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**Bruce Summers,**  
Administrator.

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## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 327 and 337

RIN 3064-AE89

#### Limited Exception for a Capped Amount of Reciprocal Deposits From Treatment as Brokered Deposits

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is amending its regulations that implement brokered deposits and interest rate restrictions to conform with recent changes to section 29 of the Federal Deposit Insurance Act made by section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act related to reciprocal deposits, which took effect on May 24, 2018. The FDIC is also making conforming amendments to the FDIC's regulations governing deposit insurance assessments.

**DATES:** This rule will be effective March 6, 2019.

**FOR FURTHER INFORMATION CONTACT:**

Division of Risk Management Supervision: Thomas F. Lyons, Chief, Policy and Program Development, (202) 898-6850, [tlyons@fdic.gov](mailto:tlyons@fdic.gov); Judy Gross, Senior Policy Analyst, (202) 898-7047, [jugross@fdic.gov](mailto:jugross@fdic.gov). Division of Insurance and Research: Ashley Mihalik, Chief, Banking and Regulatory Policy, (202) 898-3793, [amihalik@fdic.gov](mailto:amihalik@fdic.gov). Legal Division: Vivek V. Khare, Counsel, (202) 898-6847, [vkhare@fdic.gov](mailto:vkhare@fdic.gov); Thomas Hearn, Counsel, (202) 898-6967, [thohearn@fdic.gov](mailto:thohearn@fdic.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Policy Objectives

The policy objective of the final rule is to implement section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, codified in 12 U.S.C. 1831f, which took effect on May 24, 2018.<sup>1</sup> The main effect of the legislation and the final rule is to permit FDIC-insured financial institutions, under certain circumstances, to except certain amounts of reciprocal deposits from treatment as brokered deposits.

<sup>1</sup> Public Law 115-174, 132 Stat. 1296-1368 (2018).

#### II. Background

The Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act) was enacted on May 24, 2018.<sup>2</sup> Section 202 of the Act amends section 29 of the Federal Deposit Insurance Act (FDI Act)<sup>3</sup> to except a capped amount of reciprocal deposits from treatment as brokered deposits for certain insured depository institutions. In addition, section 202 ensures that the interest rate restrictions in section 29 remain applicable to *any* deposit, including reciprocal deposits, whether or not they meet the limited exception. Section 202 was effective immediately upon enactment.

As more fully discussed below, well-capitalized institutions are not restricted from accepting or soliciting brokered deposits and have no restrictions on the rates they pay on deposits. However, under section 29, less than well-capitalized institutions may generally not accept, renew, or roll-over brokered deposits and may not offer rates on any deposits that are significantly higher than the prevailing rates in the institution's normal market area. Section 29 defines the term "deposit broker" and provides a list of exclusions to that term. Funds obtained through a deposit broker are considered brokered deposits. Section 202 amends section 29 to provide that a capped amount of reciprocal deposits will not be considered funds obtained through a deposit broker for certain insured depository institutions, and thus such deposits will be non-brokered. Reciprocal deposits that do not meet the section 202 exception are brokered deposits under section 29.

##### A. Section 29 of the FDI Act

Under section 29 of the FDI Act, an insured depository institution that is less than well capitalized is restricted from accepting deposits by or through a deposit broker.<sup>4</sup> The FDIC may, however, waive this restriction if the insured depository institution is adequately capitalized; the restriction cannot be waived if the institution is less than adequately capitalized.<sup>5</sup> Section 29 also imposes restrictions on the deposit interest rates that an insured depository institution may offer if the institution is not well capitalized.<sup>6</sup> These interest rate restrictions cannot be waived. Section 337.6 of the FDIC's Rules and Regulations implements

<sup>2</sup> Public Law 115-174, 132 Stat. 1296-1368 (2018).

<sup>3</sup> See 12 U.S.C. 1831f.

<sup>4</sup> 12 U.S.C. 1831f(a).

<sup>5</sup> 12 U.S.C. 1831f(c).

<sup>6</sup> See generally, 12 U.S.C. 1831f.

section 29 of the FDI Act.<sup>7</sup> Through this regulation, the FDIC has largely tracked the statutory definition of "deposit broker" and its exceptions.

A "deposit broker," as defined by section 29 of the FDI Act, includes "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties. . . ." Under the FDIC's regulations, a "brokered deposit" is thus defined as a deposit accepted through a "deposit broker."<sup>8</sup> The definition of "deposit broker" is subject to nine statutory exceptions in section 29 and one regulatory exception.<sup>9</sup>

##### B. Reciprocal Deposits

The reciprocal deposit arrangement is based upon a network of banks that place funds at other participating banks in order for depositors to receive insurance coverage for the entire amount of their deposits.<sup>10</sup> In these arrangements, institutions within the network are both sending and receiving identical amounts of deposits simultaneously. Because reciprocal arrangements can be complex, and involve numerous banks, they are often managed by a third-party network sponsor. As a result of this arrangement, the institutions themselves (along with the third-party network sponsors) are "in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions."<sup>11</sup> The involvement of deposit brokers within the reciprocal network means the deposits are brokered deposits.<sup>12</sup>

For assessment purposes, reciprocal deposits have been treated more favorably than other types of brokered deposits. In 2009, through rulemaking, the FDIC amended its risk-based assessment rate methodology for small institutions (generally, insured depository institutions with less than \$10 billion dollars in total assets).<sup>13</sup> In that rulemaking, the FDIC added an "adjusted brokered deposit ratio" that

<sup>7</sup> 12 U.S.C. 1831f(a).

<sup>8</sup> 12 CFR 337.6(a)(2).

<sup>9</sup> 12 U.S.C. 1831 f(g)(2), (i); 12 CFR 337.6(a)(5)(ii)(I); see also, 57 FR 23933-01 (June 5, 1992).

<sup>10</sup> See FDIC Advisory Opinion No. 03-03 (July 29, 2003).

<sup>11</sup> Excerpt of the definition of "deposit broker." 12 U.S.C. 1831f.

<sup>12</sup> See FDIC's 2011 Study on Core and Brokered Deposits, issued July 2011, Sections IV.E. and VIII.E.

