reserves and the depository institution's contractual clearing balance, if any, and then subtracting from this product the depository institution's clearing balance allowance, if any; or

(2) $50,000, minus the depository institution's clearing balance allowance, if any. Any carryover not offset during the next period may not be carried over to subsequent periods.

§ 204.7 [Removed]

■ 8. Section 204.7 is removed.

§ 204.6 [Redesignated as § 204.7]

■ 9. Section 204.6 is redesignated as § 204.7.

■ 10. New § 204.6 is added to read as follows:

§ 204.6 Charges for reserve deficiencies.

(a) Deficiencies in a depository institution's required reserve balance, after application of the carryover provided in § 204.5(e), are subject reserve-deficiency charges. Federal Reserve Banks are authorized to assess charges for deficiencies in required reserves at a rate of 1 percentage point per year above the primary credit rate, as provided in § 201.51(a) of this chapter, in effect for borrowings from the Federal Reserve Bank on the first day of the calendar month in which the deficiencies occurred. Charges shall be assessed on the basis of daily average deficiencies during each maintenance period. Reserve Banks may, as an alternative to levying monetary charges, after consideration of the circumstances involved, permit a depository institution to eliminate deficiencies in its required reserve balance by maintaining additional reserves during subsequent reserve maintenance periods.

(b) Reserve Banks may waive the charges for reserve deficiencies except when the deficiency arises out of a depository institution's gross negligence or conduct that is inconsistent with the principles and purposes of reserve requirements. Decisions by Reserve Banks to waive charges are based on an evaluation of the circumstances in each individual case and the depository institution's reserve maintenance record. For example, a waiver may be appropriate for a small charge or once during a two-year period for a deficiency that does not exceed a certain percentage of the depository institution's required reserves. If a depository institution has demonstrated a lack of due regard for the proper maintenance of required reserves, the Reserve Bank may decline to exercise the waiver privilege and assess all charges regardless of amount or reason for the deficiency.

(c) In individual cases, where a Federal supervisory authority waives a liquidity requirement, or waives the penalty for failing to satisfy a liquidity requirement, the Reserve Bank in the District where the involved depository institution is located shall waive the reserve requirement imposed under this part for such depository institution when requested by the Federal supervisory authority involved.

(d) Violations of this part may be subject to assessment of civil money penalties by the Board under authority of Section 19(1) of the Federal Reserve Act (12 U.S.C. 505) as implemented in 12 CFR part 263. In addition, the Board and any other Federal financial institution supervisory authority may enforce this part with respect to depository institutions subject to their jurisdiction under authority conferred by law to undertake cease and desist proceedings.

PART 209—ISSUE AND CANCELLATION OF FEDERAL RESERVE BANK CAPITAL STOCK (REGULATION I)

■ 10. The authority citation for part 209 continues to read as follows:

Authority: 12 U.S.C. 2222, 248, 282, 286–288, 321, 323, 327–328, 333, and 466.

■ 11. § 209.2 is amended by revising paragraph (c)(1) to read as follows:

§ 209.2 Banks desiring to become member banks.

* * * * *

(c) * * *

(1) *General rule.* For purposes of this part, a national bank or a State bank is located in the Federal Reserve District that contains the location specified in the bank's charter or organizing certificate, or as specified by the institution's primary regulator, or if no such location is specified, the location of its head office, unless otherwise determined by the Board under paragraph (c)(2) of this section.

* * * * *

By order of the Board of Governors of the Federal Reserve System, May 22, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–12431 Filed 5–28–09; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AD35

Special Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: Pursuant to section 7(b)(5) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(b)(5), the FDIC is adopting a final rule to impose a 5 basis point special assessment on each insured depository institution's assets minus Tier 1 capital as of June 30, 2009. The amount of the special assessment for any institution, however, will not exceed 10 basis points times the institution's assessment base for the second quarter 2009 risk-based assessment. The special assessment will be collected on September 30, 2009. The final rule also provides that if, after June 30, 2009, the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level that shall be close to or below zero at the end of any calendar quarter, the Board, by vote, may impose additional special assessments of up to 5 basis points on all insured depository institutions based on each institution's total assets minus Tier 1 capital reported on the report of condition for that calendar quarter. Any single additional special assessment will not exceed 10 basis points times the institution's assessment base for the corresponding quarter's risk-based assessment. The earliest possible date for imposing any such additional special assessment under the final rule would be September 30, 2009, with collection on December 30, 2009. The latest possible date for imposing any such additional special assessment under the final rule would be December 31, 2009, with collection on March 30, 2010. Authority to impose any additional special assessments under the final rule terminates on January 1, 2010.

DATES: *Effective Date:* June 30, 2009.

