cover crop, as long as such crop is not intended for harvest; or

(iii) To plant sunflower seed after the late planting period. (The production guarantee for such acreage will be fifty percent (50%) of the production guarantee for timely planted acres. (For example, if your production guarantee for timely planted acreage is 900 pounds per acre, your prevented planting production guarantee would be equivalent to 450 pounds per acre (900 pounds multiplied by 0.5)). Production to count for such acreage will be determined in accordance with subsections 12.(c) through (e).

(2) In addition to the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), the insurance period for prevented planting coverage begins:

(i) For the crop year your application is accepted, on the sales closing date contained in the Special Provisions for the insured crop in the county; or

(ii) For any continuous crop year following the crop year your application is accepted, or for any crop year this insurance policy is transferred to a different insurance provider, on the sales closing date for the crop year immediately preceding the current crop year, provided continuous coverage has been in effect since that date.

(3) The acreage to which prevented planting coverage applies will be limited as follows:

(i) If you participate in any program administered by the United States Department of Agriculture for the crop year which limits the number of acres that may be planted, prevented planting acreage will not exceed the CFSA base acreage for the insured crop, reduced by any acreage reduction applicable to the farm under such program.

(ii) If you do not participate in any program administered by the United States Department of Agriculture which limits the number of acres that may be planted, unless a written agreement exists to the contrary, eligible acreage will not exceed the greater of:

(A) The CFSA base acreage for the insured crop, if applicable;

(B) The number of acres planted to sunflower seed on each CFSA Farm Serial Number during the previous crop year (adjusted for any reconstitution which may have occurred prior to the sales closing date); or

(C) One hundred percent (100%) of the simple average of the number of acres planted to sunflower seed during the crop years that were used to determine your yield.

(iii) Acreage intended to be planted under an irrigated practice will be limited to the number of acres properly prepared to carry out an irrigated practice.

(iv) A prevented planting production guarantee will not be provided for:

(A) Any acreage that does not constitute at least 20 acres or 20 percent (20%) of the acres in the unit, whichever is less;

(B) Land for which the actuarial table does not designate a premium rate unless a written agreement exists designating such premium rate;

(C) Land used for conservation purposes or intended to be or considered to have been left unplanted under any program administered by the United States Department of Agriculture;

(D) Land on which any crop, other than sunflower seed has been planted and is intended for harvest, or has been harvested in the same crop year; or

(E) Land which planting history or conservation plans indicate would remain fallow for crop rotation purposes;

(v) For the purpose of determining eligible acreage for prevented planting coverage, acreage for all units will be combined and be reduced by the number of sunflower acres timely planted and late planted. (For example, assume you have 100 acres eligible for prevented planting coverage in which you have a 100 percent (100%) share. The acreage is located in a single CFSA Farm Serial Number which you insure as two separate optional units consisting of 50 acres each. If you planted 60 acres of sunflower seed on one optional unit and 40 acres of sunflower seed on the second optional unit, your prevented planting eligible acreage would be reduced to zero, (100 acres eligible for prevented planting coverage less 100 acres planted equals zero)). If you report more sunflower acreage under this contract than is eligible for prevented planting coverage, we will allocate the eligible acreage to insured units based on the number of prevented planting acres and share you reported for each unit.

(4) When the CFSA Farm Serial Number covers more than one unit, or a unit consists of more than one CFSA Farm Serial Number, the covered acres will be pro-rated based on the number of acres in each unit or CFSA Farm Serial Number that could have been planted to sunflowers in the crop year.

(5) In accordance with the provisions of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report any insurable acreage you were prevented from planting. This report must be submitted on or before the acreage reporting date, even though you may elect to plant the acreage after the late planting period. Any acreage you report as eligible for prevented planting coverage which is not eligible will be deleted from prevented planting coverage.

Done in Washington D.C., on December 22, 1994.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 94-32021 Filed 12-28-94; 8:45 am]

BILLING CODE 3410-08-P

Agricultural Marketing Service

7 CFR Part 1208

[FV-94-708FR]

RIN: 0581-AB20

Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (Department) is issuing the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order (Order). The Order establishes a national industry-funded promotion and information program for fresh cut flowers and fresh cut greens (cut flowers and greens). The Order requires handlers to pay an assessment based on their gross sales of cut flowers and greens, regardless of the country of origin, to the National PromoFlor Council (Council). Composed of floral industry representatives, who are wholesalers, producers, importers, and retailers, the Council will use the assessments collected to conduct a generic promotion and information program to maintain, expand, and develop markets for cut flowers and greens.

EFFECTIVE DATE: December 29, 1994.

FOR FURTHER INFORMATION CONTACT: Arthur Pease, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456, telephone (202) 720-6930.

SUPPLEMENTARY INFORMATION: This final Order is issued under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 [Pub. L. 103-190] approved December 14, 1993, hereinafter referred to as the Act.

Prior documents in this proceeding:

Proposed Rule—Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order published June 28, 1994, (59 FR 33400).

This final rule has been issued in conformance with Executive Order 12866 and the Office of Management and Budget has determined that it is a "significant regulatory action".

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule does not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under § 8 of the Act, after an order is implemented, a person subject to the order may file a petition with the Secretary stating that the order or any provision of the order, or any obligation imposed in connection with the order, is not in accordance with law and requesting a modification of the order or an exemption from the order. The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Only those wholesale handlers, retail distribution centers, producers, and importers who have annual sales of $750,000 or more of cut flowers and greens and sell those products to exempt handlers, retailers, or consumers are considered to be qualified handlers and assessed under the order. There are approximately 900 wholesalers, 150 importers, and 200 domestic producers who are qualified handlers.

The majority of these qualified handlers are classified as small businesses. As defined by the Small Business Administration [13 CFR 121.601] small agricultural service firms, which includes the qualified handlers who are required to pay assessments under the order, have been defined as those having annual receipts of less than $5 million.

Statistics reported by the National Agricultural Statistics Service show that 1993 sales at wholesale of domestic cut flowers and greens total approximately $535 million while the value of imports during 1993 was approximately $382 million. The leading States in the United States producing cut flowers and greens, by wholesale value, are California, which produces approximately 60 percent of the domestic crop, followed by Florida, Colorado, Washington, New York, Hawaii, and Pennsylvania. Major countries exporting cut flowers and greens into the United States, by value, are Columbia, which accounts for approximately 60 percent, followed by The Netherlands, Mexico, and Costa Rica.

During the first three years the order is in effect, the rate of assessment may not exceed 0.5 percent of the gross sales of cut flowers and greens. After the order has been in effect for three years, the assessment rate may be increased or decreased by no more that 0.25 percent each year when recommended by two-thirds of the members of the Council and approved by the Secretary. However, at no time may the assessment rate exceed 1.0 percent of gross sales of cut flowers and greens. Notice and comment rulemaking will be required to change the assessment rate.

Although the maximum assessment collection is expected to total about $10 million annually, the economic impact of a 1.0 percent or less assessment on each qualified handler will not be significant.

While the proposed order imposes certain recordkeeping requirements on qualified handlers, information required under the order can be compiled from records currently maintained. Thus, any added burden resulting from increased recordkeeping is not expected to be significant when compared to the benefits that will accrue to such businesses. The order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements.

Although the order imposes some additional costs and requirements on qualified handlers, it is anticipated that the program under the order will help to increase the demand for cut flowers and greens. Therefore, any additional costs are expected to be offset by the benefits derived from expanded markets and sales benefiting all segments of the floral industry. Accordingly, the Administrator of the AMS has determined that the provisions of the order will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 [44 U.S.C. Chapter 35] the forms, reporting, and recordkeeping requirements included in this action were submitted for approval to the Office of Management and Budget (OMB) and assigned OMB No. 0581–0168, except for Council member nominee information sheets that were previously assigned OMB No. 0505–0001. On the effective date of the program, the information collection burden will be combined with the other AMS research and promotion programs included under assigned OMB No. 0581–0093. Information collection requirements that are included in this action are:

(1) *A periodic report by each qualified handler who handles cut flowers and greens.* The estimated maximum number of respondents is 1,250, each submitting an average of 12 responses per year, with an estimated average reporting burden of 10 minutes per response.

(2) *An application requesting postponement of assessment payments.* The estimated maximum number of respondents is 25, each submitting an average of 4 responses per year, with an estimated average reporting burden of 20 minutes per response.

(3) *A refund application form for persons who desire a refund of their assessments.* The estimated maximum number of respondents is 210, each submitting 1 response prior to the initial referendum, or an annual average of 70 respondents, with an estimated average reporting burden of 15 minutes per response.

(4) *An exemption application for wholesale handlers, retail distribution centers, producers, and importers of cut flowers and greens with gross annual sales under $750,000 and will be exempt from assessments and recordkeeping requirements.* The estimated number of respondents for this form is 500, each submitting one response per year, with an estimated average burden of 15 minutes per response.

(5) *A referendum ballot to be used to determine whether qualified handlers favor continuance of the order.* The estimated number of respondents completing this ballot will be 1,250, each submitting one response approximately every 3 years, or an annual average of 417 respondents, with an estimated average reporting burden of 15 minutes per response.

(6) *A nominee background statement form for Council member and alternate member nominees.* The estimated number of respondents for this form is 50 for the initial nominations to the Council and approximately 17 respondents annually thereafter. Each respondent will submit one response per year, with an estimated average reporting burden of 30 minutes per response.

(7) *A requirement to maintain records sufficient to verify reports submitted under the order.* The estimated maximum number of recordkeepers necessary to comply with this requirement is 1,750 each of whom will have an estimated annual burden of 15 minutes.

Background

The Act provides for the establishment by the Secretary of Agriculture (Secretary), of a national cut flowers and greens promotion and consumer information program which would be funded by assessments levied on qualified handlers not to exceed 1 percent of their gross sales of cut flowers and greens.

The Act authorized the submission of proposals for a cut flowers and greens promotion and consumer information order by industry organizations or any other interested person affected by the Act. As required by the Act, the order provides for the establishment of a National PromoFlor Council. The Council is to be composed of 25 voting members: 14 members representing qualified wholesale handlers of domestic and imported cut flowers and greens; 3 members representing producers who are qualified handlers of cut flowers and greens; 3 members representing importers who are qualified handlers of cut flowers and greens; 3 members representing traditional retailers of cut flowers and greens; and 2 members representing persons who produce cut flowers and greens. Each member shall have an alternate.

The Department issued a news release on February 17, 1994, requesting proposals for an initial order or portions of an initial order.

In response to that news release an entire proposed order was submitted by the PromoFlor Organizing Group, Inc. (POG). POG, an industry group that was created and sponsored by 68 floral industry organizations and more than 700 floral businesses developed a proposal for the promotion and consumer information order for cut flowers and greens. Once the Order is issued, POG will cease to exist except for the period of time it takes for it to serve as the initial election committee to assist in the nomination of members and alternates to the initial Council. After the Council is appointed, the Council will be the election committee.

The Department published POG's proposed order as Proposal I. The Department modified POG's proposed text (1) to make it consistent with the Act and other similar national research and promotion programs supervised by the Department, (2) to simplify the language and format of some provisions, and (3) to add certain sections necessary for proper administration of the Order by the Department.

In addition to the proposal from POG, the Department published proposals addressing the nomination of the Council's retailer members and defining "traditional retailer" and "traditional retail florist organization", submitted by Florists' Transworld Delivery Association (FTD) (Proposal II) and the Produce Marketing Association (PMA) (Proposal III). All three proposals were published in the June 28, 1994, issue of the **Federal Register** (59 FR 33400).

Interested persons were invited to submit comments on the proposals until August 29, 1994. Fifty-eight comments were received during the comment period. One comment was received after the comment period.

There were two comments opposing the Order, one submitted by a retail florist who, among other objections, opposed it on the basis of government interference in private business. The other comment in opposition to the proposed Order was filed by the Office of Chief Counsel for Advocacy of the U.S. Small Business Administration (OCCA) which raised a number of issues including the constitutionality of the Order.

Of the 58 comments received, four expressed the opinion that the phrase "traditional retail florist" be restricted only to those independently owned retail florists whose major business is selling cut flowers and greens to consumers. In contrast, the proposed definition of "traditional retailer" submitted by PMA (Proposal III) included all retailers whose primary business is the sale of floral products including those who have a specific department dedicated to the sale of such products. These four commenters also wanted to exclude from Council membership, those marketers of cut flowers and greens who sell floral items through supermarkets and department stores. In the same vein, FTD argued that there should be a distinction between traditional retail florists and other retail florists. It is FTD's position that the traditional retail florists, should be small independent "mom and pop" shops selling to consumers. The organization also stated that it is the largest organization representing this segment of the floral industry with 23,000 members, and as a cooperative, it should have a permanent position on the Council. FTD further argued that other types of retailers such as mass marketers and non-traditional retailers are not as attuned to consumers and marketing programs as the retail florists represented by FTD.