<sup>13</sup> 74 FR 9525 (Mar. 4, 2009).

applied to small institutions that were well capitalized and well rated. This ratio measured the extent to which significant reliance on brokered deposits helped to fund rapid asset growth. After consideration of comments received in response to the proposed rule, reciprocal deposits were not included as part of the adjusted brokered deposit ratio. In its final rule, the FDIC stated that “[it] recognizes that reciprocal deposits may be a more stable source of funding for healthy banks than other types of brokered deposits and that they may not be as readily used to fund rapid asset growth.”<sup>14</sup> When the FDIC updated its risk-based assessment rate methodology for established small institutions in 2016, it replaced the adjusted brokered deposit ratio with a new brokered deposit ratio.<sup>15</sup> The new ratio, which measures significant reliance on brokered deposits (rapid asset growth is considered as a separate measure) and applies to all established small institutions, continues to exclude reciprocal deposits for institutions that are both well capitalized and well rated.<sup>16</sup> Thus, for well capitalized, well rated institutions under \$10 billion, reciprocal deposits continue to generally have no impact on assessments.

### C. Notice of Proposed Rulemaking

Prior to enactment of the Act, all reciprocal deposits were classified as brokered deposits.<sup>17</sup> Section 202 of the Act amends section 29 of the FDI Act to except a capped amount of reciprocal deposits from treatment as brokered deposits for certain insured depository institutions. Section 202’s amendments took effect upon enactment on May 24, 2018.

Section 202 defines “reciprocal deposits” as “deposits received by an agent institution through a deposit placement network with the same maturity (if any) and in the same aggregate amount as covered deposits placed by the agent institution in other network member banks.” Network member banks may receive other deposits through a network such as (1) deposits received without the institution placing into the network a deposit of the same maturity and same aggregate amount (sometimes referred to as “one-way network deposits”) and (2) deposits placed by the institution into the network where the deposits were

obtained, directly or indirectly, by or through a deposit broker. Such other network deposits meet the definition of brokered deposits but would not meet the definition of reciprocal deposits. Thus, these deposits would not be eligible to be excepted from an institution’s brokered deposits under section 202.

On September 12, 2018, the FDIC Board authorized publication of a notice of proposed rulemaking (NPR) to implement section 202. The NPR was published in the **Federal Register** on September 26, 2018, with a 30-day comment period.<sup>18</sup> In the NPR, the FDIC proposed to implement section 202’s limited exception by incorporating its provisions into § 337.6(e)(2) of the brokered deposit rules, without change. These provisions, and their definitions, must be satisfied in order for a capped amount of reciprocal deposits to be excepted from treatment as brokered deposits. The FDIC also proposed to conform its assessment regulations with section 202 and the proposed amendments to the brokered deposit regulations.

The FDIC received twelve comments from insured depository institutions, banking associations, bank service providers, and law firms writing on behalf of institutions. The commenters generally supported the proposed rule. After careful consideration of all comments received, the FDIC is adopting as proposed the amendments to 12 CFR part 337, which incorporate section 202 of the Act, and the conforming amendments to the assessment regulations in 12 CFR part 327. Comments are discussed in the relevant sections, below.

## III. Discussion of Treatment of Reciprocal Deposits Under the Act and Final Rule

### A. Deposit Placement Network, Covered Deposits, and Network Member Bank

The term “deposit placement network” is defined in section 202 as a network in which an insured depository institution participates, together with other insured depository institutions, for the processing and receipt of reciprocal deposits. Institutions that are members of the deposit placement network are “network member banks.”

The deposits that an “agent institution” places at other banks in return for reciprocal deposits are termed “covered deposits” under section 202. The term covered deposit is defined as a deposit that (1) is submitted for placement through a deposit placement

network and (2) does not consist of funds that were obtained for the agent institution, directly or indirectly, by or through a deposit broker before submission for placement through the deposit placement network.

One commenter requested that the FDIC clarify whether deposits placed at an insured depository institution in satisfaction of Section 29’s “primary purpose exception”<sup>19</sup> would meet the definition of “covered deposit” and thus be eligible for the limited exception for reciprocal deposits.<sup>20</sup> The term “deposit broker” does not include an agent or nominee whose primary purpose is not the placement of funds with depository institutions.<sup>21</sup> Deposits placed at an insured depository institution by an entity that is not a deposit broker because it meets the primary purpose exception are not brokered. Thus, if such non-brokered deposits are submitted for placement through a deposit placement network, they may qualify as “covered deposits” eligible for the limited exception for reciprocal deposits, subject to the other requirements and definitions in section 202 and the Final Rule.

### B. Agent Institution

Consistent with section 202, § 337.6(e)(2) defines “agent institution” as an insured depository institution that places a covered deposit through a deposit placement network at other insured depository institutions in amounts that are less than or equal to the standard maximum deposit insurance amount, and specifies the interest rate to be paid for such amounts, if the insured depository institution:

- Is well capitalized<sup>22</sup> and has a composite condition of outstanding (CAMELS “1”) or good (CAMELS “2”) when most recently examined under

<sup>19</sup> See 12 U.S.C. 1831f(g)(2)(I).

<sup>20</sup> Generally, deposits placed by a third party are brokered deposits, unless the third party meets one of the exceptions to the definition of deposit broker. The commenter specifically references the primary purpose exception with respect to certain broker-dealers that place a limited amount of customer free cash balances into deposit accounts at affiliated banks as agent for their customers. These deposits have not been viewed by staff, subject to certain conditions, as brokered deposits via an advisory opinion. Note that a staff advisory opinion is not binding on the FDIC’s Board of Directors.

<sup>21</sup> 12 U.S.C. 1831f(g)(2)(I).

<sup>22</sup> See generally, 12 CFR part 325, subpart B, or 12 CFR part 324, subpart H (FDIC); 12 CFR part 208 (Board of Governors for the Federal Reserve System); 12 CFR part 6 (Office of the Comptroller of the Currency). 12 U.S.C. 1831o. “Well capitalized” is already defined in 12 CFR 337.6(a)(3)(i).

<sup>14</sup> *Id.* at 9532.

<sup>15</sup> Generally, an established small bank is a small institution that has been federally insured for at least five years. See 12 CFR 327.8(v).

<sup>16</sup> See 12 CFR 327.16(a)(1)(ii).

<sup>17</sup> See FDIC’s 2011 Study on Core and Brokered Deposits, issued July 2011, Section IV.

<sup>18</sup> 83 FR 48562 (Sept. 26, 2018).

section 10(d) of the FDI Act (described as “well rated”)<sup>23</sup>;

- has obtained a waiver pursuant to section 29(c) of the FDI Act; or
  - does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized.

### C. Caps Applicable to Agent Institutions

Consistent with section 202, under the regulation, an “agent institution” can except reciprocal deposits from being classified as brokered deposits up to its applicable statutory caps, as explained below.

