed thrifts were prevalent, and the stress on the safety net for such institutions was relatively severe. The stress has been considerably relieved, however. The FDIC considers that, under current conditions, there is no longer any need to maintain a special set of rules for troubled-seller cases.

Moreover, the FDIC ordinarily must contribute its own resources to induce buyers to acquire such institutions. Any reduction in future assessments that the FDIC offers as an incentive merely reduces the amount of money the FDIC must contribute at the time of the transaction. The simpler and more straightforward approach is to reflect all such considerations in the net price that buyers pay for such institutions at the time of the transaction.

Two commenters, both trade groups, oppose the FDIC's position. One commenter agrees with the FDIC's reasons for ending the discount, but suggests that the FDIC should retain it for the purpose of ''giving prospective bidders the choice of accepting the predetermined deposit haircut or pricing deposit volatility contingencies''. The other commenter strongly urges the FDIC to retain the discount, giving the following reasons: ''deposit runoff remains a factor''; and ''pricing variations that depend on runoff calculation are uncertain''. The FDIC does not believe these reasons are persuasive, however. The discount is not an alternative to estimating the volatility of deposits and determining an appropriate price for them. The discount is simply a reduction in the base amount on which future assessments will be computed. Whatever uncertainties are present will persist, without regard for whether the base amount retains its full nominal value or is discounted by a fixed amount.

3. Conduit Deposits

The FDIC staff has taken the position that, when an Oakar institution assumes secondary-fund deposits from one institution (original transferor) but promptly re-transfers them to another institution (re-transferee) under certain conditions, the retransferred deposits are not counted as ''acquired'' deposits for the purpose of computing the Oakar institution's AADA. The Oakar institution is regarded as a mere conduit for the deposits. The deposits themselves retain their original insurance status after the re-transfer: whatever their status in the hands of the original transferor, whether BIF-insured or SAIF-insured, the deposits have that status in the hands of the ultimate retransferee. The FDIC described this interpretation, which is the settled view of the FDIC, in the preamble to the proposed rule, but the proposed rule itself did not set forth a provision making this point explicit. The final rule contains such a provision.

The FDIC has invoked the conduit principle only in very narrow circumstances. The FDIC has agreed to exclude the re-transferred deposits when determining an Oakar institution's AADA only when all of the following conditions have been met: the Oakar institution has committed to re-transfer specified branches as a condition of approval of the transaction; the commitment has been enforceable; and the re-transfer has been required to occur within six months after consummation of the initial Oakar transaction. *See, e.g.*, FDIC Advisory Op. 94–48, 2 FED. DEPOSIT INS. CORP., LAW, REGULATIONS, RELATED ACTS 4901–02 (1994).

The FDIC is codifying and refining the ''conduit'' principle. Under the final rule, secondary-fund deposits have the status of ''conduit'' deposits in the hands of an Oakar institution only if the Oakar institution has acquired them in an Oakar transaction, if a federal banking supervisory agency or the United States Department of Justice has explicitly ordered the institution to re-transfer the deposits within six months after the date of that transaction, if the institution's obligation to make the re-transfer is enforceable, and if the re-transfer must be completed in the six-month grace period. If the conditions are not satisfied, the conduit principle does not come into play, and the deposits are regarded as having been assumed by the Oakar institution at the time of the original Oakar transaction. Any subsequent re-transfer of the deposits would be treated as a separate transaction, and analyzed independently of the Oakar transaction.

The final rule also clarifies the point that conduit deposits are used to compute the Oakar institution's AADA on a temporary basis. The deposits are counted in the ''amount of deposits acquired'' by the Oakar institution—and therefore in its AADA—during the semiannual period in which the transaction occurs. The AADA so computed is used to determine the assessment due for the next semiannual period. If the institution retains the deposits during part of that following period, the deposits are again included in the ''amount of deposits acquired''—and are again part of the institution's AADA—for the purpose of computing the assessment for the semiannual period after that. But thereafter the deposits are excluded from the ''amount of deposits acquired'' by the Oakar institution. In this regard, one commenter (a trade group) says the deposits should ''be assessed on a pro rata basis for the time they remain on the institution's books''. The FDIC declines to adopt this suggestion. The suggestion is a departure from the FDIC's general method of determining assessments, which derives an institution's assessment base from the deposits that the institution holds at the end of each calendar quarter, and which does not take into account the length of time the institution holds the deposits.