Thirty-one comments expressed concern that too limited an interpretation of the term "traditional retail florist" would preclude a large segment of the floral industry from being represented on the Council. In the United States, the so-called mass-marketers such as supermarkets and other large merchandizing operations, represent about 50 percent of the volume of flowers and greens sold and about 33 percent of the total dollar value of floral sales. These commenters contend that the term "traditional retail florist" should be very broad and should include any retailer whose primary business is the sale of floral products, including cut flowers and greens, or has a specific department dedicated to the sale of floral products including cut flowers and greens.

A total of thirty-six comments including PMA opposed the proposal that FTD or any other wire service or organization be assigned a permenant position representing retailers on the Council. The commenters expressed views that retailers should not have to be affiliated with a particular wire service affiliation or specific organization but could contribute significantly to the floral industry's promotional efforts and should be eligible to serve on the Council. The commenters included floral organizations and businesses, representing all segments of the floral industry from many different areas of the country.

After considering all of the comments received on the issues of Council representation and the proper definition of "traditional retail florist", it is determined that the term should be broadly defined as proposed by PMA, and that the membership on the Council should include as wide a spectrum as possible representing the retail segment of the floral industry. The FTD proposal allotting one of the Council member positions to FTD is not adopted. The Act already requires that one position on the Council be represented by AFMC. Having two of the three retailer positions on the Council allocated to specific associations would significantly limit the representation by other floral industry retail segments. However, this does not mean that a FTD nominee could not be appointed to the Council by the Secretary. Proposal III published in the June 28, 1994, issue of the **Federal Register** is accepted and incorporated into the Order because it affords a large cross-section of retailers an opportunity to serve on the Council.

Another comment made by FTD was that the uniform factor of 1.43 was not high enough because it went further back in the channel of distribution than the wholesalers selling to small retail florists. This factor was recommended by the industry for those distribution centers making non-sale transfers of fresh cut flowers and greens to retail outlets and represents the markup on a sale from wholesaler to retailer. This is equivalent to the same step in the marketing distribution process that the traditional retailer described by FTD uses when purchasing fresh cut flowers and greens from a wholesaler. The sources used by wholesalers or distribution centers to acquire fresh cut flowers and greens or the prices they pay should be equivalent, because both would be expected to have the same access to floral suppliers. Consequently, there are no actual differences as to where in the marketing process assessments are levied.

OCCA commented that in its view the Order is unconstitutional. We disagree with this view. In addition, OCCA urged the Agricultural Marketing Service (AMS) to perform a regulatory flexibility analysis. AMS had already made the determination that a regulatory flexibility analysis is not appropriate for a program of this nature and its relatively small economic impact.

OCCA also contended that the cost associated with recordkeeping and the calculation of assessments due would be greater than AMS assumes. The Department does not anticipate a significant increase in costs and paperwork burden to those covered by the program because all of the records required to be maintained under the Order are based on sales of product or calculations based on the acquisition cost of product. These types of records are normally kept by all businesses in the floral industry, especially by wholesale handlers with annual sales of $750,000 or more, and the calculation of assessments is a one step procedure using such readily available records. Further, the industry was provided 60 days to comment on all aspects of the proposed Order, including the potential burden of calculating and paying assessments and paperwork, and no individual, who would be a qualified handler under the Order, expressed a concern in this area.

OCCA further contended that AMS failed to take into account the impact of the Order on small retail florists. As OCCA correctly stated, retail florists are not assessed under the Order. However, it was OCCA's position that wholesalers would pass on the assessment costs in terms of higher prices. There is sufficient competition within the wholesale floral industry with approximately 900 wholesale handlers, 150 importers, and 200 domestic producers who are considered to be qualified handlers (those having annual sales of $750,000 or more) plus an undetermined number of suppliers who are smaller than the qualified handlers and who sell to the retail florists. Thus, we do not feel that a one-half of one percent assessment at the wholesale level would result in higher prices.

OCCA also expressed concern with having POG serve as the initial election committee, arguing that this would place too much power in the hands of one segment of the industry. The POG represents a substantial majority of the qualified handlers who would be paying assessments under the program. This organization also has the knowledge and respect of the floral industry necessary to perform this important function. Balloting for nominees will be conducted by an independent certified public accounting firm to ensure that the nominations are conducted in an impartial manner. We believe that there is no reason to be concerned by POG's role in the nominations process. As a matter of fact the nomination process will be more efficient and less costly to the industry if it is conducted as proposed.

OCCA also recommended that FTD and PMA each be allocated a seat on the Council. The Act requires that one position be assigned to the American Floral Marketing Association. As we have already stated, it is the Department's view that the retailer positions on the Council should be open to as wide a retailer representation as possible so that no segment of the retail floral industry is discriminated against. It would be difficult to determine which organization has the most retail members, and this action would further preclude other retailers, who may not be members of the largest organization, from serving on the Council. Therefore, the Order provision concerning these nominations will remain as proposed.

OCCA also commented on the need for referendum procedures. We are aware that such procedures are needed and will promulgate those procedures in advance of the referendum which is to be held no later than 3 years after the Order is issued.

OCCA questions the Act giving the Secretary of Agriculture (Secretary), and more specifically the AMS which administers these programs, latitude in determining whether the order tends to effectuate the policy of the Act. However, this is consistent with the statutory scheme.

PMA also, recommended that nominations be limited to national organizations. We are in agreement with this recommendation. The acceptance of nominations only from national retail florists organizations was already included in § 1208.32(b) of the proposed Order which is retained in the final Order. In addition, the definition of "traditional retail florists organization" is accepted as proposed in Proposal III, and that definition requires nationwide membership. Further, PMA is in favor of keeping the two retailer seats that were not designated for AFMC open to as large a segment of the floral industry as possible. The provisions of this Order are also in agreement with this recommendation.

Fifteen comments did not address any specific issues or proposals but indicated general support for the Order and the program.

POG, which proposed an entire order for fresh cut flowers and greens that was published in the June 28, 1994, issue of the **Federal Register** as Proposal I, submitted a comment recommending that several changes be made in the final Order.

In § 1208.10 of the proposed Order, POG believes that the definition of the term " gross sales price" needs further clarification. The definition in the proposal contained the phrase "total amount of the transaction in a sale of fresh cut flowers and greens." Because there are numerous different methods used by wholesalers, importers, and producers in pricing cut flowers and greens in the industry, POG believes that further clarification is necessary so that qualified handlers will not be confused when calculating assessments due. Some qualified handlers invoice such charges as boxing, sleeving, cooling, and delivery separately while others include such charges in the price of the cut flowers and greens. Therefore, POG contends that an equitable basis for determining what constitutes the gross sales price, needs to be further explained in the Order to ensure that all qualified handlers are aware of the basis for calculating assessments. The Department accepts a change in the definition of "gross sales price" in § 1208.10 which includes other charges that are normally associated with the pricing of cut flowers and greens but placed the methodology for determining variations under the assessment provisions in § 1208.50.

Minor clarification changes of the wording in §§ 1208.16(a), 1208.18, 1208.18(a), and 1208.31(c) were accepted and incorporated in the Order.

POG recommended an amendment to § 1208.31(h) which would change the time period for conducting the nomination process from 90 days to 120 days before the terms of office begins and which would have appointments made at least 30 days before the terms of office begin. This recommendation is not adopted. The nomination process can begin at any time, and the appointment process may or may not take the full 90 days. Incorporating the recommended change would restrict any flexibility the Secretary has in the appointment process. Further, all nominees submitted for appointment normally have prepared themselves for assuming their member roles when accepting the nomination.

POG also recommended a change in § 1208.34(b) to eliminate the exception that a person serving an initial term of office of two years could only serve one additional 3-year term of office. This change recommended by POG is denied on the basis that the Department believes that for the sake of clarity it is necessary to specify that those persons serving initial two-year terms of office are eligible to serve one additional term of office on the Council.

Changes in §§ 1208.34(c) and (d) recommended by POG that the wording describing when the terms of office begin for the initial members of the Council be better clarified. Wording recommended by POG for clarification of the provisions is accepted and incorporated in the Order.

POG's recommended change in § 1208.36(b) that would change the word "cast" to "voting" is unnecessary, and thus not adopted.

The change POG recommended in § 1208.42(b), which would add another term "postharvest physiology" to the list of authorized research projects, is accepted and incorporated into the Order.

POG's comment on removing all of the references in § 1208.50(a) to the various subparagraphs in § 1208.16 and just referring to the section is accepted and incorporated into the Order, because the proposal language is repetitious and unnecessary.

POG's comments on §§ 1208.50(b), 1208.54(a), 1208.70(c), and 1208.82 are for wording changes that would clarify the intent but not the meaning of the sections. These wording changes are accepted and incorporated into the Order.

POG asked that § 1208.80 regarding a requirement that all substantive actions proposed by the Council be submitted to the Secretary should be deleted. POG argues that since all financial matters, programs, and projects require approval by the Secretary, there is no need to further require that the Secretary approve all substantive Council actions. POG'S request is not adopted because the section merely reflects the fact that the Secretary has oversight responsibility over the program. Thus, it is reasonable to expect that in order to properly carry out such responsibility the Secretary should have the authority to approve the Council's actions.

The Professional Allied Florists Association of Metropolitan Detroit submitted a comment requesting that a portion of the assessment collected by the Council be distributed to local organizations for local promotion. The Act does not authorize such disbursements, but any promotion initiated by the Council will certainly compliment any local promotions and should help increase the consumption of cut flowers and greens.

One comment was received from an individual but did not address any issues concerning the proposed Order. Another comment was received after the close of the comment period. These comments have been included in the rulemaking record.

The American Institute of Certified Public Accountants (AICPA) submitted a comment concerning § 1208.55 of the Order which deals with the postponement of assessments. The AICPA stated that the requirement that an independent certified public accountant express an opinion that a handler is insolvent or that a handler will be unable to continue to operate if required to pay the assessment when due is not possible under professional accounting standards. We concur with the AICPA's that procedures need to be developed whereby a handler would be required to have an independent accountant perform an agreed upon procedure under applicable professional standards after a postponement is requested. Procedures for the actual processing of postponement requests will be developed after the Order becomes effective and a Council is appointed. AICPA also commented that in § 1208.70(c) of the Order, the phrase "books and records" should be replaced by "financial statements" because these documents are what auditors audit. This comment is accepted with modification in that the term "financial records and documents" will be used, and the section is changed accordingly.

Other minor conforming changes made in this final rule include the requirement in § 1208.31(f) that ballots for voting for nominees be distributed only to persons assessed. This is changed because the Act does not require that producers voting for the at-large producer member nominees (east and west of the Mississippi River) necessarily have to be producers who pay assessments.

After consideration of all relevant material presented, including the initial proposals, comments received, and other available information, it is found that the Order and all the terms and conditions thereof, tends to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because a lengthy period is required to nominate and appoint the Council, the administrative agency provided for in the Order, before it can start to function. The floral industry has requested that the program become operational as soon as possible so that assessments can collected shortly after the beginning of the 1995 calendar year, which is the floral industry's largest sales period, and so that promotional and other activities can be in place as soon as possible. Before the program can begin, it will be necessary for the Council to recommend a budget of anticipated expenses to the Department for review, modification, or approval. Also, it will be necessary for the Council to hire a staff and establish an office to carry out the needed administrative functions. Further, interested persons were afforded a 60-day comment period, and no useful purpose would be served in delaying the effective date. Therefore, this final rule is effective on the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Part 1208

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Cut flowers, Cut greens, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble title 7 of the Code of Federal Regulations is hereby amended by adding a new Part 1208 to read as follows:

PART 1208—FRESH CUT FLOWERS AND FRESH CUT GREENS PROMOTION AND INFORMATION

Subpart A—Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order

Definitions

Authority: The Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, 7 U.S.C. 6801 *et seq.*

Definitions

§ 1208.1 Act.

Act means the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, Pub. L. 103–190, 7 U.S.C. §§ 6801 *et seq.*, and any amendments thereto.

§ 1208.2 Consumer information.

Consumer information means any action or program that provides information to consumers and other persons on appropriate uses for cut flowers and greens under varied circumstances, or on the care and handling of cut flowers and greens.

§ 1208.3 Council.

Council means the Fresh Cut Flowers and Fresh Cut Greens Promotion Council established pursuant to § 1208.30 of this subpart and which shall be referred to as the National PromoFlor Council.

§ 1208.4 Cut flowers.

Cut flowers include all flowers cut from growing plants that are used as fresh-cut flowers and that are produced under cover or in field operations, but not including foliage plants, floral supplies, or flowering plants.