#### General Cap

An agent institution may except reciprocal deposits up to the lesser of the following amounts (referred to as the *general cap*) from being classified as brokered deposits:<sup>24</sup>

- \$5 billion or
- An amount equal to 20 percent of the agent institution’s total liabilities. Reciprocal deposits in excess of the *general cap*, as well as those reciprocal deposits that do not meet section 202’s limited exception, are brokered deposits.

#### Special Cap

A *special cap* applies if the institution is either not well rated or not well capitalized. In this case, the institution may meet the definition of “agent institution” if it does not receive reciprocal deposits in excess of the *special cap*, which is the average amount of reciprocal deposits held at quarter-end during the last four quarters preceding the quarter that the institution fell below well capitalized or well rated. Thus, the *special cap* is applicable to agent institutions that were previously well capitalized and well rated. Section 202 does not provide a date by which an institution must demonstrate that its amount of

reciprocal deposits are within the *special cap*.

The FDIC will calculate an institution’s *special cap* based on information reported in its Call Reports as proposed. For an institution that falls below well rated or well capitalized, the FDIC will evaluate the institution’s compliance with the *special cap* based on Call Report data submitted for the reporting date immediately following when the determination is made.

One commenter was concerned that it would not be possible to calculate a four quarter history of reciprocal deposits until March 31, 2019, because reciprocal deposits were not defined separately from brokered deposits before section 202 was enacted on May 24, 2018. However, reciprocal deposit data prior to the date of enactment is available because institutions have reported reciprocal deposits on Call Report Schedule RC–O since June 30, 2009.<sup>25</sup>

#### Application of Statutory Caps

Below are descriptions of how the two statutory caps will apply to an agent institution based upon its capital and composite ratings.<sup>26</sup>

1. *Well capitalized and well rated.* Institutions that are both well capitalized and well rated can have non-brokered reciprocal deposits up to the *general cap*. Any amount of reciprocal deposits over the *general cap* will not meet the limited exception and therefore that amount will be considered to be “brokered deposits.” Well capitalized institutions may accept brokered deposits, including reciprocal deposits that are brokered deposits, without restrictions.

2. *Not well capitalized or not well rated.* Institutions that are either not well capitalized or not well rated are subject to the lesser of either the *special cap* or the *general cap*. The amount of reciprocal deposits within the institution’s *applicable cap* will not be considered brokered deposits. In no event, however, can an institution’s non-brokered reciprocal deposits exceed the *general cap*. With respect to an institution that is well capitalized but not well rated, if it received reciprocal

deposits above the *special cap*, it will no longer meet the definition of “agent institution.”

Institutions that are less than well capitalized, however, are subject to restrictions on the acceptance of brokered deposits, including reciprocal deposits that are brokered deposits. Because only reciprocal deposits of an agent institution that are below the applicable cap are considered non-brokered, a less than well-capitalized agent institution may not accept reciprocal deposits in excess of the *special cap*. (An adequately capitalized institution’s non-brokered reciprocal deposits may be above the *special cap* with a waiver from the FDIC, but can also never exceed the *general cap*.<sup>27</sup>)

#### Comments on the Application of the Special Cap

Two commenters objected to the proposed rule’s application of the special cap when an institution falls below well capitalized or is no longer well rated. They noted that while section 202 limits the amount an agent institution can “receive,” it does not limit amounts an agent institution can maintain, retain, or hold. Thus, according to commenters, an institution that falls below well capitalized or well rated should not be required to lower the amount of reciprocal deposits it holds within the special cap. Rather these institutions should be able to retain reciprocal deposits, even if above the special cap, so long as when those reciprocal deposits mature or roll off, the institution does not receive additional reciprocal deposits that cause its total to exceed the special cap (*i.e.*, the previous four-quarter average). One commenter argued that this interpretation is consistent with the FDIC’s current interpretation of Section 29 of the Federal Deposit Insurance Act: If an institution drops to adequately capitalized, it does not need a waiver for deposits previously accepted when it was well capitalized. In this case, the adequately capitalized institution would continue to report such deposits as brokered.

The FDIC recognizes that the statute only limits the amount of reciprocal deposits an institution may “receive” in

<sup>23</sup> CAMELS refers to Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. The effective date of a CAMELS composite rating is the date of written notification to the institution by its primary federal regulator or state authority of its supervisory rating. See *e.g.*, 12 CFR 327.4(f).

<sup>24</sup> See FFIEC Supplemental Instructions, Call Report Date, June 30, 2018 <https://www.fdic.gov/news/news/financial/2018/fil18039a.pdf>.

<sup>25</sup> Since June 30, 2009, institutions reported “Reciprocal brokered deposits” on Call Report Schedule RC–O. Until the passage of the Act, all reciprocal deposits were considered brokered deposits. As provided in the supplemental instructions to the September 30, 2018 Call Report, a new line item “Total reciprocal deposits” was proposed to be added to Schedule RC–E. In addition, the instructions note a one-time reporting line item of “Total reciprocal deposits as of June 30, 2018” (when the law was effective). These new line items track the new definition of “reciprocal deposit” in Section 202.

<sup>26</sup> For an example of Section 202’s applicability, refer to the NPR at 83 FR 48564.

<sup>27</sup> 12 U.S.C. 1831f(c). Institutions that are adequately capitalized may seek a waiver from the FDIC to accept brokered deposits. Waivers under section 29(c) are only available (1) on a case-by-case basis, (2) upon application to the FDIC, (3) to adequately capitalized institutions, and (4) upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to such institution. Less than adequately capitalized institutions (undercapitalized or significantly undercapitalized institutions) are not eligible to seek a waiver from the FDIC.

order to be considered an agent institution. Thus, an institution that is less than well capitalized or not well rated will still qualify as an agent institution if it holds a level of reciprocal deposits above the special cap, as long as (1) such deposits were received before the institution became less than well capitalized or not well rated, (2) such deposits are time deposits,<sup>28</sup> and (3) the institution satisfies all other qualifications necessary to be an agent institution. For example, an institution that is well capitalized but no longer well rated could continue to be an agent institution if it holds reciprocal time deposits that it received prior to its rating downgrade until those time deposits mature or roll off, but would no longer be an agent institution if it renewed or rolled over such deposits and doing so caused the total amount of reciprocal deposits to exceed the special cap. In this case, once the institution receives reciprocal deposits in excess of its special cap, it is no longer an agent institution. If an institution is not an agent institution, all of its reciprocal deposits should be reported as brokered deposits.