Two commenters support the conduit rule as proposed by the FDIC. Three others urge the FDIC to broaden the conduit rule to reach cases in which the buyer re-transfers the deposits voluntarily. The FDIC declines to do so, however. One of the primary purposes for the conduit rule—absent which the FDIC would not have adopted the rule—is to accommodate the directives of the Department of Justice and the federal banking agencies. That purpose is not served when the seller does not act under government compulsion.

One commenter urged the FDIC to extend the conduit rule to cases in which the buyer does not re-transfer the deposits, but merely divests itself of them by paying them off. The commenter suggests that deposits should qualify as conduit deposits if the buyer knows it will re-transfer the deposits within a very short time after acquiring them, and if the buyer can identify the deposits with great specificity. The FDIC declines to adopt this position, however. The FDIC wishes to confine the conduit rule to circumstances where the actions of the parties, and the relationships among them, are reasonably well defined. When the Department of Justice or a federal banking supervisor orders a buyer to re-transfer deposits to another institution, the FDIC may safely expect that the link between the buyer and the deposits will be severed. Moreover, the buyer remains subject to continuing federal oversight, the focus of which is on the structural and economic changes that the divestiture has been designed to produce. The result is that the oversight ensures that the link between the buyer and the deposits will remain severed. The case is otherwise when a buyer merely pays off the deposits. When no other institution is involved, the buyer may easily re-establish its connection with the depositors—and, as a practical matter, recover the deposits—either directly or indirectly. Moreover, any continuing federal oversight of the buyer is more likely to focus on general regulatory objectives, such as the maintenance of an appropriate capital level, that do not prevent the buyer from re-establishing its link to the deposits.

F. Transitional Matters

1. Freezing prior AADAs

In theory, an Oakar institution's AADA is computed anew for each semiannual period. An institution's AADA for a current semiannual period is equal to the sum of three elements:

- *Element 1*: The volume of secondary-fund deposits that the institution originally acquired in the Oakar transaction;
- *Element 2*: The aggregate of the growth increments computed with respect to the semiannual periods prior to the one with respect to which Element 3 is being determined; and
- *Element 3*: The growth increment with respect to the period just prior to the current period (*i.e.*, just prior to the period for which the assessment is due, and for which the AADA is being computed). Element 3 is computed on a base that equals the sum of elements 1 and 2.

The FDIC has consistently interpreted its existing rules to mean that, when a growth increment has already been determined with respect to a semiannual period, the growth increment continues to have the same value thereafter. *See, e.g.*, FDIC Advisory Op. 9219, 2 FED. DEPOSIT INS. CORP., LAW, REGULATIONS, RELATED ACTS 4619, 4620–21 (1992). The net effect has been to ''freeze'' AADAs—and their elements—for prior semiannual periods. The final rule codifies this principle.

In keeping with this principle, the interpretations set forth in the final rule apply on a purely prospective basis. They come into play only for the purpose of computing future AADAs. The final rule's interpretations do not affect AADAs already computed for prior semiannual periods, or the assessments that Oakar institutions have already paid on them. Nor do they affect the prior-period elements of AADAs that are to be determined for future semiannual periods (except insofar as the interpretations affect the increment computed with respect to the second semiannual period of 1996). In short, the final rule ''leaves prior AADAs alone''.

2. 1st-Half 1997 Assessments: Excluding Deposit Sales From the Growth Calculation

The FDIC will follow its existing procedures in computing AADAs for the first semiannual period of 1997, with one exception. An institution's AADA for the first semiannual period of 1997 will be based on the growth of the institution's deposits as measured over the entire calendar year 1996. The AADA so determined will be used to compute both quarterly payments for the first semiannual period of 1997.

The exception is that, when computing an AADA's increment of growth with respect to the second semiannual period of 1996, the FDIC will apply its new limitation on ''negative'' growth: that is, the FDIC will decline to consider shrinkage attributable to deposit-transfer transactions that have occurred on and after July 3, 1996 (the date on which the Federal Register published the proposed rule).

The FDIC acknowledges that this limitation makes a significant break with the past. The FDIC further recognizes that the limitation can affect the business considerations that affect deposit-transfer transactions. The FDIC considers that the industry has had ample notice of the limitation, however, and that the parties to any such transaction have been able to factor in any new costs that the limitation may have produced.

At the same time, the FDIC agrees that it would be inappropriate to apply the limitation retroactively to transactions that have been completed earlier in 1996. The parties to these transactions did not have notice of the FDIC's proposal. The FDIC will therefore include shrinkage attributable to a deposit sale that occurred during the first semiannual period of 1996 when determining the annual growth rate for an Oakar institution with respect to that semiannual period. The annual growth rate as so computed will be used in computing the institution's AADA for the first semiannual period of 1997 and for future periods.