FOR FURTHER INFORMATION CONTACT: Munsell W. St. Clair, Acting Chief, Fund Analysis and Pricing Section, Division of Insurance and Research, (202) 898–8967; Christopher Bellotto, Counsel, Legal Division, (202) 898–3801 or Sheikha Kapoor, Senior Attorney, Legal Division, (202) 898–3960; Donna Saulnier, Manager, Assessment Policy Section, Division of Finance (703) 562–6167.

SUPPLEMENTARY INFORMATION:

I. Background

Recent and anticipated failures of FDIC-insured institutions resulting from deterioration in banking and economic conditions have significantly increased losses to the Deposit Insurance Fund (the fund or the DIF). The reserve ratio of the DIF declined from 1.22 percent as of December 31, 2007, to 0.40 percent (preliminary) as of December 31, 2008, and is expected to decline further by March 31, 2009. Twenty-five institutions failed in 2008, and the FDIC projects a substantially higher rate of institution failures this year and in the next few years, leading to a further decline in the reserve ratio. (As of May 15, 2009, 33 institutions had failed in 2009.) Because the fund reserve ratio fell below 1.15 percent as of June 30, 2008, and was expected to remain below 1.15 percent, the Federal Deposit Insurance Reform Act of 2005 (the Reform Act) required the FDIC to establish and implement a Restoration Plan that would restore the reserve ratio to at least 1.15 percent within five years, absent extraordinary circumstances.[1]

On October 7, 2008, the FDIC established a Restoration Plan for the DIF.[2] The Restoration Plan called for the FDIC to set assessment rates such that the reserve ratio would return to 1.15 percent within five years. The plan also required the FDIC to update its loss and income projections for the fund and, if needed to ensure that the fund reserve ratio reached 1.15 percent within five years, increase assessment rates. The FDIC amended the Restoration Plan on February 27, 2009, and extended the time within which the reserve ratio must be returned to 1.15 percent from five years to seven years due to extraordinary circumstances.[3] The FDIC also adopted a final rule (the assessments final rule) that, among other things, set quarterly initial base assessment rates at 12 to 45 basis points beginning in the second quarter of 2009.[4] However, given the FDIC's estimated losses from projected institution failures, these assessment rates will not be sufficient to return the fund reserve ratio to 1.15 percent within seven years and are unlikely to prevent the DIF fund balance and reserve ratio from falling to near zero or becoming negative in 2009.

[1] Section 7(b)(3)(E) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(b)(3)(E).

[2] 74 FR 61598 (October 16, 2008).

[3] 74 FR 9564 (Mar. 4, 2009).

[4] 74 FR 9525 (Mar. 4, 2009).

II. Interim Rule With Request for Comment

On February 27, 2009, the FDIC, using its statutory authority under section 7(b)(5) of the FDI Act (12 U.S.C. 1817(b)(5)), adopted an interim rule with request for comment imposing a 20 basis point special assessment on June 30, 2009, to be collected on September 30, 2009, at the same time that the regular quarterly risk-based assessments for the second quarter of 2009 are collected.[5] Under the interim rule with request for comment, the assessment base for the special assessment was the same as the assessment base for the second quarter risk-based assessment.

The interim rule with request for comment also provided that, after June 30, 2009, if the reserve ratio of the DIF is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to or below zero at the end of any calendar quarter, the Board, by vote, may impose a special assessment of up to 10 basis points as of the end of any such quarter based on each institution's assessment base calculated pursuant to 12 CFR 327.5 for the corresponding assessment period.

III. Comments Received

The FDIC sought comments on every aspect of the interim rule with request for comment, with six particular issues posed. The FDIC received over 14,000 comments, which are discussed in section V below.

IV. Final Rule

The final rule differs in several ways from the interim rule with request for comment. The final rule imposes a 5 basis point special assessment on each institution's assets minus Tier 1 capital as reported on the report of condition as of June 30, 2009, rather than a 20 basis point special assessment on each institution's assessment base for the second quarter 2009 risk-based assessment, as provided in the interim rule with request for comment. The amount of the special assessment for any institution, however, will not exceed 10 basis points times the institution's assessment base for the second quarter 2009 risk-based assessment. The special assessment will be collected on September 30, 2009.

The FDIC estimates that the total amount collected under the special assessment will approximately equal the amount that would have been collected by imposing approximately a 7 and one-third basis point special assessment on the aggregate industry assessment base for the second quarter 2009 risk-based assessment. For all institutions, the assessment rate in the final rule will result in a much smaller assessment than under the interim rule with request for comment.

[5] 74 FR 9338 (Mar. 4, 2009).

According to the FDIC's projections, the special assessment, combined with the rates adopted in the final assessment rule in February 2009, should result in maintaining a year-end 2009 fund balance and reserve ratio that are positive, albeit close to zero.[6, 7] It is important, however, to recognize the inherent uncertainty in these projections. Given the importance of maintaining a positive fund balance and reserve ratio, it is probable that an additional special assessment will be necessary, although the amount and timing of such a special assessment is uncertain.