Another commenter noted that an institution that is well capitalized but not well rated may be treated the same or worse under section 202 and the proposed rule than adequately capitalized or undercapitalized institutions. This is because, under section 29(c) of the FDI Act, only an adequately capitalized institution may be an agent institution pursuant to a waiver. Thus, according to the commenter, a well-capitalized but not well-rated institution would be treated the same as an undercapitalized institution, both of which are not eligible for a waiver under section 29(c) and could only qualify as an agent institution through application of the special cap. The commenter suggested that the FDIC amend the regulation to alleviate this discrepancy in relative treatment, arguing that this would better reflect congressional intent.

Amending the final rule in the manner that the commenter suggests would be inconsistent with section 29 of the FDI Act, as well as section 202 of the Act. Section 202 unambiguously defines “agent institution” to include an institution that has obtained a waiver pursuant to paragraph (c) of section 29. Section 29 of the FDI Act only allows the FDIC to grant a waiver for adequately capitalized institutions.

<sup>28</sup> Transactional reciprocal deposits are viewed as being “received” daily.

#### D. Treatment of *De Novo* Institutions

Several commenters objected that the regulation would not allow *de novo* institutions to benefit from the limited exception for reciprocal deposits because they would not have a composite condition rating for 12 to 14 months after being in operation and would not be eligible for the special cap because they would not have a prior four quarter average of reciprocal deposits. Commenters therefore proposed that the FDIC allow *de novo* institutions to be treated as agent institutions subject to the general cap. Some commenters suggested that the FDIC treat a *de novo* institution’s pre-opening activities and approval of its business plan from both the FDIC and the chartering authority as substitute for a composite condition rating of outstanding or good. Another commenter argued that in the absence of a four quarter average of reciprocal deposits that precedes an adverse rating or an adverse capital determination, no amount of reciprocal deposits would cause its total amount of reciprocal deposits to exceed the special cap, and therefore qualifies as an agent institution.

*De novo* institutions may be eligible for the limited exception for reciprocal deposits once they meet the definition of agent institution under the statute and Final Rule, which adopts the exact language of section 202. The FDIC considered treating a *de novo* institution as well rated as commenters suggested, but section 202 specifically requires that an institution “when most recently examined under section 10(d) was found to have a composite condition of outstanding or good.” Pre-opening activities are not examinations under section 10(d) of the FDI Act.<sup>29</sup> In addition, a *de novo* institution that does not have a preceding four quarter average of reciprocal deposits would also not be able to qualify as an agent institution under the special cap prong.

*De novo* institutions that do not qualify as “agent institutions” are not prohibited from accepting reciprocal deposits, but would need to report them as brokered.

Although *de novo* institutions may not be eligible for the limited exception for reporting reciprocal deposits as non-brokered until they receive their first rating under section 10(d) of the FDI Act, the FDIC will make every effort to accelerate the timing of a *de novo* state nonmember bank’s first examination. To

<sup>29</sup> Section 10(d) requires the appropriate Federal banking agency to “conduct a full-scope, on-site examination of each insured depository institution.” 12 U.S.C. 1820(d).

this end, the FDIC will update examiner instructions to make clear to open and operating *de novo* state nonmember banks that wish to make use of the limited exemption for not reporting reciprocal deposits as brokered that they may request an accelerated on-site examination in order to obtain an examination rating. The FDIC will work with the other federal banking agencies to encourage similar supervisory treatment.

#### E. Conforming Assessments Amendments

The FDIC is finalizing as proposed the conforming amendments to its assessments regulations to be consistent with the statutory definition of reciprocal deposits. Prior to enactment of section 202, all reciprocal deposits as defined in the assessment regulations met the definition of brokered deposits. Because section 202 excepts certain reciprocal deposits from treatment as brokered deposits, the FDIC is replacing the current definition of “reciprocal deposits” in § 327.8(q) with a new term, “brokered reciprocal deposit.” A “brokered reciprocal deposit” is a “reciprocal deposit” as defined under section 202, and § 337.6(e)(2)(v), that does not meet the statute’s limited exception (for example, deposits over the applicable caps discussed above). The FDIC is also making conforming amendments to § 327.16(a)(1)(ii) and (e)(3), which reference reciprocal deposits.

For assessment purposes, “brokered reciprocal deposits” will continue to be excluded from the brokered deposit ratio for established small institutions that are well capitalized and well rated.<sup>30</sup> For new small banks and large and highly complex banks that are less than well capitalized or not well rated, “brokered reciprocal deposits” will continue to be included in an institution’s total brokered deposits for the brokered deposit adjustment.<sup>31</sup>

<sup>30</sup> The brokered deposit ratio may increase assessment rates for established small banks with brokered deposits greater than 10 percent of total assets. Since 2009, when the ratio was first used as one of the financial measures used to determine an established small bank’s assessment rate, the ratio has excluded reciprocal deposits from brokered deposits if the bank is well capitalized and well rated. See 12 CFR 327.16(a)(1)(ii).

<sup>31</sup> The brokered deposit adjustment applies to all new small institutions in Risk Categories II, III, and IV, and all large and all highly complex institutions, except large and highly complex institutions (including new large and new highly complex institutions) that are well capitalized and have a CAMELS composite rating of 1 or 2. The brokered deposit adjustment can increase assessments for institutions that have brokered deposits in excess of 10 percent of domestic deposits. See 12 CFR 327.16(e)(3).

The FDIC notes that the statutory definition of “reciprocal deposit” is substantially similar to the current regulatory definition in part 327, with one difference. Section 202’s definition of “reciprocal deposits” is limited to funds obtained from a deposit placement network in exchange for funds placed into the network that meet the definition of “covered deposits,” which excludes funds that were obtained, directly or indirectly, by or through a deposit broker before submission for placement through the deposit placement network. As such, funds that do not meet the statutory definition of “reciprocal deposit” because they are obtained in exchange for funds that the institution acquired by or through a deposit broker are “brokered deposits” and would not meet the definition of “brokered reciprocal deposits.”

One commenter supported the amendments to the assessment rules to conform to the changes in the treatment of certain reciprocal deposits. Another commenter suggested adding the term “non-brokered reciprocal deposits” to the assessment regulations in order to allow all well capitalized institutions to benefit from the reciprocal deposit limited exception. The FDIC believes this addition is unnecessary. Under the Final Rule, all institutions that qualify under section 202 will be allowed to exclude reciprocal deposits from brokered deposits for both the brokered deposit ratio and the brokered deposit adjustment. The assessments regulations, amended as proposed, only include brokered reciprocal deposits for the brokered deposit adjustment, and, for institutions that are well capitalized and well rated, exclude brokered reciprocal deposits from the brokered deposit ratio. Non-brokered reciprocal deposits would not be included in either the brokered deposit adjustment or the brokered deposit ratio by definition.