3. 2nd-Half 1997 Assessments: Use of Quarterly AADAs

The FDIC will begin measuring AADAs on a quarterly basis during the first semiannual period of 1997. The first quarterly AADA component that the FDIC will identify and measure will be the quarterly component as of March 31, 1997. That component will reflect the rate of growth of the institution's deposits during the first calendar quarter of 1997 (January–March). The component so measured will be used to determine the institution's first quarterly payment for the second semiannual period in 1997—that is, the June payment.

The second quarterly AADA component that the FDIC will identify and measure will reflect the rate of growth of the institution's deposits during the second calendar quarter of 1997 (April–June). The second component will be used to determine the institution's second quarterly payment for the second semiannual period in 1997 (the September payment).

G. Simplification and Clarification of the Regulation

The final rule makes certain changes to the current regulation that clarify and simplify it without changing its meaning. The FDIC is making these changes in response to two initiatives. Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325, 108 Stat. 2160 (Sept. 23, 1994), requires federal agencies to streamline and modify their regulations. In addition, the FDIC has voluntarily committed itself to review its regulations on a 5-year cycle. *See* Development and Review of FDIC Rules and Regulations, 2 FED. DEPOSIT INS. CORP., LAW, REGULATIONS, RELATED ACTS 5057 (1984). The FDIC considers that subpart B of part 327 is a fit candidate for review under each of these initiatives.

The final rule clarifies subpart B by defining and using the terms ''primary fund'' and ''secondary fund''. An Oakar institution's primary fund is the fund to which the institution belongs; its secondary fund is the other insurance fund. Using these terms, the FDIC is simplifying paragraphs (1) and (2) of § 327.32(a) by eliminating redundant language; the changes do not alter the meaning of these provisions.

In addition, the FDIC is clarifying § 327.6(a) by changing the nomenclature used therein. ''Deposit-transfer transaction'' is replaced by ''terminating transaction''; ''acquiring institution'' is replaced by ''surviving institution''; and ''transferring institution'' is replaced by ''terminating institution''. The terms previously used in § 327.6(a) are also used in other provisions of part 327, where they have different and less specialized meanings. The change in nomenclature in § 327.6(a) is intended to avoid any confusion that the previous terminology might have caused.

III. Effective Date

The final rule is effective on January 1, 1997. Notwithstanding the fact that the FDIC has asked for comment on the changes made by the final rule, the final rule is an interpretive rule, and may be made effective without having been published 30 days prior to its effective date. 5 U.S.C. 553(d)(2).

Moreover, the FDIC has determined that there is good cause for the rule to be made effective on January 1, 1997, and not after a 30-day delay. The 30-day delay is not necessary in the case of provisions that codify the FDIC's existing interpretations: *e.g.*, those pertaining to the *Rankin* doctrine, to the principle of negative growth in general, the conduit principle, to the nominal-value rule for initial AADAs in healthy-seller cases, and to the principle that the value of AADAs for prior semiannual periods will be ''frozen''. The 30-day delay is likewise not necessary in the case of provisions that, by their terms, do not affect the assessment for the first semiannual period of 1997: *e.g.*, those that shift the burden of computing AADAs to the FDIC, those that interpret the AADA—and the growth thereof—on a quarterly basis, and those that apply the nominal-value rule to initial AADAs in troubled-seller cases.

The FDIC has refrained from adopting the final rule earlier, inasmuch as the rule is predicated in part on certain prior actions of the Board, notably the reduction of assessment rates for SAIF members. Nevertheless, the FDIC considers it necessary for certain of the changes made by the rule to apply with respect to the assessment for the first semiannual period of 1997, which begins on January 1, 1997—notably, the exclusion of deposit-sales from the computation of growth in the AADA. The FDIC has therefore determined that it has good cause to adopt the final rule with respect to these provisions without the full 30-day delay.

IV. Request for Public Comment

The FDIC has solicited comment on all aspects of the rule. In particular, the FDIC has solicited comment on the following points: attributing deposits that an Oakar institution transfers to another institution according to principles articulated in the *Rankin* letter, or treating the transferred deposits as a blend of deposits insured by both insurance funds; having the FDIC, rather than individual institutions, compute AADAs using information provided by the institutions; interpreting AADAs as consisting of quarterly components, and computing the growth of AADAs on a quarterly cycle rather than an annual one; retaining the concept of negative growth for the purpose of computing AADAs; excluding deposit sales from the computation of growth; applying the nominal-amount principle for determining initial AADAs in all cases, including troubled-seller cases; and preserving the conduit-deposit concept.