Therefore, the final rule also provides that, if, after June 30, 2009, but before January 1, 2010, the reserve ratio of the DIF is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to or below zero at the end of any calendar quarter, the Board, by vote, may impose an additional special assessment of up to 5 basis points as of the end of any such quarter on all insured depository institutions based on each institution's total assets minus Tier 1 capital as reported on the report of condition for that calendar quarter. Any single additional special assessment will not exceed 10 basis points times the institution's assessment base for the corresponding quarter's risk-based

[6] The Helping Families Save Their Homes Act of 2009, discussed below, extends the temporary deposit insurance coverage limit increase to $250,000 (from the permanent limit of $100,000 for deposits other than retirement accounts) through the end of 2013. The legislation allows the FDIC to factor in the increase in the coverage limit for assessment purposes. Institutions do not currently report the amount of deposits insured above $100,000 (except for retirement accounts). Staff estimates that when institutions begin reporting estimated insured deposits that reflect the higher coverage limit (probably in their September 30, 2009 reports of condition), projected reserve ratios (provided they are positive) will be somewhat lower than they would be using the $100,000 coverage limit. Taking the coverage limit increase into account would not, of course, convert a positive reserve ratio to a negative one.

[7] Also, according to staff's projections, the combination of the 5 basis points special assessment (without any additional special assessments) and regular assessments should return the reserve ratio to 1.15 percent in 2016, one year later than required by the amended Restoration Plan, which requires that the reserve ratio return to 1.15 percent by the end of 2015. It should be noted that the Restoration Plan allows the FDIC the flexibility to adjust assessment rates as needed throughout the plan period to ensure that the fund reserve ratio reaches 1.15 percent within seven years (loss and income projections must be updated at least semiannually).

assessment. The interim rule with request for comment had allowed additional special assessments of up to 10 basis points on the assessment base used for quarterly risk-based assessments.

The earliest any such additional special assessment could be imposed under the final rule would be September 30, 2009, with collection on December 30, 2009. An additional special assessment of up to 5 basis points may be needed and the FDIC will consider whether to impose such an additional special assessment later in 2009, but the amount and timing of any additional special assessment remain uncertain.

Authority to impose any additional special assessments terminates under this rule on January 1, 2010. The FDIC's ability to collect any special assessments imposed prior to January 1, 2010, would not be affected by this termination date.

Special Assessment

The FDIC realizes that assessments are a significant expense, particularly during a financial crisis and recession when bank earnings are under pressure. Banks currently face tremendous challenges even without having to pay higher assessments. Assessments reduce the funds that banks can lend in their communities to help revitalize the economy. For that reason, the FDIC has found ways to reduce the size of the special assessment since adopting the interim rule with request for comment. The FDIC recently imposed a surcharge on senior unsecured debt guaranteed under the Temporary Liquidity Guarantee Program (TLGP). Funds collected and anticipated to be collected from this surcharge allow the FDIC to reduce somewhat the size of the special assessment.

The FDIC also requested that Congress increase the FDIC's authority to borrow from Treasury. The size of the special assessment adopted in the interim rule with request for comment reflected the FDIC's need to maintain adequate resources to cover potential unforeseen losses. The FDIC had a thin cushion against unforeseen losses because its $30 billion borrowing authority from Treasury for losses from bank failures had not increased since 1991, although industry assets had more than tripled.

On May 20, 2009, Congress increased the FDIC's authority to borrow from Treasury from $30 billion to $100 billion as a part of the Helping Families Save Their Homes Act of 2009. In addition, this legislation authorized a temporary increase until December 31, 2010, in the FDIC's borrowing authority above $100 billion (but not to exceed $500 billion) based on a process that would require the concurrence of the FDIC's Board, the Federal Reserve Board, and the Secretary of the Treasury in consultation with the President. This increase in the FDIC's borrowing authority gives the FDIC a sufficient cushion against unforeseen bank failures to allow it to reduce the size of the special assessment significantly while continuing to assess at a level that maintains the DIF through industry funding. Although the industry would still pay assessments to cover projected losses and rebuild the fund over time, a lower special assessment will mitigate the pro-cyclical effects of assessments.