#### F. Interest Rates

Section 202 applies the statutory interest rate restrictions under section 29 to all reciprocal deposits. More specifically, section 202 amends section 29(e) of the FDI Act by ensuring that the interest rate restrictions apply to less than well capitalized banks that accept reciprocal deposits.<sup>32</sup> As a result, section 202 confirms that the current statutory and regulatory rate restrictions for less than well capitalized institutions continue to apply to *any* deposit, including a reciprocal deposit

that is a covered deposit.<sup>33</sup> To ensure consistent treatment of the interest rate restrictions under section 202, the FDIC is adopting conforming amendments to § 337.6(b)(2)(ii) of its rules and regulations as proposed. The FDIC did not receive comments objecting to the adoption of these conforming changes.

#### G. Other Brokered Deposit Comments

Several commenters suggested that the FDIC eliminate all limits on the acceptance of reciprocal deposits and two commenters suggested that the FDIC treat all reciprocal deposits as core deposits. However, section 202 did not change the definition of deposit broker in section 29 of the FDI Act and only allows a limited amount of reciprocal deposits to be excepted from being treated as brokered deposits in certain circumstances (where the institution qualifies as an agent institution). Thus, the statute does not provide a blanket exception for all reciprocal deposits to be treated as nonbrokered.

Commenters also responded to a question about whether reciprocal deposits that are no longer considered brokered deposits under section 202 would be viewed by a potential acquiring institution in the same way it views traditional retail deposits. Commenters indicated that reciprocal deposits increase franchise value. In light of these comments that taking non-brokered reciprocal deposits in failed bank transactions may provide a benefit to some acquiring banks, the FDIC will include nonbrokered reciprocal deposits in the calculation of the deposit premium paid by the assuming institution of a failed bank.

A number of commenters addressed general brokered deposit issues not specifically related to the limited exception for reciprocal deposits under section 202. For example, some commenters discussed the FDIC’s interpretation of “deposit broker” and the need to update the calculation of the national rate cap. The FDIC is planning to publish an advanced notice of proposed rulemaking (ANPR) seeking comment on all parts of the brokered deposit regulation (§ 337.6) and will consider these comments when reviewing comments on the ANPR. The FDIC encourages interested parties to submit comments about the brokered deposit regulations when the ANPR is published.

#### IV. Expected Effects

As noted previously, section 202 of the Act took effect upon enactment, and the rule will conform part 337 with the

legislation and align the assessment rules with the statute’s definition of “reciprocal deposits.” The rule applies to all FDIC-insured depository institutions. As of March 31, 2018, there were 5,616 FDIC-insured institutions.<sup>34</sup> Of these, 2,528 institutions reported having brokered deposits, which totaled \$980 billion. Of the institutions reporting brokered deposits, 1,185 institutions also reported having reciprocal deposits, totaling \$48 billion.

#### Benefits

The rule could affect deposit insurance assessments for a small number of FDIC-insured institutions. As discussed in Section II: Background, the brokered deposit ratio is one of the financial measures used to determine assessment rates for established small banks. The brokered deposit ratio may increase assessment rates for established small banks with brokered deposits greater than 10 percent of total assets.<sup>35</sup> Among these banks, those that are well capitalized and well rated can already deduct reciprocal deposits from brokered deposits and generally would not be affected by the final rule, for assessment purposes.<sup>36</sup> Furthermore, the final rule will not affect the assessment rates of any banks that do not have reciprocal deposits or whose brokered deposits comprise less than 10 percent of total assets. The FDIC estimates that fewer than ten (0.178 percent) small FDIC-insured institutions that are either not well capitalized or not well rated (or both) could have a lower assessment rate under the final rule if their reciprocal deposits are excepted from brokered deposits.<sup>37</sup> For large institutions, generally insured depository institutions with greater than \$10 billion in total assets, the final rule may alter the core deposit ratio, resulting in a change in the bank’s assessment.<sup>38</sup> The FDIC estimates that 20 (0.356 percent) FDIC-insured institutions could have a lower assessment due to the effect of the final rule on their core deposit ratio for assessment purposes, if their reciprocal

<sup>34</sup> The FDIC is analyzing expected effects based on March 31, 2018 Call Report data, which is the last available Call Report data prior to enactment of section 202 on May 24, 2018.

<sup>35</sup> All else equal, a higher brokered deposit ratio will result in a higher assessment rate.

<sup>36</sup> See 12 CFR 327.16(a)(1)(ii).

<sup>37</sup> FDIC Call Report, March 31, 2018.

<sup>38</sup> The core deposit ratio applies to large and highly-complex institutions and is measured as domestic deposits, excluding brokered deposits and uninsured non-brokered time deposits, divided by total liabilities. Reciprocal deposits that are brokered reciprocal deposits will continue to be excluded from the ratio. See 12 CFR 327.16(b) and 12 CFR part 327, appendix B to subpart A.

<sup>32</sup> 12 U.S.C. 1831f(h).

<sup>33</sup> 12 U.S.C. 1831f(g)(3) and (e).

deposits are excepted from treatment as brokered. Based on data as of March 31, 2018, the FDIC estimates that no more than 30 institutions would have reduced assessment rates, all else equal, and the FDIC's aggregate assessment revenue would be reduced by an estimated \$4.3 million annually.

Adequately capitalized institutions may also benefit from the final rule through a reduction in administrative costs. Before this rule change, these institutions must have sought and received a regulatory waiver from the FDIC in order to accept brokered deposits.<sup>39</sup> The Final Rule allows these institutions that previously accepted reciprocal deposits to continue to receive reciprocal deposits up to the lesser of the *general* or *special cap* without requesting a waiver. This allowance results in a de minimis savings of administrative expenses for affected institutions. The number of institutions that may benefit from this reduction in administrative costs is difficult to accurately estimate with available data because it depends on the specific financial conditions of each bank, fluctuating market conditions for reciprocal deposits, and future management decisions.

Undercapitalized institutions also benefit from the final rule by being allowed to accept reciprocal deposits up to the lesser of either the *general* or *special cap*, even though they are otherwise prohibited from receiving brokered deposits.<sup>40</sup> Before this rule change, undercapitalized institutions could not solicit or accept any reciprocal deposits because all reciprocal deposits were treated as brokered deposits. Because the final rule excepts a certain amount of reciprocal deposits from treatment as brokered, undercapitalized institutions that, when better capitalized, previously accepted reciprocal deposits may now be allowed to receive reciprocal deposits up to the lesser of the *general* or *special cap* despite being undercapitalized. If undercapitalized institutions can receive reciprocal deposits, the result may be increased utilization of reciprocal deposits in the future. However, this effect is difficult to estimate with available data because the decision to receive reciprocal deposits depends on the specific financial conditions of each bank, fluctuating market conditions for reciprocal deposits, and future management decisions.