§ 1208.5 Cut greens.

Cut greens include all cultivated or noncultivated decorative foliage cut from growing plants that are used as fresh-cut decorative foliage (except Christmas trees) and that are produced under cover or in field operations, but not including foliage plants, floral supplies, or flowering plants.

§ 1208.6 Cut flowers and greens.

The term *cut flowers and greens* means either cut flowers or cut greens, even though the cut flowers or cut greens are sold as separate commodities by a person in the floral marketing system, or cut flowers and cut greens collectively when both commodities are sold by a person in the floral marketing system.

§ 1208.7 Department.

Department means the United States Department of Agriculture.

§ 1208.8 Exempt handler.

Exempt handler means a person who would otherwise be considered to be a qualified handler except that the person's annual sales of cut flowers and greens to retailers and other exempt handlers is less than $750,000.

§ 1208.9 Fiscal year.

Fiscal year means a 12-month period recommended by the Council and approved by the Secretary.

§ 1208.10 Gross sales price.

Gross sales price means the total amount of the transaction in a sale of cut flowers and greens from a handler to a retailer or exempt handler including but not limited to charges such as containers, pre-cooling, packing, sleeving, delivery, freight, shipping, or other charges necessary to the protection and preservation of the cut flowers and greens.

§ 1208.11 Order.

Order means this subpart.

§ 1208.12 Part and subpart.

Part means the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order and all rules and regulations issued pursuant to the Act. The order itself shall be a subpart of such part.

§ 1208.13 Person.

Person means any individual, group of individuals, firm, partnership, corporation, joint stock company, association, society, cooperative, or other legal entity.

§ 1208.14 Promotion.

Promotion means any action determined by the Secretary to advance the image, desirability, or marketability of cut flowers and greens, including paid advertising.

§ 1208.15 Producer that is a qualified handler.

Producer that is a qualified handler means an entity that is engaged: In the domestic production, for sale in commerce, of cut flowers and greens and that owns or shares in the ownership and risk of loss of the cut flowers and greens; or as a first processor of noncultivated greens, in receiving the greens from a person who gathers the greens for handling; and is subject to assessments as a qualified handler under the order.

§ 1208.16 Qualified handler.

Qualified handler means a person operating in the cut flowers and greens marketing system that sells domestic or imported cut flowers and greens to retailers and exempt handlers and whose annual sales of cut flowers and greens to retailers and exempt handlers are $750,000 or more. The term does not include a person who only physically transports or delivers cut flowers and greens. However, the term does include, but is not limited to, the following entities when they have the requisite volume of sales of cut flowers and greens as provided in §§ 1208.50 and 1208.57:

(a) A qualified wholesale handler—a person in business as a floral wholesale jobber (*i.e.*, a person who conducts a commission or other wholesale business in buying and selling cut flowers and greens) or as a floral supplier (*i.e.*, a person engaged in acquiring cut flowers and greens to be manufactured into floral articles or otherwise processed for resale) if the annual value of the qualified wholesale handlers sale of cut flowers and greens to retailers and exempt handlers is $750,000 or more;

(b) A manufacturer of bouquets for sale to retailers if the cut flowers and greens used in such articles are a substantial portion of the value of the manufactured floral articles;

(c) A manufacturer of floral articles (other than bouquets) for sale to retailers if the cut flowers and greens used in such articles are a substantial portion of the value of the manufactured floral articles;

(d) An auction house that clears the sale of cut flowers and greens to retailers and exempt handlers through a central clearinghouse;

(e) A distribution center that is owned or controlled by a retailer if the predominant retail business activity of the retailer is floral sales. In addition to sales, non-sale transfers of cut flowers and greens by the distribution center to retail outlets, shall be counted for the purpose of applying the $750,000 minimum volume rule to the center and the value of such transfers shall be determined as provided in §§ 1208.50 and 1208.57;

(f) An importer that is a qualified handler—a person whose principal activity is the importation of cut flowers and greens into the United States (either directly or as an agent, broker, or consignee of any person or nation that produces or handles cut flowers and greens outside of the United States for sale in the United States) and who sells such cut flowers and greens to retailers and exempt handlers or directly to consumers, if the annual combined value of such sales determined as provided in §§ 1208.50 and 1208.57 totals $750,000 or more;

(g) A producer that is a qualified handler, *e.g.*, a person who produces cut flowers and greens and who sells such cut flowers and greens directly to retailers or consumers if the annual combined value of such sales determined as provided in §§ 1208.50 and 1208.57 totals $750,000 or more.

§ 1208.17 Research.

Research means market research and studies limited to the support of advertising, market development, and other promotion efforts and consumer information efforts relating to cut flowers and greens, including educational activities.

§ 1208.18 Retailer.

Retailer means a person who sells cut flowers and greens to consumers. The term includes:

(a) All retail outlets that sell cut flowers and greens to consumers including retail florists, supermarkets, and other mass market retail outlets that sell such cut flowers or greens, except distribution centers defined in § 1208.16(e) (*i.e.*, centers that are owned or controlled by a retailer if the predominant retail business activity of the retailer is floral sales and whose sales and non-sale transfers of cut flowers and greens to retail outlets total $750,000 or more, determined as provided in this subpart) even though such centers may also make direct sales to consumers.

(b) Distribution centers owned or controlled by a retailer (or distribution centers owned or controlled cooperatively by a group of such retailers) when the predominant business activity of the retailer or retailers is not the sale of cut flowers and greens to consumers; and

(c) Distribution centers independently owned but operated primarily to provide food products to retail stores.

§ 1208.19 Secretary.

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1208.20 Substantial portion.

Substantial portion means that portion of the total value of manufactured floral articles that represents the value of the cut flowers and greens in such articles (expressed as a percentage factor) which the Council, with the approval of the Secretary, finds to be great enough to cause such articles to be classed as cut flowers and greens under this subpart.

§ 1208.21 State.

State means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau (until such time as the Compact of Free Association is ratified).

§ 1208.22 Traditional retailer.

Traditional retailer means any retailer, as defined in § 1208.18, whose primary business is the sale of floral products, including fresh cut flowers and cut greens, or who has a specific department dedicated to the sale of floral products, including fresh cut flowers and cut greens.

§ 1208.23 Traditional retail florist organization.

Traditional florist organization means membership organizations of traditional retailers with activities and membership which are nationwide in scope.

§ 1208.24 United States.

United States means the States collectively.

Establishment of the Council

§ 1208.30 Establishment and membership of the Council.

(a) A Fresh Cut Flowers and Fresh Cut Greens Promotion Council which shall be named the National PromoFlor Council is hereby established to administer the terms and provisions of this subpart. The Council shall consist of 25 members nominated by the floral industry and appointed by the Secretary, as provided in this subpart, each of whom shall have an alternate nominated and appointed in the same manner as members of the Council are nominated and appointed.

(b) The membership of the Council shall be divided as follows:

(1) 14 members and their alternates shall represent qualified wholesale handlers of domestic or imported cut flowers and greens;

(2) Three members and their alternates shall represent producers that are qualified handlers of cut flowers and greens;

(3) Three members and their alternates shall represent importers that are qualified handlers of cut flowers and greens;

(4) Three members and their alternates shall represent traditional retailers of cut flowers and greens;

(5) One member and alternate shall represent persons who produce cut flowers and greens in locations east of the Mississippi River; and

(6) One member and alternate shall represent persons who produce cut flowers and greens in locations west of the Mississippi River.

§ 1208.31 Election and appointment of members and alternates other than retailers.

(a) PromoFlor Organizing Group, Inc., an industry organizing committee, is designated as an election committee for the purpose of receiving the names of individuals who are engaged in the industry and who are prepared to serve as members (other than retailer members) of the Council or as alternates if elected as nominees and if selected by the Secretary for such positions.

(b) The election committee shall, within five (5) days of the issuance of this subpart and with the assistance of the Secretary, request the submission of names of candidates for nominees from those segments of the industry for which nominees must be selected by an election process. These segments are: qualified wholesale handlers; importers who are qualified handlers; producers of cut flowers and greens who are qualified handlers; and producers of cut flowers and greens without regard to whether they are qualified handlers. Notification of the industry of the selection process by the election committee shall be by a news release to industry publications and where appropriate, newspapers of general circulation. In order to be assured of a place on the slate of candidates, the names of candidates must be received by the election committee not later than fifteen (15) days after the date of the first such news release.

(c) Names of candidates shall be sought for the following seats on the Council:

(1) 14 members and their respective alternates to represent qualified wholesale handlers of domestic or imported cut flowers and greens. Two such members and their respective alternates to represent the United States at large and two such members and their respective alternates to represent each of the following regions:

Region 1 (Pacific): Alaska, California, Hawaii, Oregon, Washington, the Commonwealth of the Northern Mariana Islands, Guam, the Federated States of Micronesia, American Samoa, the Republic of the Marshall Islands, and the Republic of Palau.

Region 2 (Inter-Mountain): Arizona, Arkansas, Colorado, Idaho, Kansas, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming.

Region 3 (North Central): Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, and Wisconsin.

Region 4 (Northeast): Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

Region 5 (Mid-Atlantic): Delaware, District of Columbia, Kentucky, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia.

Region 6 (Southeast): Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the United States Virgin Islands.

(2) Three at-large members and their alternates to represent importers that are qualified handlers of cut flowers and greens.

(3) Three members and their alternates to represent producers of cut flowers and greens that are qualified handlers of cut flowers and greens. There shall be one such member and alternate from each of the following production areas:

Production Area 1: California.

Production Area 2: Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

Production Area 3: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia.

(4) Two members and their respective alternates to represent persons who produce cut flowers and greens in locations east and west of the Mississippi River, respectively. There shall be one such member and alternate from the east, and one such member and alternate from the west.

(d) Names of candidates for nominees may be submitted by state, regional (either regions within a state or regions that include more than one state as appropriate), or national industry organizations, provided that the organization has members engaged in the appropriate segment of the industry and from the region or production area if applicable, or by petition. The names of candidates submitted by an industry organization shall be accompanied by statements showing the role of the organization in the industry and general information about the membership it represents. No industry organization may submit more than two names of candidates for each seat on the Council. The names of candidates submitted by petition shall be accompanied by petitions in support of such candidate, signed by not less than ten (10) persons engaged in the appropriate segment of the industry and from the region or production area, if applicable, that the candidate will represent if ultimately selected by the Secretary. Submission of names of all candidates, whether by organizations or by petition, must include a certification by the candidate that the candidate is within the segment of the industry and the region or production area for which the candidate is nominated and, if elected as a nominee and if subsequently appointed by the Secretary, the candidate is willing to serve as a member or alternate member on the Council.

(e) The names of candidates so submitted shall be reviewed and organized by the election committee for the preparation of slates of candidates. Separate slates for each segment and region of the industry shall be prepared as appropriate. There must be at least four candidates for each position on the Council for which nominees must be selected by election. No candidate may seek nomination for more than one seat on the Council. In a case where a candidate is nominated more than once, the election committee will decide which place on the ballot the candidate's name will appear. If insufficient candidates have been proposed for any seat, the election committee shall select additional candidates as required. The slates shall be prepared not later than 5 days after the date for receiving names of candidates by the election committee.

(f) After all candidates have been listed on the slates of candidates, the slates shall be supplied to an independent certified public accounting (CPA) firm contracted by the election committee. The ballots shall be printed and distributed by the CPA firm by U.S. mail, or other means selected by the election committee, not later than 15 days after the slates of candidates are received from the election committee. To the maximum extent practicable, ballots will be distributed to all persons who are eligible to vote for candidates under this subpart in the segment of the industry, the region, or in the United States as a whole, as applicable, to which the ballot pertains. Ballots that are not returned to the CPA firm within 20 days shall be declared invalid. The votes for each candidate on the ballots shall be tallied by the CPA firm at the end of the voting period and the results furnished to the election committee. The election committee shall issue a news release setting forth the names of the candidates and the number of votes received by each candidate within 5 days after the voting period has ended. Those candidates on each of the ballots who rank first, second, third, and fourth in the number of votes received for each seat on the Council shall be declared the nominees for each such seat.

(g) The names of those declared the nominees for each of the seats on the Council representing the various segments of the industry and the designated regions or production areas, where applicable, shall be submitted to the Secretary in order of rank with the number of votes received by each such nominee shown after the nominee's name and with the recommendation that the nominee with the most votes for each of such seats be declared the member of the Council and the nominee with the next greatest number of votes for each of such seats be declared the alternate member. The Secretary shall then appoint from the nominees so provided the members and their alternates for each of such seats on the Council.