In addition, in accordance with section 3506(c)(2)(B) of the Paperwork Reduction Act, 44 U.S.C. 3506(c)(2)(B), the FDIC has solicited comment for the following purposes on the collection of information described herein:

- To evaluate whether the collection of information is necessary for the proper performance of the functions of the FDIC, including whether the information has practical utility;
- To evaluate the accuracy of the FDIC's estimate of the burden of the collection of information;
- To enhance the quality, utility, and clarity of the information to be collected; and
- To minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The FDIC has also solicited comment on all other points raised or options described herein, and on their merits relative to the rule.

V. Paperwork Reduction Act

Under the FDIC's prior procedures, each Oakar institution was required to compute its AADA at the end of each year, using a worksheet provided by the FDIC (annual growth worksheet). The annual growth worksheet showed the computation of the institution's AADA for the first semiannual period of the current year—that is, the AADA that was used to compute the assessment due for the first semiannual period of the current year—which was based on the institution's growth during the prior year. The institution was required to provide the annual growth worksheet to the FDIC as a part of the institution's certified statement.

In addition, whenever an institution was the buyer in an Oakar transaction, it was required to submit a transaction worksheet showing the total deposits acquired on the transaction date. If the seller were an Oakar institution, and if the buyer had acquired the entire institution, the buyer was also required to report the seller's last AADA (as shown in the seller's last call report). The buyer was then required to subtract this number from the total deposits acquired in order to determine its new AADA.

The final rule changes this procedure for the annual growth worksheets for the first semiannual period of 1997 (*i.e.*, for the worksheets that show the growth of deposits during 1996). The change only affects Oakar institutions that transferred deposits to other institutions during 1996. Such an institution must report the total amount of deposits that it transferred in transactions from July 1–December 31, 1996.

Thereafter the FDIC will compute the AADAs for all Oakar institutions, using information taken from their quarterly call reports. Institutions will not have to report additional information in most cases. An Oakar institution that has neither acquired nor transferred deposits in the prior quarter will not have to provide any additional information at all. An Oakar institution that has acquired deposits will have to provide the same information at the end of the quarter that it now provides at the end of the year; there will be a change in the timing, but no change in burden.

Only an Oakar institution that transferred deposits will have to provide additional information. Sellers will have to report the volume of deposits transferred and the date of the transaction. This information is readily available: the extra reporting burden is small.

More to the point, the net effect is to reduce the overall reporting burden on Oakar institutions. The burden of submitting extra information in deposit-sale cases is more than offset by the elimination of the growth worksheet and by the FDIC's assumption of the burden of computing AADAs.

Accordingly, the FDIC is revising an existing collection of information. The revision has been reviewed and approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

The impact of the final rule on paperwork burden is to require a one-time *de minimis* report from approximately 100 institutions for the first semiannual period in 1997, and thereafter to eliminate the annual growth worksheet for all 900 Oakar institutions, which takes an estimated two hours to prepare. The effect of this procedure on the estimated annual reporting burden for this collection of information is a reduction of 1,800 hours:

Approximate Number of Respondents: 900.

Number of Responses per Respondent: −1.

Total Annual Responses: 900.

Average Time per Response: 2 hours.

Total Average Annual Burden Hours: −1800 hours.

The FDIC expects the Federal Financial Institutions Examination Council and the Office of Thrift Supervision to require (as needed) the information in the quarterly reports of condition, starting with the report for March 31, 1997.

VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply to the final rule. Although the FDIC has chosen to publish general notice of the rule, and to ask for public comment on it, the FDIC was not obliged to do so, as the rule is interpretive in nature. *See id.* 553(b) and 603(a).

Moreover, the FDIC considers that the rule amounts to a net reduction in burden for all Oakar institutions, as they no longer have to prepare or file regular annual growth worksheets after the worksheet with respect to 1996. Instead, a limited number of Oakar institutions must submit one new piece of information, and only for quarters in which they have transferred deposits.

In addition, although the Regulatory Flexibility Act requires a regulatory flexibility analysis when an agency publishes a rule, the term ''rule'' (as defined in the Regulatory Flexibility Act) excludes ''a rule of particular applicability relating to rates''. *Id.* 601(2). The final rule relates to the rates that Oakar institutions must pay, because it addresses various aspects of the method for determining the base on which assessments are computed. The Regulatory Flexibility Act is therefore inapplicable to this aspect of the final rule.