As of March 31, 2018, there were 2,528 (45 percent) institutions that

reported holding some amount of brokered deposits and 1,185 (21 percent) that reported holding some amount of reciprocal deposits. The changes could affect some metrics that rely on the amount of brokered deposits reported on the Call Report, such as:

- Net Noncore Funding Dependence Ratio
- Brokered Deposits maturing in less than one year to Brokered Deposits Ratio
- Brokered Deposits to Deposits Ratio
- Listing Service and Brokered Deposits to Deposits Ratio
- Reciprocal Brokered Deposits to Total Brokered Deposits Ratio

#### Costs

With regard to the difference in the previous regulatory definition of "reciprocal deposits" for assessment purposes, which was added pursuant to the FDIC's assessment authority under section 7 of the FDI Act, and the statutory definition of reciprocal deposits that was added to section 29 of the FDI Act, the FDIC notes that banks do not report data on the amount (if any) of deposits that were obtained, directly or indirectly, by or through a deposit broker before submission for placement through the deposit placement network. As a result, the FDIC cannot estimate whether this change to align the assessment regulation definition of "reciprocal deposits" with the statutory definition of that term in section 29 of the FDI Act would affect the amount of reciprocal deposits that a bank would report or whether it would affect any bank's assessment rate.

With regard to costs to the Deposit Insurance Fund, the FDIC estimates that, assuming all currently reported reciprocals align with the statutory definition, all else equal, the FDIC's aggregate assessment revenue would be reduced by an estimated \$4.3 million annually. Additional reduced assessment revenue could occur if institutions shift their funding mix in ways that affect assessment rates, such as less use of traditional brokered deposits, and increased use of reciprocal deposits. Historically, when resolving failed institutions, the FDIC has found that potential acquiring institutions have generally been unwilling to pay a premium for reciprocal deposits, typically treating them consistent with other brokered deposits. It is not clear whether reciprocal deposits that are no longer treated as brokered as a result of section 202 would be viewed by potential acquiring institutions as more akin to traditional retail deposits for purposes of warranting a premium.

Additionally, the final rule could pose some additional regulatory costs associated with changes to internal systems or processes, or changes to reporting requirements.

#### V. Alternatives

The FDIC considered alternatives but believes that the final rule represents the most appropriate option. In particular, the FDIC considered whether a rulemaking implementing section 202 was necessary or appropriate, because section 202's amendments to section 29 became effective upon the Act's enactment on May 24, 2018. However, the FDIC believes that conforming § 337.6 with section 202's amendments will remove confusion that might arise if interested parties only consult § 337.6 for requirements related to brokered deposits.

Section 202 did not address the assessment rules in part 327 with respect to reciprocal deposits. The definition of "reciprocal deposits" in part 327 varies with the definition of that term in section 202. As an alternative, the FDIC considered whether it should continue to use the existing definition of "reciprocal deposits" for assessment purposes. However, the FDIC was concerned that having two different definitions of "reciprocal deposits" could cause confusion as well as undue burden in the industry, particularly for reporting purposes.

#### VI. Regulatory Analysis and Procedure

##### A. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC requested comments on this issue but received none.

##### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, generally requires an agency, in connection with a rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.<sup>41</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" to include banking organizations with total

<sup>39</sup> 12 U.S.C. 1831f(c); 12 CFR 337.6(c).

<sup>40</sup> 12 CFR 337.6(b).

<sup>41</sup> 5 U.S.C. 601 *et seq.*

assets of less than or equal to \$550 million.<sup>42</sup>

As of March 31, 2018, there were 5,616 FDIC-insured institutions, of which 4,177 are considered small entities for the purposes of RFA.<sup>43</sup>

The rule could affect deposit insurance assessments for a small number of FDIC-insured, small entities. As discussed in Section II: Background, the brokered deposit ratio is one of the financial measures used to determine assessment rates for established small banks. The brokered deposit ratio may increase assessment rates for established small banks with brokered deposits greater than 10 percent of total assets.<sup>44</sup> Among these banks, those that are well capitalized and well rated can already deduct reciprocal deposits from brokered deposits and generally would not be affected by the proposed rule, for assessment purposes.<sup>45</sup>

Furthermore, the rule will not affect the assessment rates of small banks that do not have reciprocal deposits or whose brokered deposits comprise less than 10 percent of total assets. The FDIC estimates that seven (0.2 percent) small, FDIC-insured entities that are either not well capitalized or not well rated (or both) could have a lower assessment rate under the proposed rule if their reciprocal deposits are excepted from brokered deposits.<sup>46</sup>

There are 611 (14.6 percent) small entities that report holding some amount of reciprocal deposits and 1,499 (35.9 percent) that report holding some amount of brokered deposits. These changes could affect some metrics that rely on the amount of brokered deposits reported on the Call Report, such as:

- Net Noncore Funding Dependence Ratio
- Brokered Deposits maturing in less than one year to Brokered Deposits Ratio
- Brokered Deposits to Deposits Ratio
- Listing Service and Brokered Deposits to Deposits Ratio

<sup>42</sup> The SBA defines a small banking organization as having \$550 million or less in assets, where “a financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201 (as amended, effective December 2, 2014). “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

<sup>43</sup> FDIC Call Report, March 31, 2018.

<sup>44</sup> All else equal, a higher brokered deposit ratio will result in a higher assessment rate.

<sup>45</sup> See 12 CFR 327.16(a)(1)(iii).

<sup>46</sup> FDIC Call Report, March 31, 2018.

#### • Reciprocal Brokered Deposits to Total Brokered Deposits Ratio

Based on available information, it is difficult to determine whether additional regulatory costs or costs to the Deposit Insurance Fund could result. Nonetheless, the rule could pose some additional regulatory costs associated with changes to internal systems or processes, or changes to reporting requirements. Based on the information above, the FDIC certifies that the rule will not have a significant economic impact on a substantial number of small entities.

#### C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a “major rule” within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, Title II).