Nevertheless, the FDIC still needs to impose a special assessment. The FDIC currently projects approximately $70 billion in losses due to insured depository institution failures over the next five years, the great majority of which are expected to occur in 2009 and 2010. The $70 billion estimate of losses is about $5 billion higher than the FDIC's estimate in February 2009. The FDIC also currently projects that, without a special assessment, the reserve ratio of the DIF will become negative by the end of 2009. Given current projections, the FDIC expects that the special assessment will keep the DIF positive, albeit at a low level.[8]

Section 7(b)(5) of the FDI Act, governing special assessments, allows the Corporation to impose one or more special assessments on insured depository institutions in an amount determined by the Corporation for any purpose that the Corporation may deem necessary. One of the FDIC's principal purposes in imposing special assessments under this rule is to prevent the reserve ratio of the fund from declining to zero or below. The statute does not define the assessment base to be used when imposing a special assessment. Thus, the FDIC has authority to define the appropriate assessment base for the special assessment by rulemaking. *Chevron USA* v. *NRDC,* 467 U.S. 837, 843 (1984); 12 U.S.C. 1819 (a) Tenth. Moreover, prior to 1991, section 7(b)(4) of the FDI Act defined a depository institution's assessment base as the institution's liability for deposits as reported on the institution's report of condition, subject to certain statutory adjustments. The Federal Deposit Insurance Corporation Improvement Act of 1991 repealed those provisions and substituted the current risk-based assessment system provisions.[9] No specific definition of the assessment base was put in its place, thus giving the FDIC the discretion to establish the appropriate base against which to charge assessments depending on circumstances.

The interim rule with request for comment based the amount of the special assessment on the assessment base used for the regular quarterly risk-based assessments. In contrast, the final rule bases the special assessment on an institution's total assets less Tier 1 capital. After careful consideration, the FDIC has concluded that a departure from the regular risk-based assessment base is appropriate in the current circumstances because it better balances the burden of the special assessment. The FDIC has excluded Tier 1 capital from the assessment base to ensure that no institution will be penalized for holding large amounts of capital.

Unless additional special assessments are needed, all institutions will pay less than they would have under the interim rule with request for comment. Even if a second special assessment is needed, no institution will pay more than it would have paid under the interim rule with request for comment.

A 5 basis point special assessment rate based on assets minus Tier 1 capital should increase the reserve ratio as of the end of 2009 by approximately 10 basis points. According to the FDIC's projections, this 5 basis point special assessment (without any additional special assessments), combined with the rates adopted in the final assessment rule in February 2009, would return the reserve ratio to 1.15 percent in 2016, one year later than required by the amended Restoration Plan, which requires that the reserve ratio return to 1.15 percent by the end of 2015. It should be noted that the Restoration Plan allows the FDIC the flexibility to adjust assessment rates as needed throughout the plan period to ensure that the fund reserve ratio reaches 1.15 percent within seven years (loss and income projections must be updated at least semiannually).

[8] The Helping Families Save Their Homes Act of 2009, discussed above, extends the temporary deposit insurance coverage limit increase to $250,000 (from the permanent limit of $100,000 for deposits other than retirement accounts) through the end of 2013. The legislation allows the FDIC to factor in the increase in the coverage limit for assessment purposes. Institutions do not currently report the amount of deposits insured above $100,000 (except for retirement accounts). The FDIC estimates that when institutions begin reporting estimated insured deposits that reflect the higher coverage limit (probably in their September 30, 2009 reports of condition), projected reserve ratios (provided they are positive) will be somewhat lower than they would be using the $100,000 coverage limit. Taking the coverage limit increase into account would not, of course, convert a positive reserve ratio to a negative one.

[9] Section 302(a), Pub. L. 102–242, 105 Stat. 2236, 2345–48 (Dec. 19, 1991).

As part of the Restoration Plan, the FDIC has the authority to restrict the use of the one-time assessment credit while the plan is in effect, although an institution may still apply any remaining credit against its assessment to the lesser of its assessment or 3 basis points.[10] The FDIC has decided not to restrict assessment credit use in the Restoration Plan. The FDIC projects that the amount of the assessment credit remaining at the time that the special assessment is imposed on June 30, 2009, will be very small and that its use will have very little effect on assessment revenue.[11]

Effect on Capital and Earnings

The FDIC has analyzed the effect of a 5 basis point special assessment on assets minus Tier 1 capital (not to exceed 10 basis points on an institution's June 30, 2009, assessment base) on the capital and earnings of insured institutions. For this analysis, the FDIC has projected that insured institutions' earnings from April 1, 2009, through March 31, 2010, will equal their earnings from April 1, 2008, through March 31, 2009, a period that included several stressful quarters.[12] Given this projection, for the industry as a whole, the 5 basis point special assessment in 2009 would result in March 31, 2010, equity capital that would be approximately 0.2 percent lower than in the absence of a special assessment. Based on this projection for industry earnings, a 5 basis point special assessment would cause 2 institutions (with $2.9 billion in aggregate assets) whose equity-to-assets ratio would have exceeded 4 percent in the absence of such an assessment to fall below that percentage. Of these institutions, the equity-to-assets ratio of one institution (with $0.2 billion in aggregate assets) would fall below 2 percent.