Finally, the legislative history of the Regulatory Flexibility Act indicates that its requirements are inappropriate to this aspect of the final rule. The Regulatory Flexibility Act is intended to assure that agencies' rules do not impose disproportionate burdens on small businesses:

> Uniform regulations applicable to all entities without regard to size or capability of compliance have often had a disproportionate adverse effect on small concerns. The bill, therefore, is designed to encourage agencies to tailor their rules to the size and nature of those to be regulated whenever this is consistent with the underlying statute authorizing the rule.

126 *Cong. Rec.* 21453 (1980) (''Description of Major Issues and Section-by-Section Analysis of Substitute for S. 299'').

The final rule does not impose a uniform cost or requirement on all Oakar institutions regardless of size: to the extent that it imposes any costs at all, the costs have to do with the effects that the rule has on Oakar institutions' assessments. An institution's assessment is proportional to its size. Moreover, while the FDIC has authority to establish a separate risk-based assessment system for large and small members of each insurance fund, *see* 12 U.S.C. 1817(b)(1)(D), the FDIC has not done so. Within the current assessment scheme, the FDIC cannot ''tailor'' assessment rates to reflect the ''size and nature'' of institutions.

VII. Congressional Review

The FDIC is submitting a report to each House of the Congress and to the Comptroller General with respect to the final rule in conformity with the procedures specified in 5 U.S.C. 801. The FDIC is submitting the report voluntarily and not under compulsion of the statute, however. The term ''rule''—as that term is used in section 801—excludes ''any rule of particular applicability, including a rule that approves or prescribes * * * rates''. *Id.* 804(3). The FDIC considers that the final rule is governed by this exclusion, because the final rule pertains to the computations associated with assessment rates. Accordingly, the requirements of *id.* 801–808 do not apply.

In any case, because the final rule is interpretive in character, notice and comment are not required under the Administrative Procedure Act. *See* 5 U.S.C. 553(b). Accordingly, the FDIC has for good cause found that notice and public procedure thereon are ''unnecessary'' within the meaning of 5 U.S.C. 808(2). The final rule will therefore take effect on the date specified herein.

List of Subjects in 12 CFR Part 327

Assessments, Bank deposit insurance, Banks, banking, Financing Corporation, Reporting and recordkeeping requirements, Savings associations.

For the reasons set forth in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation is amending 12 CFR part 327 as follows:

PART 327—ASSESSMENTS

1. The authority citation for part 327 continues to read as follows:

Authority: 12 U.S.C. 1441, 1441b, 1813, 1815, 1817–1819; Deposit Insurance Funds Act of 1996, Pub. L. 104–208, 110 Stat. 3009 *et seq.*

2. In § 327.6 the section heading and paragraph (a) are revised to read as follows:

§ 327.6 Terminating transfers; other terminations of insurance.

(a) *Terminating transfer*—(1) *Assessment base computation.* If a terminating transfer occurs at any time in the second half of a semiannual period, each surviving institution's assessment base (as computed pursuant to § 327.5) for the first half of that semiannual period shall be increased by an amount equal to such institution's pro rata share of the terminating institution's assessment base for such first half.

(2) *Pro rata share.* For purposes of paragraph (a)(1) of this section, the phrase *pro rata share* means a fraction the numerator of which is the deposits assumed by the surviving institution from the terminating institution during the second half of the semiannual period during which the terminating transfer occurs, and the denominator of which is the total deposits of the terminating institution as required to be reported in the quarterly report of condition for the first half of that semiannual period.

(3) *Other assessment-base adjustments.* The Corporation may in its discretion make such adjustments to the assessment base of an institution participating in a terminating transfer, or in a related transaction, as may be necessary properly to reflect the likely amount of the loss presented by the institution to its insurance fund.

(4) *Limitation on aggregate adjustments.* The total amount by which the Corporation may increase the assessment bases of surviving or other institutions under this paragraph (a) shall not exceed, in the aggregate, the terminating institution's assessment base as reported in its quarterly report of condition for the first half of the semiannual period during which the terminating transfer occurs.

* * * * *

3. Section 327.8 is amended by revising paragraph (h) and adding paragraphs (j) and (k) to read as follows:

§ 327.8 Definitions.

* * * * *

(h) As used in § 327.6(a), the following terms are given the following meanings:

(1) *Surviving institution.* The term *surviving institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(2) *Terminating institution.* The term *terminating institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a terminating transfer.