#### D. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has reviewed the rule and determined that it revises certain reporting requirements that have been previously cleared by the OMB under various control numbers.<sup>47</sup>

On May 24, 2018, the Act amended various statutes administered by the Agencies and affected regulations issued by the Agencies.<sup>48</sup> As described above, certain amendments made by the Act took effect on the day of the Act’s enactment and immediately impacted institutions’ regulatory reports. In response to emergency review requests, the Agencies received approval from OMB to revise the reporting of information in the Call Reports

<sup>47</sup> The reporting requirements are found in the three Consolidated Reports of Condition and Income (Call Reports) promulgated by the Federal Financial Institutions Examination Council (FFIEC). The Call Reports are designated FFIEC 031 (Consolidated Report of Condition and Income for a Bank with Domestic and Foreign Offices); FFIEC 041 (Consolidated Report of Condition and Income for a Bank with Domestic Offices Only); and FFIEC 051 (Consolidated Report of Condition and Income for a Bank with Domestic Only and Total Assets of Less than \$1 Billion). The FFIEC constituent bank regulatory agencies (the Board of Governors of the Federal Reserve System (the Board), the Office of the Comptroller of the Currency (the OCC) and the FDIC) (the Agencies) have each obtained information collection clearances from OMB under the following Control Numbers: 7100–0036 (Board); 1557–0081 (OCC); and 3064–0052 (FDIC).

<sup>48</sup> Public Law 115–174, 132 Stat. 1296 (2018).

including the reciprocal deposits provisions described in this rule. As a result of OMB’s emergency approval of revisions to the information collections affected by the above statutory changes, the expiration date of these collections has been revised to February 28, 2019. The Agencies have begun the regular PRA process for revising and extending these information collections for three years and they published the required 60-day notice in the **Federal Register** on September 28, 2018.<sup>49</sup>

#### E. Riegle Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4701, requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.<sup>50</sup> In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The changes relating to “reciprocal deposits” and section 29 are effective upon enactment of section 202, and as described previously, institutions have already begun reporting reciprocal deposits as per the new law. This final rule relating to the amendments to part 337 of the FDIC’s regulations is effective 30 days after publication in the **Federal Register**. The rule also includes changes to conform section 202’s statutory definition of “reciprocal deposit” with the current definition of “reciprocal deposit” in the FDIC’s assessments regulations in part 327. The FDIC requested comments on any administrative burdens that the changes would place on depository institutions, including small depository institutions and customers of depository institutions and received one comment; that comment supported the change in the assessment rule. Consistent with RCDRIA, changes to the assessment

<sup>49</sup> 83 FR 49160 (Sept. 28, 2018).

<sup>50</sup> 12 U.S.C. 4802.

regulations are effective on the first day of the calendar quarter that begins after the date on which this final rule is published.

**List of Subjects**

12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

12 CFR Part 337

Banks, banking, Reporting and recordkeeping requirements, Securities, Savings associations.

**Authority and Issuance**

For the reasons stated in the preamble, the FDIC amends 12 CFR parts 327 and 337 as follows:

**PART 327—ASSESSMENTS**

■ 1. The authority citation for 12 CFR part 327 continues to read as follows:

**Authority:** 12 U.S.C. 1441, 1813, 1815, 1817–19, 1821.

■ 2. Amend § 327.8 by revising paragraph (q) to read as follows:

**§ 327.8 Definitions.**

\* \* \* \* \*

(q) *Brokered reciprocal deposits.* Reciprocal deposits as defined in § 337.6(e)(2)(v) that are not excepted from the institution’s brokered deposits pursuant to § 337.6(e).

\* \* \* \* \*

■ 3. Amend § 327.16 by:

- a. In the table in paragraph (a)(1)(ii)(A), revising the entry for “Brokered Deposit Ratio”; and
- b. In paragraph (e)(3) introductory text, removing “reciprocal deposits as defined in § 327.8(p)” and adding in its place “brokered reciprocal deposits as defined in § 327.8(q)”.

The revision reads as follows:

**§ 327.16 Assessment pricing methods—beginning the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent.**

- (a) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*
- (A) \* \* \*

**DEFINITIONS OF MEASURES USED IN THE FINANCIAL RATIOS METHOD**

Variables	Description
* * * * *	
Brokered Deposit Ratio .....	The ratio of the difference between brokered deposits and 10 percent of total assets to total assets. For institutions that are well capitalized and have a CAMELS composite rating of 1 or 2, brokered reciprocal deposits as defined in § 327.8(q) are deducted from brokered deposits. If the ratio is less than zero, the value is set to zero.
* * * * *	

**PART 337—UNSAFE AND UNSOUND BANKING PRACTICES**

■ 4. The authority citation for 12 CFR part 337 continues to read as follows:

**Authority:** 12 U.S.C. 375a(4), 375b, 1463(a)(1), 1816, 1818(a), 1818(b), 1819, 1820(d), 1828(j)(2), 1831, 1831f, 5412.

■ 5. Amend § 337.6 by revising paragraph (b)(2)(ii) introductory text, redesignating paragraph (e) as paragraph (f), and adding a new paragraph (e) to read as follows:

**§ 337.6 Brokered deposits.**

\* \* \* \* \*

- (b) \* \* \*
- (2) \* \* \*

(ii) Any adequately capitalized insured depository institution that has been granted a waiver to accept, renew or roll over a brokered deposit, or is an agent institution that receives a reciprocal deposit (under § 337.6(e)(2)(i)(C)), may not pay an effective yield on any such deposit which, at the time that such deposit is accepted, renewed or rolled over, exceeds by more than 75 basis points:

\* \* \* \* \*

(e) *Limited exception for reciprocal deposits—(1) Limited exception.* Reciprocal deposits of an agent institution shall not be considered to be funds obtained, directly or indirectly, by or through a deposit broker to the extent that the total amount of such reciprocal deposits does not exceed the lesser of:  
 (i) \$5,000,000,000; or  
 (ii) An amount equal to 20 percent of the total liabilities of the agent institution.

(2) *Additional definitions that apply to the limited exception for reciprocal deposits.* (i) *Agent institution* means an insured depository institution that places a covered deposit through a deposit placement network at other insured depository institutions in amounts that are less than or equal to the standard maximum deposit insurance amount, specifying the interest rate to be paid for such amounts, if the insured depository institution:

- (A)(1) When most recently examined under section 10(d) of the Federal Deposit Insurance Act (12 U.S.C. 1820(d)) was found to have a composite condition of outstanding or good; and
- (2) Is well capitalized;
- (B) Has obtained a waiver pursuant to paragraph (c) of this section; or

(C) Does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized.

(ii) *Covered deposit* means a deposit that:

- (A) Is submitted for placement through a deposit placement network by an agent institution; and
- (B) Does not consist of funds that were obtained for the agent institution, directly or indirectly, by or through a deposit broker before submission for placement through a deposit placement network.