For profitable institutions, the 5 basis point special assessment would result in pre-tax income for 2009 that would be 5.1 percent lower than if the FDIC did not charge the special assessment. For unprofitable institutions, pre-tax losses would increase by an average of 2.0 percent.

Further Special Assessments

The FDIC recognizes that there is considerable uncertainty about its projections for losses and insured deposit growth, and, therefore, of future fund reserve ratios. As a result, the FDIC has concluded that the need for any further special assessments should be considered periodically beginning later this year when the FDIC can use the most recently available data on fund losses and the fund reserve ratio.

Under the final rule, the Board may, by vote, impose additional special assessments of up to 5 basis points each on all insured depository institutions to further ensure that the fund reserve ratio does not decline to a level that could undermine public confidence in federal deposit insurance or to a level which shall be close to or below zero at the end of a calendar quarter. Any such special assessment would be imposed on the last day of a quarter for the remainder of 2009 (September 30 or December 31) and would be collected approximately three months later at the same time that quarterly risk-based assessments are collected. The earliest possible date that the Board, by vote, may impose such an additional special assessment is September 30, 2009 (which would be collected December 30, 2009). The latest possible date for imposing any such special assessment under the final rule would be December 31, 2009 (which would be collected on March 30, 2010). The final rule reduces the maximum size of any such additional special assessment to 5 basis points from the 10 basis points allowed by the interim rule with request for comment, and also changes the base for calculating this special assessment.

Any additional special assessment also would be based on an institution's total assets minus Tier 1 capital as reported on the report of condition for the quarter ending the date the special assessment is imposed rather than being based on the institution's assessment base. Thus, for example, a special assessment imposed on December 31, 2009, would be based on total assets minus Tier 1 capital reported for the fourth quarter of 2009 (and would be collected March 30, 2010). Any single additional special assessment is capped at 10 basis points of the institution's assessment base used for the corresponding quarter's risk-based assessment. If the FDIC needs to impose an additional special assessment larger than 5 basis points, it will do so by further rulemaking.

Near the end of the third and fourth quarters of 2009, if there is a reasonable possibility that the reserve ratio has declined to a level that could undermine public confidence in federal deposit insurance or to a level which shall be close to or below zero, staff will estimate the reserve ratio for that quarter from available data on, or estimates of, insurance fund assessment income, investment income, operating expenses, other revenue and expenses, and loss provisions (including provisions for anticipated failures). Because no data on estimated insured deposits will be available until after the quarter-end, the FDIC will assume that estimated insured deposits will increase during the quarter at the average quarterly rate over the previous four quarters.

If the FDIC estimates that the reserve ratio will fall to a level that the Board believes would adversely affect public confidence or to a level close to or below zero at the end of a calendar quarter, and the Board decides to impose a special assessment of up to 5 basis points, the FDIC will announce the imposition and rate of the special assessment no later than the last day of the quarter. As soon as practicable after any such announcement, the FDIC will have a notice published in the **Federal Register** of the imposition of the special assessment.

For example, if the FDIC estimates in late December 2009 that the reserve ratio on December 31, 2009, will fall to close to or below zero, the FDIC's Board may vote to impose a special assessment of up to 5 basis points. Should the Board so vote, the special assessment will be announced no later than December 31. The announcement will state that the special assessment is being imposed on December 31, 2009, the rate of the assessment, and that the assessment will be collected along with the regular quarterly deposit insurance assessment on March 30, 2010. Notice of the special assessment will be published in the **Federal Register** as soon as practicable.

However, the FDIC will not make its estimates of quarter-end reserve ratios for purposes of any such special assessment, nor will the Board determine whether to impose such a special assessment, until shortly before the end of each quarter, in order to take advantage of the most current data available.

Authority to impose any additional special assessments terminates under this rule on January 1, 2010. However, the FDIC's ability to collect any special assessments imposed prior to January 1, 2010, would not be affected by this termination date. Thus, in the previous

[10] Section 7(b)(3)(E)(iv) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(E)(iv)). Congress awarded the industry, in aggregate, approximately $4.7 billion in assessment credits in the Federal Deposit Insurance Reform Act of 2005. Almost all of these credits have been used.

[11] For 2009 and 2010, credits may not offset more than 90 percent of an institution's assessment. Section 7(e)(3)(D)(ii) of the Federal Deposit Insurance Act (12 U.S.C. 1817(e)(3)(D)(ii)).

[12] The FDIC excluded goodwill losses and amortization expenses and impairment losses for other intangible assets from earnings during this period, since many of these items were unusual, one-time charges.

example, if the Board voted to impose an additional 5 basis point special assessment on December 31, 2009, the special assessment would be collected with the regular quarterly deposit insurance assessment on March 30, 2010.