(h) Subsequent elections of nominees and appointment of members and alternates as terms expire shall be conducted by the Council or the Council staff in the manner similar to that described above except that the Council shall act as the election committee for which provision is made in this section. The nomination and election process shall be completed at least 90 days before the beginning of each nominee's term of office.

(i) The Council shall periodically review the cut flower and greens market in the United States for changes in the geographic distribution of importing, producing, and marketing facilities and shall, if appropriate, recommend changes in the regions and production areas described in this section to the Secretary for approval.

§ 1208.32 Designation and appointment of retailer members and alternates.

(a) Four nominations for one of the traditional retailer members of the Council and that member's alternate shall be received from the American Floral Marketing Council (AFMC) or a successor entity.

(b) Four nominations for each of two members of the Council and their alternates shall be received from national traditional retail florist organizations other than the AFMC. In order to be eligible to submit nominations for members and alternates to serve on the Council, such organizations must certify that their activities and membership are nationwide in scope. No more than four nominations for each seat may be submitted by each organization.

(c) The Secretary shall choose from among the names submitted by the AFMC the names of the member and alternate who shall fill the seat on the Council representing the AFMC. The Secretary shall choose from among the names submitted by national traditional retail florist organizations other than the AFMC the two members and their alternates who shall fill the other two seats on the Council representing traditional retailers.

§ 1208.33 Failure to nominate.

If any group of qualified wholesale handlers, producers that are qualified handlers, importers that are qualified handlers, persons who produce cut flowers and greens, or traditional retailers fails to nominate individuals for appointments as members or alternates of the Council, the Secretary may appoint individual(s) from the appropriate segment(s), region(s), or area(s) of the industry to fill the vacancy or vacancies. The failure of any nominee to promptly indicate the nominee's willingness to serve in such manner as may be prescribed by the Secretary shall be treated as a failure to nominate.

§ 1208.34 Term of office and compensation.

(a) The term of office for each member or alternate member of the Council shall be three years. As provided in the Act, the initial appointments on the Council shall be as follows: nine of the member appointments shall be for two-year terms, eight of the appointments shall be for three-year terms, and eight of the appointments shall be for four-year terms. Alternate members shall have the same terms of office as their respective members. The term of office on the initial Council shall be apportioned as follows:

(1) One of the two qualified wholesale handler members representing each of Regions 1, 2, 4, and 5 shall serve two-year terms of office; one of the two qualified wholesale handler members representing each of Regions 3, 4, and 6 shall serve three-year terms of office; and one of the two qualified wholesale handler members representing each of Regions 1, 2, 3, 5, and 6 shall serve four-year terms of office.

(2) The two qualified wholesale handler members representing the United States at large shall serve terms of office of two years and three years respectively.

(3) The members representing producers that are qualified handlers from Production Areas 1 and 2 shall serve three-year terms of office, and the member representing producers that are qualified handlers from Production Area 3 shall serve a four-year term of office.

(4) The three members representing importers that are qualified handlers shall serve terms of office of two, three, and four years respectively.

(5) The members representing producers that produce cut flowers and greens east and west of the Mississippi River shall each serve two-year terms of office.

(6) The member representing retailers nominated by the AFMC shall serve a two-year term of office. The two members representing retailers not nominated by the AFMC shall serve three-year and four-year terms of office respectively.

(b) No member of the Council may serve more than two consecutive terms of three years, except that any member serving an initial term of four years or two years may serve an additional term of three years.

(c) The term of office for the initial Council shall begin immediately following appointment by the Secretary. Should the term of office of the initial Council begin before January 1, 1995, the time between appointment and January 1, 1995, shall not count towards the initial term of office. Should the term of office of the initial Council begin later than January 1, 1995, all time until the following January will count as a full year toward the terms of office set out in this section. In subsequent years, the term of office shall begin on January 1 or such other period which may be recommended by the Council and approved by the Secretary.

(d) Members of the Council shall serve without compensation, but each member or alternate member acting in place of a member shall be reimbursed for the expenses incurred in performing duties as a member of the Council.

§ 1208.35 Vacancies.

(a) Should any Council member position become vacant, the alternate of that member shall automatically assume the position of said member. Candidates for the vacant alternate member position which resulted from the alternate filling the vacant member position shall be nominated in the manner specified in §§ 1208.31 and 1208.32. *Provided*, That a vacancy will not be required to be filled if the unexpired term is less than six months.

(b) Should the positions of both a member and such member's alternate become vacant, Candidates to serve the unexpired terms of office for such member and alternate shall be nominated in the manner specified in §§ 1208.31 and 1208.32. *Provided*, That a vacancy will not be required to be filled if the unexpired term is less than six months.

(c) If a member of the Council consistently refuses to perform the duties of a member of the Council, if a member of the Council fails to submit reports and remit assessments required under this part, or if a member of the Council is known to be engaged in acts of dishonesty or willful misconduct, the Council may recommend to the Secretary that the member be removed from office. If the Secretary finds that the recommendation of the Council shows adequate cause, the Secretary shall remove such member from office. Further, without recommendation of the Council, a member may be removed by the Secretary upon a showing of adequate cause, if the Secretary determines that the person's continued service would be detrimental to the achievement of the purposes of the Act.

§ 1208.36 Procedure.

(a) Thirteen (13) Council members, including alternates acting in place of members of the Council, shall constitute a quorum: Provided, That such alternates shall serve only when the member is absent from a meeting or is disqualified. Any action of the Council shall require the concurring votes of a majority of those present and voting. At assembled meetings, all votes shall be cast in person.

(b) In lieu of voting at an assembled meeting, and, when in the opinion of the chairperson of the Council such action is considered necessary, or for matters of an emergency nature when there is not enough time to call an assembled meeting, the Council may act upon a majority of concurring votes of its members cast by mail, telegraph, telephone, facsimile, or by other means of communication: *Provided*, That each member or alternate acting for a member receives an accurate, full, and substantially identical explanation of each proposition. Telephone votes shall be promptly confirmed in writing. All votes shall be recorded in the Council minutes.

§ 1208.37 Executive committee.

(a) The Council is authorized to appoint an executive committee of not more than nine persons from among its members. Initially, the executive committee shall be composed of the following:

(1) Four members representing qualified wholesale handlers;

(2) Two members representing producers that are qualified handlers;

(3) Two members representing importers that are qualified handlers; and

(4) One member representing traditional retailers.

(b) After the initial appointments, each appointment to the executive committee shall be made so as to ensure that the committee reflects, to the maximum extent practicable, the membership composition of the Council as a whole.

(c) Each initial appointment to the executive committee shall be for a term of two years. After the initial appointments, each appointment to the executive committee shall be for a term of one year.

(d) The Council may delegate to the executive committee the authority of the Council under this subpart to hire and manage staff and conduct the routine business of the Council consistent with such policies as are determined by the Council.

Activities of the Council

§ 1208.40 Duties of the Council.

The Council shall have the following duties, in addition to the duties specified in other sections of this subpart:

(a) Administer this subpart in accordance with the terms and provisions of this subpart;

(b) Make rules and regulations to effectuate the terms and provisions of this subpart;

(c) Appoint members of the Council to serve on the executive committee, as provided in § 1208.37;

(d) Employ such persons as the Council determines are necessary, and set the compensation and define the duties of the persons;

(e) Develop budgets for the implementation of this subpart and submit the budgets to the Secretary for approval, and propose and develop (or receive and evaluate), approve, and submit to the Secretary for approval plans and projects for cut flowers and greens promotion, consumer information, or related research;

(f) Implement plans and projects for cut flowers and greens promotion, consumer information, or related research, or contract or enter into agreements with appropriate persons to implement the plans and projects and pay the costs of the implementation of contracts and agreements with funds received under this subpart;

(g) Keep minutes, books, and records which clearly reflect all of the acts and transactions of the Council. Minutes of all meetings shall be promptly provided to the Secretary;

(h) Evaluate ongoing and completed plans and projects for cut flowers and greens promotion, consumer information, or related research;

(i) Receive, investigate, and report to the Secretary complaints of violations of this subpart and direct that the staff of the Council periodically review the list of importers of cut flowers and greens provided by the Customs Service to determine whether persons on the list are subject to this subpart;

(j) Recommend to the Secretary amendments to this subpart;

(k) Invest, pending disbursement under a plan or project, funds collected through assessments only in: Obligations of the United States or any agency of the United States, general obligations of any State or any political subdivision of a State, any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or obligations fully guaranteed as to principal and interest by the United States. Income from any such invested funds may be used only for a purpose for which the invested funds may be used.

(l) Prepare and submit to the Secretary such reports as may be prescribed for appropriate accounting with respect to the receipt and disbursement of funds entrusted to the Council monthly, or at such times as prescribed by the Secretary. Monthly financial statements shall be submitted to the Department and shall include at least:

(1) A balance sheet, and

(2) An expense budget comparison showing expenditures during the month, year-to-date expenditures, and an unexpended budget. Upon request, a summary of checks issued by the Council is to be made available. Reports shall be submitted within 30 days after the end of each month.

(m) To cause the books of the Council to be audited by an independent certified public accountant at the end of each fiscal period, and at such other times as the Council or the Secretary may deem necessary. The report of each audit shall show the receipt and expenditure of funds collected pursuant to this part, and shall be submitted to the Secretary.

(n) To give the Secretary the same notification, written or oral, as provided to Council members concerning all conference calls and meetings, including executive, advisory, subcommittee, and other meetings related to Council matters, and to grant the Secretary access to all such calls and meetings;

(o) To follow the Department's equal opportunity/civil rights policies; and

(p) Provide the Secretary such information as the Secretary may require.

§ 1208.41 Budgets and expenses

(a) The Council shall promptly adopt and forward to the Secretary for approval its determination of the beginning and ending dates of an annual fiscal period to be used by the Council for budgeting and accounting purposes.

(b) The Council shall submit annual budgets of its anticipated expenses and disbursement in the administration of this subpart, including the projected costs for the promotion of cut flowers and greens, consumer information, and related research plans and projects to the Secretary for approval. The first budget, which shall be submitted promptly after the effective date of this subpart, shall cover such period as may remain before the beginning of the next fiscal year. If such fiscal period is 90 days or less, the first budget shall cover such period, as well as the next fiscal year. Thereafter, the Council shall submit budgets for each succeeding fiscal year not less than 30 days before the beginning of such fiscal year.

(c) The Council is authorized to incur such expenses (including provision for a reasonable reserve for operating contingencies) as the Secretary finds are reasonable and likely to be incurred by the Council for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with this subpart. Expenses authorized in this paragraph shall be paid from assessments collected pursuant to § 1208.50, or other funds available to the Council.

(d) The Council shall reimburse the Secretary, from assessments collected pursuant to § 1208.50, or from other funds available to the Council, for administrative costs incurred by the Department to carry out its responsibilities pursuant to this subpart after December 29, 1994.

(e) The Council shall establish an interest-bearing escrow account with a bank that is a member of the Federal Reserve System and shall deposit in such account an amount equal to the percentage determined by the Council to be held in reserve for the payment of refunds pursuant to § 1208.54.

(f) The Council may, with the approval of the Secretary, borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Council.

§ 1208.42 Plans, projects, budgets, and contracts.

The Council shall develop and implement plans and projects for the promotion of, and the dissemination of information about, cut flowers and greens, as well as for research related to cut flowers and greens in accordance with the following:

(a) The Council shall develop, or contract for the development of, plans and projects for advertising, sales promotion, other promotion, and for dissemination of consumer information, with respect to cut flowers and greens, and may disburse such funds as necessary for these purposes after such plans or projects have been submitted to, and approved by, the Secretary. Any such plan or project shall be directed toward increasing the general demand for cut flowers and greens and shall not make reference to a private brand or trade name, point of origin, or source of supply, except that the Council may offer such plans and projects of the Council for use by commercial parties such as local, regional, State, or national floral industry organizations, and then only under terms and conditions prescribed by the Council and approved by the Secretary. No plan or project may make use of unfair or deceptive acts or practices with respect to quality or value.

(b) The Council shall develop, or contract for the development of, plans and projects for research on the development of both established and new markets for cut flowers and greens and for research with respect to postharvest physiology, distribution, sale, marketing, use, and promotion of cut flowers and greens, as well as the dissemination of consumer information concerning cut flowers and greens. The Council is authorized to develop, or contract for the development of, such plans and projects for other research with respect to the marketing, promotion, and dissemination of information about cut flowers and greens as it finds appropriate. The Council may disburse such funds as necessary for these purposes after such plans or projects have been submitted to, and approved by, the Secretary.