(iii) *Deposit placement network* means a network in which an insured depository institution participates, together with other insured depository institutions, for the processing and receipt of reciprocal deposits.

(iv) *Network member bank* means an insured depository institution that is a



member of a deposit placement network.

(v) *Reciprocal deposits* means deposits received by an agent institution through a deposit placement network with the same maturity (if any) and in the same aggregate amount as covered deposits placed by the agent institution in other network member banks.

\* \* \* \* \*

Dated at Washington, DC, on December 18, 2018.

By Order of the Board of Directors.  
Federal Deposit Insurance Corporation.

**Valerie Best,**

*Assistant Executive Secretary.*

[FR Doc. 2018–28137 Filed 2–1–19; 8:45 am]

BILLING CODE 6714–01–P

## FARM CREDIT ADMINISTRATION

### 12 CFR Part 622

RIN 3052–AD33

#### Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation

**AGENCY:** Farm Credit Administration.

**ACTION:** Final rule.

**SUMMARY:** This regulation implements inflation adjustments to civil money penalties (CMPs) that the Farm Credit Administration (FCA) may impose or enforce pursuant to the Farm Credit Act of 1971, as amended (Farm Credit Act), and pursuant to the Flood Disaster Protection Act of 1973, as amended by the National Flood Insurance Reform Act of 1994 (Reform Act), and further amended by the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act).

**DATES:** *Effective date:* This regulation is effective on February 4, 2019.

*Applicability date:* The inflation-adjusted CMP were applicable beginning January 15, 2019.

**FOR FURTHER INFORMATION CONTACT:**

Michael T. Wilson, Policy Analyst,  
Office of Regulatory Policy, Farm  
Credit Administration, McLean, VA  
22102–5090, (703) 883–4124, TTY  
(703) 883–4056,

Or

Autumn R. Agans, Senior Attorney,  
Office of General Counsel, Farm  
Credit Administration, McLean, VA  
22102–5090, (703) 883–4082, TTY  
(703) 883–4056.

**SUPPLEMENTARY INFORMATION:**

#### I. Objective

The objective of this regulation is to adjust the maximum CMPs for inflation

through a final rulemaking to retain the deterrent effect of such penalties.

## II. Background

### A. Introduction

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (1996 Act) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) (collectively, 1990 Act, as amended), requires all Federal agencies with the authority to enforce CMPs to evaluate and adjust, if necessary, those CMPs each year to ensure that they continue to maintain their deterrent value and promote compliance with the law. Section 3(2) of the 1990 Act, as amended, defines a civil monetary penalty<sup>1</sup> as any penalty, fine, or other sanction that: (1) Either is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.<sup>2</sup>

The FCA imposes and enforces CMPs through the Farm Credit Act<sup>3</sup> and the Flood Disaster Protection Act of 1973, as amended. FCA's regulations governing CMPs are found in 12 CFR parts 622 and 623. Part 622 establishes rules of practice and procedure applicable to formal and informal hearings held before the FCA, and to formal investigations conducted under the Farm Credit Act. Part 623 prescribes rules regarding persons who may practice before the FCA and the circumstances under which such persons may be suspended or debarred from practice before the FCA.

### B. CMPs Issued Under the Farm Credit Act

The Farm Credit Act provides that any Farm Credit System (System) institution or any officer, director, employee, agent, or other person participating in the conduct of the affairs of a System institution who violates the terms of a cease-and-desist order that has become final pursuant to section 5.25 or 5.26 of the Farm Credit Act must pay up to a maximum daily

amount of \$1,000<sup>4</sup> during which such violation continues. This CMP maximum was set by the Farm Credit Amendments Act of 1985, which amended the Farm Credit Act. Orders issued by the FCA under section 5.25 or 5.26 of the Farm Credit Act include temporary and permanent cease-and-desist orders. In addition, section 5.32(h) of the Farm Credit Act provides that any directive issued under sections 4.3(b)(2), 4.3A(e), or 4.14A(i) of the Farm Credit Act “shall be treated” as a final order issued under section 5.25 of the Farm Credit Act for purposes of assessing a CMP.

Section 5.32(a) of the Farm Credit Act also states that “[a]ny such institution or person who violates any provision of the [Farm Credit] Act or any regulation issued under this Act shall forfeit and pay a civil penalty of not more than \$500<sup>5</sup> per day for each day during which such violation continues.” This CMP maximum was set by the Agricultural Credit Act of 1987, which was enacted in 1988, and amends the Farm Credit Act. Current, inflation-adjusted CMP maximums are set forth in existing § 622.61 of FCA regulations.<sup>6</sup>

The FCA also enforces the Flood Disaster Protection Act of 1973,<sup>7</sup> as amended by the National Flood Insurance Reform Act of 1994,<sup>8</sup> which requires FCA to assess CMPs for a pattern or practice of committing certain specific actions in violation of the National Flood Insurance Program. The existing maximum CMP for a violation under the Flood Disaster Protection Act of 1973 is \$2,000.<sup>9 10</sup>

### C. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015

#### 1. In General

The 2015 Act required all Federal agencies to adjust the CMPs yearly, starting January 15, 2017.

Under Section 4(b) of the 1990 Act, as amended, annual adjustments are to be

<sup>4</sup> The inflation-adjusted CMP in effect on January 15, 2018, for a violation of a final order is \$2,269 per day, as set forth in § 622.61(a)(1) of FCA regulations.

<sup>5</sup> The inflation-adjusted CMP in effect on January 15, 2018, for a violation of the Farm Credit Act or a regulation issued under the Farm Credit Act is \$1,026 per day, as set forth in § 622.61(a)(2) of FCA regulations.

<sup>6</sup> Prior adjustments were made under the 1990 Act.

<sup>7</sup> 42 U.S.C. 4012a.

<sup>8</sup> Public Law 103–325, title V, 108 Stat. 2160, 2255–87 (September 23, 1994).

<sup>9</sup> Public Law 112–141, 126 Stat. 405 (July 6, 2012).

<sup>10</sup> The inflation-adjusted CMP in effect on January 15, 2018, for a flood insurance violation is \$2,133, as set forth in § 622.61(b) of FCA regulations.

<sup>1</sup> Note: While the 1990 Act, as amended by 1996 and 2015 Acts, uses the term “civil monetary penalties” for these penalties or other sanctions, the Farm Credit Act and the FCA Regulations use the term “civil money penalties.” Both terms have the same meaning. Accordingly, this rule uses the term civil money penalty, and both terms may be used interchangeably.

<sup>2</sup> See 28 U.S.C. 2461 note.

<sup>3</sup> Public Law 92–181, as amended.