V. Summary of Comments

The FDIC received over 14,000 comment letters, the vast majority of which stated that the proposed 20 basis point special assessment could have a significant adverse effect on the industry at a very difficult time in the economic and business cycles. A number of letters from smaller institutions and their trade groups noted that the assessment would be particularly hard for community banks to absorb.

Alternatives

While recognizing that the banking industry stands behind the DIF, most of the comments suggested alternatives to reduce or eliminate a large, one-time special assessment. Proposed alternatives included spreading out payments over a number of quarters or years, increasing the amount of time needed to recapitalize the fund, borrowing from the Treasury, issuing FICO-like bonds, borrowing from the industry, allowing the industry to take an equity stake in the FDIC similar to the credit union model implemented by the National Credit Union Administration (NCUA) for the National Credit Union Share Insurance Fund (NCUSIF), using revenue from the TLGP, Legacy Loan Program and Troubled Asset Relief Program (TARP) initiatives, and reducing FDIC operational and resolutions costs.

The FDIC is aware, and has acknowledged, that a 20 basis point special assessment would be a significant expense for the industry, particularly given current conditions. For the reasons discussed earlier, the FDIC has decided to reduce the size of the special assessment to 5 basis points on each insured depository institution's assets minus Tier 1 capital as of June 30, 2009, with the potential for imposing additional special assessments of up to 5 basis points on each institution's total assets minus Tier 1 capital should the FDIC's Board determine that the fund has declined to a level that would undermine public confidence in the deposit insurance system or to a level close to or below zero at the end of a calendar quarter. This decision, in effect, reduces the special assessment and spreads it out (if more than one assessment becomes necessary), thereby avoiding a large one time fee and the effect of that fee on earnings and capital.

While the increase in the FDIC's borrowing authority from the Treasury gives the FDIC a sufficient cushion against unforeseen bank failures to allow it to reduce the size of the special assessment, the FDIC continues to believe that the line of credit with Treasury should be used to fund unexpected losses, not expected losses.

Many of the other proposed alternative funding mechanisms would require legislative changes, as the FDIC does not currently have the statutory authority to issue equity or create an entity to issue FICO-like bonds. Even if the FDIC had the authority to issue equity, insured institutions would need to determine regularly whether their equity investment was impaired and, if so, whether the impairment was other than temporary. If the investment were other-than-temporarily impaired, institutions would have to recognize an impairment loss in earnings and write down the asset (as credit unions have recently had to do with respect to their deposits in the NCUSIF). Given the FDIC's current projections for the fund balance, banks may have to recognize an other-than-temporary impairment loss on equity investments in the FDIC soon after the issuance of the equity.

While FICO-like bonds, if properly structured, could allow insured institutions to finance recapitalization of the DIF over a long period, Congress is not currently considering this option (or the possibility of allowing the FDIC to issue equity). Consequently, this option would probably not solve the FDIC's short-term need for funds to keep the fund balance positive.

Regarding the proposals to use funds from various financial stability initiatives, as previously discussed, anticipated funds collected from the TLGP surcharge have allowed the FDIC to reduce somewhat the size of the special assessment. The FDIC does not have access to TARP funds.

Borrowing from the industry would create both an asset and offsetting liability for the FDIC and this would not increase the fund or the reserve ratio.

Several commenters, including a national trade association, expressed concern about the potential for a negative feedback loop where the special assessment causes deterioration in performance ratios leading by extension to CAMELS downgrades and a subsequent increase in premiums. The FDIC is aware of this and will issue guidance to examiners following the adoption of this rule instructing them to assign component and composite ratings without regard to payment of the special assessment.

Maximum Rate/Exemption for Weaker Institutions

In addition to requesting comments on the special assessment, the FDIC sought specific comment on whether there should be a maximum rate that the combination of an institution's regular quarterly assessment rate and a special assessment could not exceed and whether weaker institutions should be exempted, in whole or in part, from the special assessment.

The FDIC received a few comments on whether there should be a cap, or maximum rate, that the combination of an institution's regular quarterly assessment rate and a special assessment should not exceed. Several state trade groups noted that, for institutions whose rate is close to 100 basis points, there should be a cap, suggesting 50 basis points. Regarding whether weaker banks should be exempted, many commenters noted that the special assessment should be risk based so that less of the burden would be placed on healthy, well-run banks. However, in response to both questions, some national trade groups noted that the industry needs as many viable institutions as possible to limit costs to recapitalize the DIF.

Given the significant reduction in the amount of the special assessment, the FDIC does not believe that either a cap (other than the general cap of 10 basis points of an institution's assessment base used for its risk-based assessment) or an exemption for weaker institutions is warranted. In addition, the FDIC does not favor using a risk-based system in this situation. The special assessment is intended to rebuild the fund, not to reflect risk of failure. Moreover, a risk-based special assessment would result in too large a premium for the riskiest institutions, particularly when taken in combination with regular premiums.