(c) The Council shall submit to the Secretary, for approval before implementation, any contracts for development of plans and projects, as well as such plans and projects as may be developed by or approved by the Council for advertising, promotion, dissemination of information, and research. All such submissions to the Secretary shall be accompanied by a proposed budget showing the estimated expense to be incurred and the availability of revenue from which such expense may be paid. On approval of any such submission, the Council may proceed with the contract, plan or project and incur the expenses necessary to carry it out. Contracts or agreements to be submitted to the Secretary and entered into if approved by the Secretary shall, among such other matters as may be required, provide that:

(1) The contracting or agreeing party shall develop and submit to the Council a plan or project, together with a budget that includes the estimated costs to be incurred for the plan or project;

(2) The plan or project shall become effective on the approval of the Secretary; and

(3) The contracting or agreeing party shall:

(i) Keep accurate records of all of the transactions of the party;

(ii) Account for funds received and expenses;

(iii) Make periodic reports to the Council of activities conducted; and

(iv) Make such other reports as the Council or the Secretary may require.

(d) The Council, from time to time, may seek advice from and consult with experts from the production, import, wholesale, and retail segments of the cut flowers and greens industry to assist in the development of promotion, consumer information, and related research plans and projects. For these purposes, the Council may appoint special committees composed of persons other than Council members. A committee so appointed may not provide advice or recommendations to a representative of an agency, or an officer, of the Federal Government, and shall consult directly with the Council.

§ 1208.43 Other contracts and agreements.

The Council may enter into contracts or agreements for administrative services, including contracts of employment, as may be required to conduct its business in accordance with such fiscal period budgets as may have been approved by the Secretary. To the extent appropriate to the contract involved, contracts entered into by the Council under the authority of this section shall contain provisions comparable to those described in § 1208.42(c).

Assessments

§ 1208.50 Assessments.

(a) Each qualified handler, as defined in § 1208.16, shall pay to the Council an assessment in an amount determined in accordance with this subpart, on each sale of cut flowers and greens to a retailer or an exempt handler (as defined in § 1208.8) and on each non-sale transfer of cut flowers and greens to a retailer by a qualified handler that is a distribution center; as well as each direct sale of cut flowers and greens to a consumer by a producer that is a qualified handler, or by an importer that is a qualified handler. Such assessments shall be remitted by each qualified handler to the Council or its agent within 60 days after the end of the month in which the sale or non-sale transfer subject to assessment under this subpart took place. Such assessments shall be paid at the following rates:

(1) During the first three years after December 29, 1994.

(i) Except as provided in paragraph (a)(1)(ii) of this section, the rate shall be one-half of 1 (0.5) percent of the gross sales price of the cut flowers and greens sold;

(ii) In the case of non-sale transfers to a retailer by a qualified handler that is a distribution center and in the case of direct sales by importers or producers, the rate shall be one-half of 1 (0.5) percent of the amount of each transaction's valuation for assessment as provided in paragraph (b);

(2) After the first three years from December 29, 1994, the uniform assessment rate may be increased or decreased annually by not more than one-quarter of 1 (0.25) percent of the gross sales price of a product sold; or in the case of other transactions the amount of such transactions, except that the assessment rate may not exceed 1 percent of the gross sales price or the transaction amount. Changes in the rate of assessment may only be made if such changes are adopted by a two-thirds majority vote of the Council and approved by the Secretary (after public notice and opportunity for comment as provided in the Act) as being necessary to carry out the objectives of the Act. Any such change so approved by the Secretary may be put into effect without a referendum but shall be announced not less than 30 days prior to the beginning of a fiscal year.

(b) Each non-sale transfer of cut flowers and greens to a retailer from a qualified handler that is a distribution center shall be treated as a sale of cut flowers and greens to a retailer and shall be assessable. Each direct sale of cut flowers and greens to a consumer by a producer who is a qualified handler or an importer who is a qualified handler shall be assessable. These transactions shall be determined to have the following valuations for assessment purposes:

(1) In the case of a non-sale transfer of cut flowers and greens from a distribution center that is a qualified handler and each direct sale of cut flowers and greens to a consumer by an importer that is a qualified handler, the amount of the valuation of the cut flowers and greens for assessment purposes shall be the price paid by the distribution center or importer to acquire the cut flowers and greens, and determined by multiplying the acquisition price by a uniform factor of 1.43 to represent the markup of a wholesale handler on a sale to a retailer.

(2) In the case of a direct sale to a consumer by a producer who is a qualified handler, the valuation of the cut flowers and greens for assessment purposes shall be equal to an amount determined by multiplying the price paid by the consumer by a uniform factor of 0.50 to represent the cost of producing the article and the markup of a wholesale handler on a sale to a retailer.

(3) The Council may consider and adopt changes in the uniform factors specified in paragraphs (b) (1) and (2) of this section. Any such change shall not become effective until it has been adopted by a majority vote of the Council and approved by the Secretary after public notice and opportunity to comment on such change as provided in the Act. Changes so adopted and approved shall become effective at the beginning of the next fiscal year.

(c) The collection of assessments shall commence on or after a date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be remitted, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments in an interest bearing account until the Council is constituted, and the funds may be transferred to the Council.

(d) Assessments shall be determined on the basis of the gross sales price. The Council, with the approval of the Secretary, may make uniform adjustments in determining the gross sales price when such adjustments reflect changes in trade practices or ensure equitable treatment of all qualified handlers paying assessments.

(e) No assessments may be levied on any sale of cut flowers and greens for export from the United States. The Council is authorized to establish procedures for the verification of exports.

(f) In general, assessment funds (less refunds, if any) shall be used:

(1) For payment of costs incurred in implementing and administering this subpart;

(2) To provide for a reasonable reserve to be maintained from assessments to be available for contingencies; and

(3) To cover the administrative costs incurred by the Secretary in implementing and administering this Act.

§ 1208.51 Influencing governmental action.

No funds collected by the Council shall in any manner be used for the purpose of influencing legislation or government action or policy, except to develop and recommend to the Secretary amendments to this subpart.

§ 1208.52 Charges for late payments.

Any assessment due the Council pursuant to § 1208.50 that is not paid on time shall be increased 1.5 percent each month it remains unpaid beginning with the day following the date such assessment was due. If not paid in full, any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a failure to submit a report when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Council shall be based on the applicable postmark date or the date actually received by the Council, whichever is earlier.

§ 1208.53 Adjustment of accounts.

Whenever the Council or the Secretary determines through an audit of a person's reports, records, books, or accounts or through some other means that additional money is due the Council or that money is due such person from the Council, such person shall be notified of the amount due. The person shall then remit any amount due the Council by the next date for remitting assessments. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

§ 1208.54 Refunds of assessments and escrow account.

(a) Any qualified handler may demand and receive from the escrow account, subject to the limitation on such payments provided in paragraph (c), a one-time refund of any assessments paid by or on behalf of the handler if the handler requests the refund before the initial referendum on this subpart is held and this subpart is rejected by the voters when it is submitted to the referendum. Such a refund will be paid only if all of the following conditions are met:

(1) The handler has paid the assessments sought to be refunded and has submitted proof of such payment;

(2) The handler does not support the program established under this subpart and so states in the handler's demand for a refund;

(3) The handler's demand for a refund is made on a form specified by the Council and filed not less than 10 days prior to the date when the initial referendum, conducted pursuant to § 1208.60(a) to ascertain whether this subpart shall remain in effect, is scheduled to begin; and

(4) This subpart is not approved by a simple majority of the votes cast by qualified handlers in the initial referendum.

(b) The Council shall establish an escrow account to be used for assessment refunds, as needed, and shall place into the account an amount equal to 10 percent of the total amount of assessments collected during the period beginning on December 29, 1994 and ending on the date the results of the initial referendum are issued and the initial referendum is completed.

(c) If the amount in the escrow account is not sufficient to refund the total amount of assessments demanded by all qualified handlers determined eligible for refunds and this subpart is not approved in the referendum, the Council shall prorate the amount of all such refunds among all eligible qualified handlers that demand the refund. If there is any amount in excess of the amount needed to pay refunds and expenses, it shall be returned pro rata to those who paid assessments. If this subpart is approved in the referendum, there shall be no refunds made, and all funds in the escrow account shall be returned to the Council for use by the Council in accordance with the other provisions of this subpart.

§ 1208.55 Postponement of collections.

(a) The Council may grant a postponement of the payment of an assessment under this subpart for any qualified handler that establishes that it is financially unable to make the payment. In order that a qualified handler that is financially unable to pay an assessment may have the opportunity to petition the Council to postpone payment of such an assessment, as provided in the Act, the Council shall develop forms and procedures for this purpose as expeditiously as possible and submit them to the Secretary for approval and issuance after notice and an opportunity for public comment thereon. Such procedures shall, among other things, require that the handler demonstrate the handler's inability to pay through the submission of an opinion prepared by an independent certified public accountant (at the handler's expense) and any other documentation specified therein to the effect that the handler is insolvent or will be unable to continue to operate if the handler is required to pay the assessment when due.

(b) The procedures for obtaining a postponement of payment to be developed by the Council for submission to the Secretary shall also include provisions with respect to the period of postponement, the conditions of payment that may be imposed and the basis, if any, on which further extensions of the time for payment will be granted so as to appropriately reflect the demonstrated needs of the qualified handler.

§ 1208.56 Determinations.

(a) The Council is authorized to make the determinations required by this subpart as to the status of persons as qualified handlers and exempt handlers including determinations of the status of persons as qualified wholesale handlers, distribution centers that are qualified handlers, producers that are qualified handlers, importers that are qualified handlers, as well as such other determinations of status and facts as may be required for the effective administration of this subpart. Based on such determinations, the Council from time to time shall publish lists of exempt handlers who are not required to pay assessments, and lists of qualified handlers who are required to pay assessments under this subpart.

(b) For the purpose of applying the $750,000 annual sales limitation to a specific person in order to determine the status of the person as a qualified handler or an exempt handler or to a specific facility in order to determine the status of the facility as an eligible separate facility for the purpose of referenda, the Council is authorized to determine the annual sales volume of a person or facility.

(c) Any such determination shall be based on the sales of cut flowers and greens by the person or facility during the most recently-completed calendar year, except that in the case of a new business or other operation for which complete data on sales during all or part of the most recently-completed calendar year are not available to the Council, the determination may be made using an alternative time period or other alternative procedures as the Council may find appropriate. In making such determinations, the Council is authorized to make attributions in accordance with paragraphs (c) (1) through (4) of this section and for the purpose of determining the annual sales volume of a person or a separate facility of a person, sales attributable to a person shall include:

(1) In the case of an individual, sales attributable to the spouse, children, grandchildren, parents, and grandparents of the person;

(2) In the case of a partnership or member of a partnership, sales attributable to the partnership and other partners of the partnership;

(3) In the case of an individual or a partnership, sales attributable to any corporation or other entity in which the individual or partnership owns more than 50 percent of the stock or (if the entity is not a corporation) that the individual or partnership controls; and

(4) In the case of a corporation, sales attributable to any corporate subsidiary or other corporation or entity in which the corporation owns more than 50 percent of the stock or (if the entity is not a corporation) that the corporation controls.

(d) The Council is also authorized to attribute any stock ownership interest as may be required to carry out this subpart. In doing so a stock ownership interest in the entity that is owned by the spouse, children, grandchildren, parents, grandparents, or partners of an individual, or by a partnership in which a person is a partner, or by a corporation more than 50 percent of the stock of which is owned by a person, shall be treated as owned by the individual or person.

(e) For the purpose of this subpart, the Council, with the approval of the Secretary, may require a person who sells cut flowers and greens to retailers to submit reports to the Council on annual sales by the person and on stock ownership.

Suspension or Termination

§ 1208.60 Suspension and termination.

If the Secretary finds that this subpart, or any provision of this subpart, obstructs or does not tend to effectuate the policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or the provision of this subpart under such terms as the Secretary determines are appropriate. Such termination or suspension shall not be considered an order within the meaning of such term in the Act.

§ 1208.61 Proceedings after termination.

(a) Upon the termination of this subpart, the Council shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the assets of the Council. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Council, including any claims unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Council under any contract or agreement entered into by it under this subpart;

(3) Make refunds from the escrow account to those persons who applied for refunds of assessments paid and who are eligible to receive such refunds. Such refunds shall be made within 30 days after the referendum results are issued.

(4) From time to time account for all receipts and disbursements, and deliver all property on hand, together with all books and records of the Council and of the trustees, to such persons as the Secretary may direct; and

(5) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Council or the trustees under this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered under this subpart shall be subject to the same obligations imposed upon the Council and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information, or industry information programs, plans, or projects authorized under this subpart.

§ 1208.62 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation or rule issued under this subpart, or the issuance of any amendment to such provisions, shall not:

(a) Affect or waive any right, duty, obligation, or liability that shall have arisen or may hereafter arise in connection with any provision of this subpart or any such regulation or rule;

(b) Release or extinguish any violation of this subpart or any such regulation or rule; or

(c) Affect or impair any rights or remedies of the United States, the Secretary, or any person with respect to any such violation.