(3) *Terminating transfer.* The term *terminating transfer* means the assumption by one insured depository institution of another insured depository institution's liability for deposits, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, when the terminating institution goes out of business or transfers all or substantially all its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments by or at the end of the semiannual period during which such assumption of liability for deposits occurs. The term *terminating transfer* does not refer to the assumption of liability for deposits from the estate of a failed institution, or to a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution.

* * * * *

(j) *Primary fund.* The *primary fund* of an insured depository institution is the insurance fund of which the institution is a member.

(k) *Secondary fund.* The *secondary fund* of an insured depository institution is the insurance fund that is not the primary fund of the institution.

4. Section 327.32 is amended by revising paragraph (a)(1), (a)(2), and (a)(4) introductory text, and removing paragraph (a)(5), to read as follows:

§ 327.32 Computation and payment of assessment.

(a) *Rate of assessment*—(1) *BIF and SAIF member rates.* (i) Except as provided in paragraph (a)(2) of this section, and consistent with the provisions of § 327.4, the assessment to be paid by an institution that is subject to this subpart B shall be computed at the rate applicable to institutions that are members of the primary fund of such institution. (ii) Such applicable rate shall be applied to the institution's assessment base less that portion of the assessment base which is equal to the institution's adjusted attributable deposit amount.

(2) *Rate applicable to the adjusted attributable deposit amount.* Notwithstanding paragraph (a)(1)(i) of this section, that portion of the assessment base of any acquiring, assuming, or resulting institution which is equal to the adjusted attributable deposit amount of such institution shall:

(i) Be subject to assessment at the assessment rate applicable to members of the secondary fund of such institution pursuant to subpart A of this part; and

(ii) Not be taken into account in computing the amount of any assessment to be allocated to the primary fund of such institution.

* * * * *

(4) *Deposits acquired by the institution.* As used in paragraph (a)(3)(i) of this section, the term ''deposits acquired by the institution'' means all deposits that are held in the institution acquired by such institution on the date of such transaction; provided, that if on or before June 30, 1997, the Corporation has been appointed or serves as conservator or receiver for the acquired institution, such term:

* * * * *

5. New §§ 327.33 through 327.37 are added to subpart B to read as follows:

§ 327.33 ''Acquired'' deposits.

This section interprets the phrase ''deposits acquired by the institution'' as used in § 327.32(a)(3)(i).

(a) *In general.*—(1) *Secondary-fund deposits.* The phrase ''deposits acquired by the institution'' refers to deposits that are insured by the secondary fund of the acquiring institution, and does not include deposits that are insured by the acquiring institution's primary fund.

(2) *Nominal dollar amount.* Except as provided in paragraph (b) of this section, an acquiring institution is deemed to acquire the entire nominal dollar amount of any deposits that the transferring institution holds on the date

of the transaction and transfers to the acquiring institution.

(b) *Conduit deposits.*—(1) *Defined.* As used in this paragraph (b), the term ''conduit deposits'' refers to deposits that an acquiring institution has assumed from another institution (original transferor) in the course of a transaction described in § 327.31(a), and that are treated as insured by the secondary fund of the acquiring institution, but which the acquiring institution has been explicitly and specifically ordered by the Corporation, or by the appropriate federal banking agency for the institution, or by the Department of Justice to commit to re-transfer to another insured depository institution (re-transferee institution) as a condition of approval of the transaction. The commitment must be enforceable, and the divestiture must be required to occur and must occur within 6 months after the date of the initial transaction.

(2) *Treatment with respect to acquiring institution.* Conduit deposits are not considered to be acquired by the acquiring institution within the meaning of § 327.32(a)(3)(i) for the purpose of computing the acquiring institution's adjusted attributable deposit amount for a current semiannual period that begins after the end of the semiannual period following the semiannual period in which the acquiring institution re-transfers the deposits.

(3) *Treatment with respect to re-transferee institution.* Conduit deposits are treated as insured by the same insurance fund after having been acquired by the re-transferee institution as when held by the original transferor.

§ 327.34 Application of AADAs.

This section interprets the meaning of the phrase ''an insured depository institution's 'adjusted attributable deposit amount' for any semiannual period'' as used in the introductory text of § 327.32(a)(3).

(a) *In general.* The phrase ''for any semiannual period'' refers to the current semiannual period: that is, the period for which the assessment is due, and for which an institution's adjusted attributable deposit amount (AADA) is computed.

(b) *Quarterly components of AADAs.* An AADA for a current semiannual period consists of 2 quarterly AADA components. The first quarterly AADA component for the current period is determined with respect to the first quarter of the prior semiannual period, and the second quarterly AADA component for the current period is determined with respect to the second quarter of the prior period.