Alternative Assessment Base/Assistance to Systemically Important Institutions

The FDIC also asked for comments on whether FDIC assessments, including special assessments, should take into account the assistance being provided to systemically important institutions and whether special assessments should be assessed on assets or some other measure, rather than the regular assessment base.

In response, a large number of commenters stated that the special assessment should be based on total assets for two reasons: (1) Assets are a more accurate gauge of risk; and (2) it would place less of the burden on smaller institutions. Several large banks and trade groups whose clients are predominantly large institutions objected to a new assessment base, arguing that deviation from the current assessment base would be inconsistent with the purpose of the DIF, which is to insure deposits. Several state bankers associations commented that weaker systemically important institutions should pay more, given the amount of assistance already received. A community bank trade group advocated a systemic risk premium.

For the reasons discussed earlier, the FDIC agrees that the special assessment should be based on assets (minus Tier 1 capital).

In response to the question regarding additional assessments, some commenters, including several national trade groups and a large bank, thought that the FDIC should go through a comment period before implementation of additional special assessments.

The FDIC believes the current rule making has provided the public and the industry with sufficient opportunity to comment. Further, the mechanism adopted for additional special assessments allows the FDIC to act quickly, using the most up-to-date data, which reduces the chances that the FDIC would have to impose a special assessment that could have been avoided with better data.

VI. Effective Date

This final rule will take effect June 30, 2009.

VII. Regulatory Analysis and Procedure

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a final rule would not have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment.[13] Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA.[14] The final rule relates directly to the rates imposed on insured depository institutions for deposit insurance. In addition, this final rule does not involve the issuance of a notice of proposed rulemaking. For these reasons, the requirements of the RFA do not apply. Nonetheless, the FDIC is voluntarily undertaking a regulatory flexibility analysis.

As of March 31, 2009, of the 8,247 insured commercial banks and savings institutions, 4,479 were small insured depository institutions, as that term is defined for purposes of the RFA (*i.e.,* those with $165 million or less in assets).

The FDIC's total assessment needs are driven by the statutory requirement that the FDIC adopt a Restoration Plan that provides that the fund reserve ratio reach at least 1.15 percent within five years absent extraordinary circumstances and by the FDIC's aggregate insurance losses, expenses, investment income, and insured deposit growth, among other factors. (The FDIC adopted an amended Restoration Plan extending the time within which the reserve ratio must be returned to 1.15 percent from five years to seven years due to extraordinary circumstances). Under the final rule, each institution would be subject to a special assessment at a uniform rate to help meet FDIC assessment revenue needs. Apart from the uniform special assessment on all institutions, the final rule makes no other changes in rates for any insured institution, including small insured depository institutions. In effect, the final rule would uniformly increase each institution's assessment by 5 basis points of the institution's total assets minus Tier 1 capital for one assessment collection (including small institutions as defined for RFA purposes), and would alter the present distribution of assessments by reducing the percentage of the special assessment borne by small institutions. Using the standard assessment base of deposits as reported in the institution's report of condition (subject to certain statutory adjustments) and applying a 7.33 [15] basis point charge, smaller institutions, as defined here, would bear 3.8 percent of the total cost of the special assessment. Applying a 5 basis point charge on assets minus Tier 1 capital, as provided in the final rule, smaller institutions would bear 2.8 percent of the total cost of the special assessment.

The final rule does not directly impose any ''reporting'' or ''recordkeeping'' requirements within the meaning of the Paperwork Reduction Act. The compliance requirements for the final rule would not exceed existing compliance requirements for the present system of FDIC deposit insurance assessments, which, in any event, are governed by separate regulations. The FDIC is unaware of any duplicative, overlapping or conflicting federal rules.

B. 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 relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) Public Law 110–28 (1996). As required by law, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

C. Paperwork Reduction Act

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

F. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations

■ For the reasons set forth in the preamble, the FDIC amends chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

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

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–1819, 1821; Sec. 2101–2109, Pub. L. 109–171, 120 Stat. 9–21, and Sec. 3, Pub. L. 109–173, 119 Stat. 3605.

■ 2. In part 327 add new § 327.11 to Subpart A to read as follows:

§ 327.11 Special assessments.

(a) *Special assessment imposed on June 30, 2009.* On June 30, 2009, the FDIC shall impose a special assessment on each insured depository institution of 5 basis points based on the institution's total assets less Tier 1 capital as reported on the report of condition for the second assessment

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

[14] 5 U.S.C. 601.