Reports, Books, and Records

§ 1208.70 Books, records, reports, cost control, and audits of the Council.

(a) The Council shall maintain the books and records that the Secretary may require to account for the receipt and disbursement of all funds entrusted to the Council in accordance with the provisions of this subpart, and shall prepare and submit to the Secretary, from time to time as prescribed by the Secretary, all reports that the Secretary may require.

(b) The Council shall, as soon as practicable after December 29, 1994 and after consultation with the Secretary and other appropriate persons, implement a system of cost controls based on normally accepted business practices that will ensure that the annual budgets of the Council include only amounts for administrative expenses that cover the minimum administrative activities and personnel needed to properly administer and enforce this subpart, and conduct, supervise, and evaluate plans and projects under this subpart.

(c) The Council shall cause the books and records of the Council to be audited by an independent certified public accountant at the end of each fiscal year. All audits must be performed in accordance with either standards issued by the American Institute of Certified Public Accountants or by the General Accounting Office. A report of each audit shall be submitted to the Secretary.

§ 1208.71 Reports, books, and records of persons subject to this subpart.

(a) Each qualified handler shall prepare and file reports containing such information as may be required by the Council with the approval of the Secretary. Such information shall include:

(1) Data showing the volume of sales and non-sale transfers of cut flowers and greens made during the reporting period;

(2) The amount of the assessment on such sales or non-sale transfers; and

(3) Any other data that may be required by the Council with the approval of the Secretary.

(b) Each person subject to this subpart shall maintain and make available for inspection by agents of the Council and the Secretary such books and records as are determined by the Council with the approval of the Secretary, as necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1208.72 Confidential treatment.

(a) Information obtained from books, records, or reports required to be maintained or filed under the Act and this subpart shall be kept confidential by all persons, including agents and former agents of the Council, all officers and employees and all former officers and employees of the Department, and by all officers and employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Council members. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this paragraph shall be deemed to prohibit:

(1) The issuance of general statements, based upon the reports, of the number of persons subject to this subpart or statistical data collected from such reports, which statements do not identify the information furnished by any such persons, and

(2) The publication, by direction of the Secretary, of the name of any individual, group of individuals, partnership, corporation, association, cooperative, or other entity that has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart so violated.

(b) No information on how a person voted in a referendum conducted under the Act shall be made public.

Miscellaneous

§ 1208.80 Right of the Secretary.

All fiscal matters, programs or projects, by-laws, rules or regulations, reports, or other substantive actions proposed and prepared by the Council shall be submitted to the Secretary for approval.

§ 1208.81 Personal Liability.

No member or employee of the Council shall be held personally responsible, either individually or jointly, in any way whatsoever, to any person for errors in judgement, mistakes, or other acts of either commission or omission of such member or employee under this subpart, except for acts of dishonesty or willful misconduct.

§ 1208.82 Patents, copyrights, inventions, publications, and product formulations.

Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Council under this subpart shall be the property of the United States Government as represented by the Council and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, publications, or product formulations, inure to the benefit of the Council. Upon termination of this subpart, § 1208.61 shall apply to determine disposition of all such property.

§ 1208.83 Amendments.

Amendments to this subpart may be proposed, from time to time, by the Council or by any interested person affected by the provisions of the Act, including the Secretary.

§ 1208.84 Separability.

If any provision of this subpart is declared invalid, or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1208.85 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96–511, is OMB number 0581–0096, except Council member nominee information sheets are assigned OMB number 0505–0001.

Dated: December 23, 1994.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

[FR Doc. 94–32066 Filed 12–28–94; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 16

[Docket No. 94–17]

RIN 1557–AA65

Securities Offering Disclosure Rules; Correction

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Correction to final rule.

SUMMARY: This document makes a technical correction to the final rule (Docket No. 94–17) that was published Wednesday, November 2, 1994 (59 FR 54789). The final rule governs the disclosure requirements for offers and sales of national bank securities.

EFFECTIVE DATE: April 3, 1995.

FOR FURTHER INFORMATION CONTACT: Elizabeth Malone, Senior Attorney, Securities and Corporate Practices Division, (202) 874–5210, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of this correction amends 12 CFR part 16 effective April 3, 1995, to set forth the disclosure requirements for offers and sales of national bank securities.

Need for Correction

As published, the final rule contains two errors that may be confusing and therefore need to be corrected. Section 16.5(e) of the final rule cross-references Securities and Exchange Commission (SEC) Rule 145 (17 CFR 230.145) rather than Rule 148 (17 CFR 230.148) as intended. Section 16.5(f) of the final rule cross-references SEC Rules 702T and 703T (17 CFR 230.702T and 230.703T), which are still included in the Code of Federal Regulations but are no longer in effect.

The reference to Rule 145 is being changed to Rule 148 and the references to Rules 702T and 703T are being deleted.

Correction of Publication

Accordingly, the publication on November 2, 1994 of the final rule (Docket No. 94–17), which was the subject of FR Doc. 94–27082, is corrected as follows:

PART 16—[CORRECTED]

§ 16.5 [Corrected]

On page 54799, column 1, paragraphs (e) and (f) of § 16.5 are corrected to read as follows:

* * * * *

(e) In a transaction that satisfies the requirements of Commission Rule 144, 144A, 148, or 236 (17 CFR 230.144, 230.144A, 230.148, or 230.236);

(f) In a transaction that satisfies the requirements of Commission Rule 701 (17 CFR 230.701); or

* * * * *

Dated: December 22, 1994.

Eugene A. Ludwig

Comptroller of the Currency.

[FR Doc. 94–32065 Filed 12–28–94; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 304 and 327

RIN 3064–AB45

Assessments; Forms, Instructions, and Reports

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) is amending its regulation on assessments to provide for the quarterly collection of insurance premiums by means of FDIC-originated direct debits through the Automated Clearing House (ACH) network, based on invoices prepared by the FDIC using data reported by insured institutions in their quarterly reports of condition. The intended purpose of the amendments is to provide for a more efficient collection process, to the benefit of the deposit insurance funds and insured institutions, and to reduce the regulatory burden on insured institutions. The Board is further amending the assessments regulation to clarify the obligation of acquiring institutions to pay assessments on deposits assumed from institutions terminating their insured status; to delete from the assessments regulation the existing references to experience factors, which are not available for use after 1994; and to include such amendments to the FDIC's regulation on forms as are necessitated by the foregoing changes to the assessments regulation. With a few very limited exceptions, the amendments made by the final rule to the existing regulation are those previously proposed by the Board for public comment.

EFFECTIVE DATE: The final rule is effective April 1, 1995.

FOR FURTHER INFORMATION CONTACT: Connie Brindle, Chief, Assessment Operations Section, Division of Finance, (703) 516–5553, or Martha Coulter, Counsel, (202) 898–7348, regarding quarterly collections; William Farrell, Chief, Assessment Management Section, Division of Finance, (703) 516–5546, or Jules Bernard, Counsel, (202) 898–3731, regarding assessment obligations of acquiring institutions; Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Collection Improvement Proposal

A. Background

Earlier this year, the Board issued for public comment a proposal to revise the existing process for collecting deposit insurance assessments. 59 FR 29965 (June 10, 1994). The Board is adopting the revisions as proposed along with technical adjustments to conform the provisions of the FDIC's assessment regulations at 12 CFR Part 327 to the new collection process. Implementation of the new system will begin with the semiannual assessment period that starts July 1, 1995.

At present, the FDIC's assessment regulations require the payment of deposit insurance premiums twice a year, in an amount computed by the institution. The computation, and the resulting assessment amount, is shown on a certified statement submitted by the institution along with a check for the full amount of the assessment. The payment must be postmarked no later than January 31 for the first semiannual period of the year (January through June), and July 31 for the second semiannual period (July through December).

Under the proposal published in June, assessment payments would be made in quarterly installments, in amounts computed by the FDIC from data reported by each institution in its quarterly report of condition for the preceding quarter.[1] Institutions would be invoiced on November 30 and February 28 for the first semiannual assessment period of each year and on May 30 and August 30 for the second semiannual period. Quarterly payment would be due one month later—December 30, March 30, June 30, and September 30, respectively—and would be collected by means of ACH debits originated by the FDIC. The first-quarterly installment for the period beginning January 1 (due two days earlier, on December 30) would be based on data reported in the institution's report of condition for the preceding September 30. The second-quarterly installment for that period (due February 28) would be based on the report of condition for the preceding December 31. The first-quarterly payment for the semiannual period beginning July 1 (due June 30) would be based on the March 31 report of condition, and the second-quarterly payment (due September 30) would be based on the June 30 report of condition. The following chart summarizes this schedule:

Semiannual assessment period covered	Quarter	Invoice date	Payment date	Report of condition used for preparation
Jan.–June	1	Nov. 30	Dec. 30	Sep. 30.
	2	Feb. 28	Mar. 30	Dec. 31.
July–Dec.	1	May 30	June 30	Mar. 31.
	2	Aug. 30	Sep. 30	June 30.

The proposal required that each institution designate a deposit account to be electronically debited by the FDIC for assessment payments. It also provided a procedure for institutions to request revision of the FDIC invoice showing the quarterly payment to be debited. It further included a procedure to be followed if, for some reason, a quarterly invoice was not timely received by an institution.

Under section 7(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(c), each insured depository institution is required to file with the FDIC a certified statement containing such assessment information as the FDIC may require for determining the institution's assessment for the semiannual period. Under the proposal, pursuant to this statutory provision, the second quarterly invoice for each semiannual period would include a statement showing both the first- and second-quarter assessment data. Each institution would be required to certify its agreement with the assessment computation as shown on the form as received from the FDIC or, alternatively, its agreement with that computation as amended in a manner specified by the institution.

B. Discussion of Comments Received

The FDIC received 51 letters in response to its request for comment on the proposal. Among the respondents were 40 depository institutions, 2 bank holding companies, 3 ACH associations, and 2 governmental entities. Comment letters were also received from the American Bankers Association, the Independent Bankers Association of America, the Savings & Community Bankers of America, and the Independent Bankers Association of Texas.

All of the responding bankers associations and ACH associations generally supported the proposal, subject to certain recommendations and concerns. According to one national bankers association, "banker response to the proposal has been overwhelmingly positive". In addition, 14 of the individual institutions favored the proposal. The two bank holding companies generally supported the proposal, although each objected to one particular element (but not the same one). Of the remaining 28 commenters, 23 individual institutions generally opposed the proposal, three institutions expressed support for some major elements and opposition to other major elements, and 2 related government agencies submitted letters expressing concern on a single specific issue.

Significant issues raised by the comment letters are addressed below. Included with the discussion of each issue is an explanation of the FDIC's conclusions regarding that issue.

1. Quarterly Collection

One of the elements receiving the most attention from commenters was the increased frequency of assessment payments, from semiannually to quarterly. Of the 24 commenters specifically addressing this issue, three bankers associations and seven individual institutions supported it and 14 individual institutions opposed it. The final rule includes this element as proposed.

The principal reasons given in support of quarterly collection were that it would simplify the assessment calculation by basing each quarterly payment on only one report of condition instead of an average of two, and that it would reduce reporting and calculation errors by moving payment dates further away from the date of the underlying report-of-condition data, thereby allowing more time for refinement of the relevant data. The reason most commonly given in opposition was that increased frequency of payment would result in additional work or increased costs for institutions. Two institutions objected to quarterly assessment payments on the grounds that they generally receive their interest income only semiannually, and one institution preferred basing assessments on an average of two quarterly reports of condition.

[1] For banks, the report of condition is called the Report of Income and Condition; for thrift institutions, the Thrift Financial Report; and for insured branches of foreign banks, the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

The issue of whether the proposal might result in increased costs to institutions was expressly addressed in the comments received from a national bankers association, which observed that any additional expenses resulting from the proposed system should be offset by an overall savings in paperwork and a reduction in assessment prepayment interest expense. Another bankers association indicated that some community banks were concerned about the additional work of verifying the FDIC's calculation four times a year, and recommended that the FDIC's quarterly assessment invoice be designed in a readily-verifiable format. A fifth commenter indicated that most banks have automated their assessment calculations and could use that capability to verify the FDIC's invoice.