(c) *Application of AADAs.* The value of an AADA that is to be applied to a quarterly assessment base in accordance with § 327.32(a)(2) is the value of the quarterly AADA component for the corresponding quarter.

(d) *Initial AADAs.* If an AADA for a current semiannual period has been generated in a transaction that has occurred in the second calendar quarter of the prior semiannual period, the first quarterly AADA component for the current period is deemed to have a value of zero.

(e) *Transition rule.* Paragraphs (b), (c) and (d) of this section shall apply to any AADA for any semiannual period beginning on or after July 1, 1997.

§ 327.35 Grandfathered AADA elements.

This section explains the meaning of the phrase ''total of the amounts determined under paragraph (a)(3)(iii)'' in § 327.32(a)(3)(ii). The phrase ''total of the amounts determined under paragraph (a)(3)(iii)'' refers to the aggregate of the increments of growth determined in accordance with § 327.32(a)(3)(iii). Each such increment is deemed to be computed in accordance with the contemporaneous provisions and interpretations of such section. Accordingly, any increment of growth that is computed with respect to a semiannual period has the value appropriate to the proper calculation of the institution's assessment for the semiannual period immediately following such semiannual period.

§ 327.36 Growth computation.

This section interprets various phrases used in the computation of growth as prescribed in § 327.32(a)(3)(iii).

(a) *Annual rate.* The annual rate of growth of deposits refers to the rate, which may be expressed as an annual percentage rate, of growth of an institution's deposits over any relevant interval. A relevant interval may be less than a year.

(b) *Growth; increase; increases.* Except as provided in paragraph (c) of this section, references to ''growth'', ''increase'', and ''increases'' may generally include negative values as well as positive ones.

(c) *Growth of deposits.* ''Growth of deposits'' does not include any decrease in an institution's deposits representing deposits transferred to another insured depository institution, if the transfer occurs on or after July 1, 1996.

(d) *Quarterly determination of growth.* For the purpose of computing assessments for semiannual periods beginning on July 1, 1997, and thereafter, the rate of growth of deposits for a semiannual period, and the amount by which the sum of the amounts specified in § 327.32(a)(3)(i) and (ii) would have grown during a semiannual period, is to be determined by computing such rate of growth and such sum of amounts for each calendar quarter within the semiannual period.

§ 327.37 Attribution of transferred deposits.

This section explains the attribution of deposits to the BIF and the SAIF when one insured depository institution (acquiring institution) acquires deposits from another insured depository institution (transferring institution). For the purpose of determining whether the assumption of deposits (assumption transaction) constitutes a transaction undertaken pursuant to section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)), and for the purpose of computing the adjusted attributable deposit amounts, if any, of the acquiring and the transferring institutions after the transaction:

(a) *Transferring institution.*—(1) *Transfer of primary-fund deposits.* To the extent that the aggregate volume of deposits that is transferred by a transferring institution in a transaction, or in a related series of transactions, does not exceed the volume of deposits that is insured by its primary fund (primary-fund deposits) immediately prior to the transaction (or, in the case of a related series of transactions, immediately prior to the initial transaction in the series), the transferred deposits shall be deemed to be insured by the institution's primary fund. The primary institution's volume of primary-fund deposits shall be reduced by the aggregate amount so transferred.

(2) *Transfer of secondary-fund deposits.* To the extent that the aggregate volume of deposits that is transferred by the transferring institution in a transaction, or in a related series of transactions, exceeds the volume of deposits that is insured by its primary fund immediately prior to the transaction (or, in the case of a related series of transactions, immediately prior to the initial transaction in the series), the following volume of the deposits so transferred shall be deemed to be insured by the institution's secondary fund (secondary-fund deposits): the aggregate amount of the transferred deposits minus that portion thereof that is equal to the institution's primary-fund deposits. The transferring institution's volume of secondary-fund deposits shall be reduced by the volume of the secondary-fund deposits so transferred.

(b) *Acquiring institution.* The deposits shall be deemed, upon assumption by the acquiring institution, to be insured by the same fund or funds in the same amount or amounts as the deposits were so insured immediately prior to the transaction.

By order of the Board of Directors.