[15] The FDIC estimates that the total amount collected under the special assessment will approximately equal the amount that would have been collected by imposing approximately a 7.33 basis point special assessment on the aggregate industry assessment base for the second quarter 2009 risk-based assessment.

period of 2009. The special assessment paid by any institution shall not exceed 10 basis points times the institution's assessment base for the second quarter 2009 risk-based assessment.

(b) *Special assessments after June 30, 2009*—(1) *Authority for additional special assessments.* After June 30, 2009, if the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that the Board believes would adversely affect public confidence or to a level which shall be close to or below zero at the end of a calendar quarter, a special assessment of up to 5 basis points on total assets less Tier 1 capital as reported on the report of condition for that calendar quarter may be imposed by a vote of the Board on all insured depository institutions. For any institution, the amount of such a special assessment shall not exceed 10 basis points times the institution's assessment base reported as of the date that the special assessment is imposed.

(2) *Termination of authority.* The authority to impose additional special assessments under this paragraph (b) shall terminate on January 1, 2010, but such termination of authority shall not prevent the Corporation from thereafter collecting any special assessment imposed prior to January 1, 2010.

(3) *Estimation process.* For purposes of any special assessment under this paragraph (b), the FDIC shall estimate the reserve ratio of the Deposit Insurance Fund for the applicable calendar quarter end from available data on, or estimates of, insurance fund assessment income, investment income, operating expenses, other revenue and expenses, and loss provisions, including provisions for anticipated failures. The FDIC will assume that estimated insured deposits will increase during the quarter at the average quarterly rate over the previous four quarters.

(4) *Imposition and announcement of special assessments.* Any special assessment under this paragraph (b) shall be imposed on the last day of a calendar quarter and shall be announced by the end of such quarter. As soon as practicable after announcement, the FDIC will have a notice of the special assessment published in the **Federal Register**.

(c) *Invoicing of any special assessments.* The FDIC shall advise each insured depository institution of the amount and calculation of any special assessment imposed under paragraph (a) or (b) of this section. This information shall be provided at the same time as the institution's quarterly certified statement invoice for the assessment period in which the special assessment was imposed.

(d) *Payment of any special assessment.* Each insured depository institution shall pay to the Corporation any special assessment imposed under paragraph (a) or (b) of this section in compliance with and subject to the provisions of §§ 327.3, 327.6 and 327.7 of subpart A, and the provisions of subpart B. The payment date for any special assessment shall be the date provided in § 327.3(b)(2) for the institution's quarterly certified statement invoice for the calendar quarter in which the special assessment was imposed.

Dated at Washington, DC this 22nd day of May, 2009.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E9–12549 Filed 5–27–09; 11:15 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Amendment No. 25–128]

Transport Category Airplanes, Various Technical Amendments and Corrections

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: This amendment corrects a number of errors in the safety standards for transport category airplanes. None of the changes are substantive in nature, and this amendment will not impose any additional burdens on any person affected by these regulations.

DATES: *Effective Date:* This amendment becomes effective May 29, 2009.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule, contact: Jeff Gardlin, FAA Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2136; facsimile (425) 227–1149; e-mail: *jeff.gardlin@faa.gov.* For legal questions concerning this final rule, contact: Douglas Anderson, ANM–7, FAA, Office of Regional Counsel, 1601 Lind Ave. SW., Renton, WA 98057–3356 telephone (202) 267–2166; e-mail: *Douglas.Anderson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

A number of unrelated errors in the safety standards for transport category airplanes have been brought to the attention of the FAA. Some are due to inadvertent omissions or other editing errors; others are simply typographical or printing errors. This document amends part 25 to correct those errors. None of the corrections are substantive in nature, and this amendment will not impose any additional burdens on any person affected by these regulations.

List of Subjects in 14 CFR Part 25

Airplanes, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

■ In consideration of the following, the Federal Aviation Administration amends part 25 of Title 14, Code of Federal Regulations, as follows:

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

■ 1. The authority citation of part 25 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702 and 44704.

§ 25.812 [Amended]

■ 2. Amend § 25.812(h), introductory text, by removing the phrase ''§§ 25.810(a) and (d)'' and adding the phrase ''§§ 25.810(a)(1) and (d)'' in its place.

§ 25.813 [Amended]

■ 3. Amend § 25.813(b)(5) by removing the phrase ''§ 25.807(d)(3)(ii)'' and adding the phrase ''§ 25.807(g)(9)(ii)'' in its place.

Appendix F to Part 25 [Amended]

■ 4. Amend Appendix F, part VII, paragraph (f)(1), by removing the phrase ''paragraph (c)(4) or (c)(4)(i)'' and adding the phrase ''paragraph (c)(3)(iv)'' in its place.

Issued in Washington, DC, on May 22, 2009.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E9–12435 Filed 5–28–09; 8:45 am]

BILLING CODE 4910–13–P