The Board believes that, while a shift to quarterly payments will add two new collection dates each year and thus require institutions to go through the payment process more often, the new collection procedure on the whole will result in an overall reduction in the amount of time devoted by institutions to assessment collections. Although it is expected that institutions will want to verify the numbers shown on the FDIC's invoice, it is also expected that institutions will need less time to verify four FDIC quarterly invoices than they currently use to compute their own assessments and prepare two semiannual assessment statements. The numbers shown on the FDIC's invoice will be the institution's own numbers, taken from its report of condition for the preceding quarter. Institutions will need only to check the numbers to satisfy themselves that they were accurately transferred from the institution's report of condition. Although the numbers will be electronically processed by the FDIC to determine an assessment amount, the assessment calculation on the invoice will be based on only one report of condition and thus require less time to verify than the current calculation, which is based on a combination of two reports of condition. Moreover, the FDIC intends to present the invoice in a format designed for ease of verification.

In addition, there is more time under the new system between the end of the applicable reporting period and the assessment payment date. As a result, there is more time for rechecking the quarterly report data and making corrections before payment of the assessment that is derived from that data. The availability of more refined data for the assessment computation should reduce the amount of time spent by institutions in revising assessment calculations subsequently rendered erroneous because of corrections in report-of-condition data.

It is possible that some commenters' opposition to quarterly payments is based on a perception that because institutions will be making an assessment payment earlier than they do now, they will lose interest income on the funds used for the earlier payment. However, this view ignores the fact that only a portion of an institution's semiannual assessment will be paid earlier; approximately one-half will be paid later. At present, the two due dates for assessment payments are January 31 and July 31. Under the new system, the first-quarterly payment dates will be December 30 and June 30, one month earlier. Thus, institutions will lose interest income for one month on approximately one-half of their semiannual assessments. However, the second-quarterly payment dates—March 30 and September 30—are two months later than the existing payment dates. Therefore, in contrast to a one-month loss of income on the accelerated portion, institutions will gain two months of income on the delayed portion. This would seem to balance out in institutions' favor, rather than to their detriment.[2]

Another possible concern for some institutions might be that basing assessments on only one quarterly report of condition rather than on an average of the two previous reports could increase their assessments.[3] Although elimination of averaging should not affect the actual amount of semiannual assessments paid by an institution, some institutions might have higher or lower cost-of-funds expenses than they would if averaging were retained. Institutions whose deposits are increasing might pay slightly less in assessment payments in the first quarter of a semiannual assessment period and slightly more in the second quarter, while the converse would apply to institutions whose assessable deposits decline through the period. However, on both an institution-by-institution and industry-wide basis, elimination of averaging is expected to simplify the assessment process without affecting the actual amount of semiannual assessments paid.[4]

2. ACH Direct Debit by the FDIC

Another key element of the collection improvement plan is the use of ACH direct debits originated by the FDIC as the method of collection. Of the 28 comment letters addressing this component, 17 were in favor and 11 were opposed. The supporters included ten individual institutions, two national bankers associations, two bank holding companies, and three ACH associations. The opposing commenters were 11 individual institutions. The Board has decided to adopt this element as proposed.

Increased efficiency over the existing paper-based collection process was the reason cited most often by supporters of electronic payment. The principal concern among the opponents seemed to be a loss of payment flexibility. Also mentioned was the difficulty of correcting errors in an electronic environment.

The FDIC believes that the existing assessment collection process will be improved substantially by utilizing an electronic payment process, to the benefit of insured depository institutions and the federal deposit insurance funds. Because the existing process is paper-based, it is more time consuming and less efficient, both for the industry and for the FDIC, than an improved collection process making fuller use of advanced payment technology.

It was not clear from the comment letters how the use of an electronic collection procedure might reduce payment flexibility for institutions. At present, institutions can submit their assessment payment by check at any time after they know the amount due, up until the payment deadline. This covers a maximum period of one month, from the last day of the latter quarter on

[2] Several commenters suggested that the purpose of quarterly collection, with an accelerated payment, is to increase the FDIC's cash flow. However, when one considers that the accelerated payment is due only one month earlier than the existing payment date, while the delayed payment date comes two months after the existing payment date, the flaw in this suggestion is clear.

[3] One institution cited loss of averaging as the sole basis for its opposition to the proposal. Yet in the example given in its comment letter (receipt of a deposit of $2 million on the last day of June, which was transferred out a few days later), the retention of two-quarter report-of-condition averaging would not eliminate the problem described. Assuming that the institution has deposits of $28 million (including the $2 million just received) at the end of June 30, and $26 million on the previous March 31 (the companion quarter-end for the same semiannual period), its "average" deposits across the semiannual period would be $27 million. Whether its average deposits of $27 million is multiplied by one-half its annual assessment rate (as under the existing system) or March's $26 million and June's $28 million are each multiplied by one-quarter of the rate (as under the new system) and then added together to determine the amount across the two quarters, the result is the same.

[4] A national bankers association noted in its comments that most bankers believe that, while there will be more volatility in the payment amount for each quarter under the proposed system than under the existing system, the total annual payment should remain about the same.

which the assessment calculations are based (December 30 or June 30) through the payment due date (January 31 or July 31). Under the electronic procedure, institutions could fund the account designated for the assessment debit (the equivalent of writing a check) at any time between receipt of the FDIC invoice and the payment due date, again a period of approximately 30 days. There are also payment deadlines under both the existing and new systems; for the former, it is the date by which the check must be postmarked, and under the latter it is the debit date. In these respects, both the existing and new systems appear to be equally flexible.

One institution objected to having the FDIC in its "electronic back pocket", which seems to reflect a concern that the FDIC might originate unexpected debits. This would not be the case, but institutions with that concern could readily address it by funding accounts designated for assessment payments only for the exact assessment amount due and only for the assessment due date.

Another possible concern might be the loss of float resulting from a change away from paper checks to electronic payments. However, the amount of cost-savings resulting from other elements of the new procedure—such as the reduction in prepayment interest expense—should more than compensate for the loss of float.

The other concern indicated by opponents of electronic collection was an increased difficulty of error resolution in an electronic environment. The FDIC believes that, to the contrary, error resolution will be significantly more efficient under the new system than under the existing system. Collection by ACH debits will allow the FDIC to identify within approximately two days of the debit any discrepancies between the amount due and the amount received, and the FDIC expects to contact immediately any institutions for which discrepancies appear. At present, identification of differences between the amounts due and the amounts paid takes two to three months because the FDIC must await reports and reconciliations of certified statement forms and paper checks from lock-box processors.

The three ACH associations from which we received comment letters on the proposal suggested that the FDIC permit institutions preferring to pay by institution-initiated ACH credits the option of doing so. While we recognize that providing such an option might benefit some institutions, the FDIC's experience, based on live testing of ACH assessments collection for the two semiannual assessment periods in 1994, is that the error rate for direct-debit collection is significantly lower.[5]

Three commenters recommended that, in using the ACH system, the FDIC comply with the rules of the National Automated Clearing House Association. It is, and has been, the FDIC's intent to do so.

3. Assessment Computation Review Procedure; Quarterly Adjustment

Under the proposal, the assessment-base data included on the quarterly assessment invoice provided to the institution by the FDIC would be taken directly from the institution's most recent report of condition. Because of the source of the data and given the mechanical nature of the assessment calculation, it was anticipated that there would be only limited occasion for institutions to disagree with the invoices. However, a procedure for resolving any such disagreements was included in the proposal. With one exception, regarding the timing of FDIC response, the Board has decided to adopt the proposed procedure.

The proposed procedure would apply only to disagreements identified in § 327.3(h) of the proposed regulation, such as where the institution believes the rate multiplier applied by the FDIC is inconsistent with the assessment risk classification assigned to the institution for the semiannual period for which the payment is due. The procedure would not apply to disputes regarding the appropriateness of the assessment risk classification assigned to the institution; such disputes would continue to be covered by the risk classification review procedure in the existing regulations.[6]

Under the new procedure, the period within which an institution could file a request for revision of an invoice would generally terminate 60 days from the date of the invoice. However, where the revision would result from an institution-initiated amendment to its report of condition, the filing deadline for the request for revision would be 60 days from the date on which such amendment is filed. The amendment of the report of condition would not automatically trigger an assessment adjustment. Instead, institutions would need to utilize the new procedure to provide notice to the FDIC of the requested revision resulting from the amendment.

This proposed procedure was specifically addressed by four commenters, all of which were bankers associations. Each of these commenters expressed some concern regarding the procedure. One association indicated that the procedure seemed reasonable, but recommended that it be revised to include a schedule for FDIC response to requested revisions. Another association agreed with the need for a deadline for FDIC response, and also urged the FDIC to reevaluate its procedures for resolving disputes concerning assessment risk classifications. According to the latter commenter, the resolution of risk classification disputes can often be protracted and confusing.

A third bankers association urged the FDIC to establish clear assessment computation review procedures so that institutions would know who to contact. The remaining association reported that some of its members had expressed doubt that the new system would result in fewer errors and greater ease of error resolution. This association recommended that, in order to increase the likelihood of these results, the FDIC make a special effort to provide clear and complete instructions and forms to institutions and to provide adequate staffing in the initial stages of the new procedure to answer institutions' questions.

Regarding the addition of a schedule for FDIC response to requested revisions, the Board has decided to include in the final rule a requirement that the FDIC respond in writing within 60 days of receipt of the request (or, if additional information is sought by the FDIC regarding the request, within 60 days of receipt of the additional information). It is anticipated that in most cases, the response would be in the form of a notice of the FDIC's decision on the request. However, in instances in which decision within 60 days is not feasible, the response is expected to consist of a status report.

The Board notes the suggestion that the FDIC reconsider the existing procedure for institutions requesting review of their assessment risk classifications. This is a matter to which the Board has given its attention on several occasions, beginning with its initial consideration of the risk-based

[5] In January 1994, an ACH-credit test was conducted with 36 small institutions. Despite careful monitoring, significant input errors occurred (incorrect certificate numbers, absence of bank name). For the July 1994 payment, testing was expanded to include 183 institutions. Of this group, 19 elected to originate payment themselves, while the remaining 164 paid by FDIC-initiated debits. No errors occurred with the debit transactions, in contrast with errors in six (approximately 30 percent) of the credit transactions (failure to include certificate numbers).

[6] Under the final rule, as under the proposal, assessment risk classifications will be assigned, and applied, semiannually. No comments were received on this subject, although one commenter supported the proposal to combine the semiannual risk classification notice with the first-quarter invoice for the semiannual period.

assessment system in 1992. It is also an area the FDIC continues to monitor, in order to identify potential refinements.

Regarding the remaining two comments, the FDIC appreciates the significance of the impact the new assessment collection procedures will have on insured institutions, and fully intends to do its best to make the change from the existing system as smooth as possible. This will include staffing an FDIC telephone "hotline" for institutions with questions concerning the new procedures, mailing relevant information and guidance to each insured institution, and initiating the formal collection from each institution of the data needed by the FDIC to identify the accounts designated for the ACH debits.

A matter related to the error-resolution procedure concerns the manner in which assessment payments are adjusted once an error has been identified and corrected. The proposal included a "rolling" correction process in which necessary adjustments in the assessment amount would be made on a quarterly basis. Thus, the FDIC would add to or subtract from the amount that would otherwise be due for the next quarterly payment the amount of any under- or over-payment from earlier quarters, with interest to be paid to or by the FDIC determined on a full-quarter basis. The Board has decided to adopt this procedure as proposed, with one very limited modification.

One commenter specifically addressing the "rolling" adjustment procedure (a national bankers association) opined that such a system is reasonable, but requested that the FDIC initiate a special procedure for large-dollar errors in the FDIC's favor (apparently referring to assessment overpayments) to enable such errors to be resolved more quickly, ideally before the payment due date. However, another commenter applauded the symmetrical treatment given by the proposal to overpayments and underpayments, in terms of quarterly adjustment and the payment of interest. The latter commenter noted that the payment of interest on a quarterly basis for both overpayments and underpayments would minimize the incentive for the FDIC to delay recognition of overpayments and reduce the incentive of institutions to delay identification and reporting of underpayments. A third commenter observed that it seems inappropriate to charge interest on underpayments when the FDIC is calculating the assessments, and that any error would seem to be that of the FDIC and not the institution.

Regarding the source of errors leading to either underpayments or overpayments, the Board notes that the data used by the FDIC in computing the assessments due is taken from reports filed by the institutions. Thus, the FDIC is not the sole possible source of over- or under-calculating the payments due. Similarly, while the FDIC intends to try to resolve errors as quickly as possible—and, to the extent possible, prior to the payment date—we do not consider it to be the fairest approach to single out for special treatment large-dollar errors in the FDIC's favor. Such treatment could be seen as giving individual institutions priority over the interest of the deposit insurance funds (and, thus, the industry as a whole) and could possibly reduce the incentive of institutions to exercise care in reporting the relevant data.