Dated at Washington, D.C., this 26th day of November 1996.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 96–31207 Filed 12–9–96; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–CE–103–AD; Amendment 39–9808; AD 96–23–18]

RIN 2120–AA64

Airworthiness Directives; Aerospace Technologies of Australia Pty Ltd. (Formerly Government Aircraft Factory) Models N22B, N24A, and N22S Airplanes; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This action makes a correction to an airworthiness directive (AD) that was published in the Federal Register on November 12, 1996 (61 FR 57993), and concerns Aerospace Technologies of Australia Pty Ltd. (ASTA) Models N22B, N24A, and N22S airplanes. The AD number for that action should be AD 96–23–18, but was referenced as AD 96–23–03. The AD currently requires replacing the existing fuselage stub fin plate with one of improved design. This action corrects the AD to reflect the correct AD number.

EFFECTIVE DATE: December 23, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Ron Atmur, Aerospace Engineer, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard., Lakewood, California 90712; telephone (310) 627–5224; facsimile (310) 627–5210.

SUPPLEMENTARY INFORMATION: On October 28, 1996, the FAA issued an airworthiness directive (AD), Amendment 39–9808 (61 FR 57993, November 12, 1996), to require replacing the existing fuselage stub fin plate with one of improved design on ASTA Models N22B, N24A, and N22S airplanes.

Need for the Correction

The AD number for that action should be AD 96–23–18, but was referenced as AD 96–23–03. As written, operators of the ASTA Models N22B, N24A, and N22S airplanes would be referencing the wrong AD in their logbook, thus creating confusion as to whether the operator had complied with the AD.

Action is taken herein to correct this reference in Amendment 39–9808 and to add this AD correction to § 39.13 of the Federal Aviation Regulations (14 CFR 39.13).

The effective date remains December 23, 1996.

Correction of Publication

Accordingly, the publication of November 12, 1996 (61 FR 57993), of Amendment 39–9808; AD 96–23–03, which was the subject of FR Doc. 96–28164, is corrected as follows:

On page 57993, in the first column, in the fifth line of the heading of the document, replace AD 96–23–03 with AD 96–23–18.

§ 39.13 [Corrected]

On page 57994, in the first column, § 39.13, the first line of the AD, replace 96–23–03 with 96–23–18.

Issued in Kansas City, Missouri on December 2, 1996.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–31264 Filed 12–9–96; 8:45 am]

BILLING CODE 4910–13–U

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 30

Foreign Futures and Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC''), subject to the conditions specified below, is granting to designated Dealers of the New Zealand Futures and Options Exchange (''Exchange'' or ''NZFOE'') the following relief: Exemption under Commission rule 30.10, 17 CFR 30.10 (1996), from application of certain of the Commission's foreign futures and options rules to solicit and accept orders from United States customers for otherwise permitted transactions on the NZFOE and on any non-U.S. exchange [1] where such Dealers are permitted under New Zealand law to conduct futures business for customers; and confirmation of the applicability of the Limited Marketing Orders.

EFFECTIVE DATE: January 9, 1997.

FOR FURTHER INFORMATION CONTACT: Jane C. Kang, Esq., or Marianne A. Bueno, Esq., Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581. Telephone: (202) 418–5430.

SUPPLEMENTARY INFORMATION: On July 23, 1987, the Commission adopted final rules governing the domestic offer and sale of commodity futures and option contracts traded on or subject to the rules of a foreign board of trade.[2] These rules, which are codified in Part 30 of the Commission's regulations,[3] generally extend the Commission's existing customer protection regulations for products offered or sold on contract markets in the United States to foreign futures and option products [4] sold to U.S. customers by imposing requirements with respect to registration, disclosure, capital adequacy, protection of customer funds, recordkeeping and reporting, sales practice and compliance procedures that are generally comparable to those applicable to wholly domestic transactions.

In formulating a regulatory program to govern the offer and sale of foreign futures and options products to U.S. customers, the Commission, among other things, considers the potential extraterritorial impact of such a program and the desirability of avoiding duplicative regulation of firms engaged

[1] The term ''non-U.S. exchange'' refers to a foreign board of trade which is defined in Commission rule 1.3 (ss), 17 CFR 1.3(ss) (1996) as:

Any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated, where foreign futures or foreign options transactions are entered into.

Thus, contracts that are traded on a market that has been designated as a contract market pursuant to section 5 of the Commodity Exchange Act (''CEA'' or ''Act'') are not within the scope of this Order.

[2] 52 FR 28980 (Aug. 5, 1987).

[3] 17 CFR Part 30 (1996).

[4] Commission rule 30.1(a), 17 CFR 30.1(a) (1996), defines the term ''foreign futures'' as ''any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade.''

Commission rule 30.1(b), 17 CFR 30.1(b) (1996), defines the term ''foreign option'' as ''any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty', made on or subject to the rules of any foreign board of trade.''