Under the proposal, as under the existing regulation, the amount of the assessment payment due from an institution is determined by multiplying its assessment base by its assessment rate (see §§ 327.3(c) and (d) of the final rule). These elements determine the amount due, despite any miscalculations or other errors that, under the existing rule, might now be made by the institution or, under the final rule, might be made by either the institution or the FDIC. As discussed above, under both the proposed and final rule, correction of such errors would be made by adjustments to subsequent quarterly invoices, with interest to be paid by the FDIC if the adjustment resulted in a credit to the institution and by the institution if the adjustment resulted in an additional payment. This is the procedure intended by the FDIC in its proposal and, based on the comments received, the procedure as understood by those addressing the adjustment process.

However, in order to avoid any confusion or misunderstanding that might otherwise arise regarding this procedure, the final rule includes additional language in § 327.3(g), which addresses adjustments to the quarterly invoices, more specifically indicating that such adjustments can be necessitated by miscalculations or other similar actions by either the FDIC or the institution.

4. Invoice/Payment Schedule

The final rule adopts the proposed invoice and payment schedule. One favorable and two unfavorable comments were received on the proposed schedule. The unfavorable comments concerned the December 30 payment date, which both commenters argued should be moved to January. The basis for this request was that a December due-date would result in assessment payments in 1995 covering five quarters (all four quarters in 1995 and the first quarter of 1996). According to one of the commenters objecting to this result, this would cause a 25 percent increase in its 1995 assessment expenses.[7]

The Board appreciates that this could present a one-time problem for some institutions. However, it should be noted that this is purely a timing issue caused by the shift from semiannual to quarterly collection; it does not involve an "extra" assessment payment. It affects only institutions that use cash-basis accounting, rather than accrual accounting, and has only a temporary impact (which would be offset with the March 30, 1996, payment).

The solution recommended by the opposing commenters was to move the December payment date to January. Because doing so only for the December 1995 payment would not cure the problem, but merely delay it until December 1996, a more permanent change in the payment date would be needed. Such a change would have a continuing adverse cost-of-funds impact on the deposit insurance funds, in contrast to the temporary impact the December payment date would have on a limited number of institutions. Accordingly, the final rule retains the December payment date provided for in the proposal.

5. Other Comments

Under the proposal, the second quarterly invoice for each semiannual period would include a statement showing both the first- and second-quarter assessment data. Each institution would be required to certify its agreement with the computation of its semiannual assessment as shown on the invoice or, alternatively, its agreement with that computation as amended in a manner specified by the institution. One national bankers association suggested that the FDIC require such a certified statement only on an annual basis, while two other commenters suggested that such statements were unnecessary and burdensome and should be eliminated.

[7] This commenter also questions whether the FDIC has the authority to require payments in a single year in excess of the total for two semiannual periods. The Board believes that section 7 of the Federal Deposit Insurance Act, 12 U.S.C. 1817, grants to the FDIC the authority to establish the collection schedule provided for in the final rule, including the December 30 payment date for the quarterly installment for the first quarter of 1996. In particular, section 7(c)(2)(B) provides that assessment payments are to be made in such manner and at such time or times as the Board prescribes by regulation.

Section 7(c)(1) of the FDI Act requires that each insured depository institution file with the FDIC a certified statement containing such information as the FDIC may require for determining the institution's semiannual assessment. The FDIC agrees that, as a practical matter, the significance of such statements may be reduced substantially under the collection system established by the final rule. However, in light of the statutory language, the Board has decided to retain the regulatory requirement for a semiannual certified statement. The FDIC plans to explore the question of whether the requirement can or should be modified.

Comment letters were received from two federal agencies, the Financing Corporation (FICO) and the Federal Housing Finance Board (FICO's regulator). Both of these letters addressed a specific provision in the existing assessments regulation that was eliminated by the proposed rule. That provision, at 12 CFR 327.23, deals with the use of an intermediary "collection agent" by the FDIC to receive assessment payments for the Savings Association Insurance Fund (SAIF) from savings associations. According to the Federal Housing Finance Board's comments (presumably with reference to the use of a collection agent), § 327.23 is critical to FICO's operations because it establishes the process through which FICO assessments are paid. The letter opines that, without § 327.23, the proposal is silent as to how FICO will obtain its SAIF assessments.

According to FICO's comment letter, it believes that the existing provision regarding the collection agent "is essential for the distribution of SAIF premiums between FICO and the FDIC". FICO states that there is no provision in law that expressly grants to the FDIC the power to collect assessments on behalf of FICO or to pay funds over to FICO. It further asserts that the presence of a third-party collection agent provides FICO bondholders with greater assurance that the SAIF premiums will be available for interest payments, and that the absence of reference to the collection agent in the proposed regulation creates some risk to FICO bondholders that their claim to assessments collected by the FDIC will be subject to competing claims of the FDIC's other creditors.

It is not clear to the FDIC how the collection-agent provision in § 327.23(a) has the significance the Federal Housing Finance Board and FICO attribute to it. It does not establish—or even address—the process through which FICO receives assessment payments or the distribution of SAIF payments between FICO and the FDIC. Even if § 327.23(a) is retained, the assessments regulation will still be silent as to how FICO obtains its assessment payments. In addition, § 327.23 does not appear to affect the priority of claims on SAIF assessments. The source of obligations and authorities regarding the distribution of SAIF assessments between FICO and the FDIC, as well as FICO's prior claim to SAIF assessments, is the FICO statute, codified at 12 U.S.C. 1441. The collection-agent provision of 12 CFR 327.23 neither adds to nor subtracts from those statutory obligations and authorities. The statute clearly indicates that FICO has first priority to make SAIF assessments, and that, with the approval of the FDIC, it can make such assessments.

Accordingly, the FDIC does not share the concerns expressed by FICO and the Federal Housing Finance Board. However, it does not appear that retention of a SAIF collection-agent provision in the final rule would have any meaningful impact on the new system. In issuing its proposal, the FDIC had already anticipated that, were the proposal adopted, the Federal Reserve Bank of Richmond would participate in a capacity that meets the description of a "collection agent" in the existing regulation. Thus, in order to accommodate the concerns expressed by FICO and the Federal Housing Finance Board, the final rule retains the SAIF collection-agent provision from § 327.23(a).

II. Mergers Resulting in the Termination of Business of the Merged Institution

A. Background

The proposed rule set forth special rules for adjusting the assessment base of an institution (buyer) that acquires deposits in bulk (deposit-transfer) from another institution (seller).[8] The final rule adopts these rules substantially as proposed, with minor revisions as described below.

As proposed, the special rules would come into play only when the following two conditions are satisfied:

(1) The seller goes out of business (or otherwise ceases to be obliged to pay subsequent assessments) by or at the end of the semiannual period in which the deposit-transfer takes place; and

(2) The deposit-transfer occurs during the second half of a semiannual assessment period (April 1 through June 30, or October 1 through December 31).

The special rules would have the effect of increasing the buyer's June 30 (or December 30) assessment payment. This payment represents the first installment on the assessment due from the buyer for the following semiannual period. Under the proposal, the increase in the buyer's payment was intended to provide compensation to the FDIC for accepting the insurance risk attributable to the deposits assumed by the buyer.

The special rules would accomplish this goal by providing for an adjustment of a buyer's March (or September) assessment base. When a deposit-transfer occurs during the second half of an assessment period, the buyer does not assume the deposits in question until after it has filed its March (or September) report of condition. Absent the adjustment, the buyer's March (or September) assessment base would not include these deposits, and the buyer's June 30 (or December 30) payment would not fully compensate the FDIC for insuring the deposits in the upcoming semiannual period. The adjustment augments the buyer's March (or September) assessment base by an amount reflecting the deposits that the buyer has assumed.

In addition, the proposal eliminated the requirement that the transferring institution file a final certified statement. Such filings are not needed under the new assessment collection system. In connection with this change, the proposal eliminated form FDIC 6420/11 ("Final Certified Statement") from part 304 of the FDIC's regulations, pertaining to forms.

B. Discussion of Comments Received

The FDIC received three comments that addressed the topic of assessment-base adjustments. One commenter said it approved of the FDIC's proposal in general, without remarking on any particular aspect. The other two commenters made substantive comments. Both opposed the proposal.

One of the opposing commenters, a bank holding company, said there was no need to adjust a buyer's assessment base to reflect the risk presented by the transferred deposits, because the buyer's Federal banking supervisor would not approve a merger or acquisition unless the buyer's risk of default is low. The FDIC considers, however, that the transferred deposits present an insurance risk to the FDIC, just as the buyer's other deposits do.

This commenter also questioned the rationale offered by the FDIC for

[8] Deposit-transfers can take many forms, including statutory mergers, consolidations, statutory assumptions, and contractual arrangements in which a buyer purchases assets and assumes deposits from a seller. Furthermore, a seller may transfer its deposits to a single buyer or to several buyers, and may do so either in a single transaction or in a series of transactions. Section 327.6(a)'s special rules cover all such cases.

proposing to adjust buyers' assessment bases. When proposing this rule, the FDIC said that adjustments of this kind are needed in connection with the conversion from a semiannual payment schedule to a quarterly one: absent such adjustments, the FDIC would not be compensated for insuring the transferred deposits under the new quarterly payment schedule. The commenter asserted that the prior payment procedures, which required two semiannual payments, suffered from this same defect.

The FDIC does not agree that its prior procedures were defective in this regard. But in any event, it remains true that adjustments of this kind are necessary to provide appropriate compensation to the FDIC with respect to transferred deposits in the context of a quarterly payment schedule. When a deposit-transfer occurs during the second half of an assessment period, the buyer does not assume the deposits in question until after it has filed its March (or September) report of condition. Absent the adjustment, the buyer's March (or September) assessment base would not include these deposits, and the buyer's June 30 (or December 30) payment would not fully compensate the FDIC for insuring the deposits in the upcoming semiannual period. To avoid this circumstance, the adjustment augments the buyer's March (or September) assessment base by an amount reflecting the deposits that the buyer has assumed.

The FDIC has chosen this approach in order to carry out the directive set forth in section 7(b)(1) of the FDI Act. Section 7(b)(1) calls for the FDIC to establish an assessment system in which an institution's assessment is based on the probability that the appropriate deposit insurance fund will incur a loss with respect to the institution, and on the likely amount of any such loss. See 12 U.S.C. 1817(b)(1). The FDIC considers that the buyer presents a continuing insurance risk to the FDIC with respect to the transferred deposits, and that accordingly the buyer's assessment payment should reflect the additional risk that flows from its increase in deposits.

The other commenter, a trade association, first said that it opposed the proposal, but then declared:

> If healthy institutions merge in either quarter of the semiannual period, the resulting institution's assessment for the next payment date should be based on the combined deposits of the merged institutions on the date of the previous quarter-end report of condition.

This, in substance, was the effect of the proposal—and now, of the final rule—although these are somewhat more generous to buyers than the commenter's suggestion. The new rule, both as proposed and adopted, says that if the seller's volume of deposits declines between the seller's report-date and the date of the deposit-transfer transaction, the buyer's next payment will be based on the seller's lower transaction-date deposits, not on the seller's report-date deposits.

The same commenter also suggested that, if the seller were a troubled institution, the buyer's assessment liability would ordinarily be taken into account in the course of the negotiations surrounding the acquisition. The FDIC believes that this point is well taken, and has incorporated it into the final rule. Under the proposal, the assessment-base adjustment provisions would not come into play if the seller is a failed institution; under the final rule these provisions would also not be triggered if the FDIC contributes its own resources to induce the buyer to assume the seller's liabilities. The FDIC considers that, in such cases, the net price paid by the buyer implicitly includes compensation to the FDIC for accepting, in its corporate capacity, the insurance risk with respect to the deposits assumed by the buyer.

Somewhat contradictorily, however, the same commenter continued as follows:

> If, on the other hand, an institution acquires the deposits of an independent, unaffiliated institution that fails during the same quarter, but after the deposit transfer, the institution acquiring the deposits should not be liable for the increase in the deposits at the next assessment payment date. Rather, the acquired deposits should be reflected in the aquirer's [*sic*] next quarterly report of condition, the same as internal deposit growth would be treated. The FDIC should be responsible for collecting the assessments due from failed institutions via a claim on the receivership.

The FDIC does not agree. For the reasons given above, the FDIC considers that, when the seller goes out of business (or otherwise ceases to be obliged to pay assessments) prior to the end of the semiannual period, the buyer's payment should reflect the risk presented by the transferred deposits.

No comments were received on the proposed elimination of the final certified statement. These provisions are adopted as proposed.

C. Other Changes to the Proposed Rule

In addition to the change already referred to regarding troubled institutions, the final rule modifies the proposed rule in minor respects. The proposed rule said that the seller's March (or September) assessment base would be reduced in amounts corresponding to the amount by which the buyers' assessment bases were increased. The final rule eliminates this provision. There is no need for it: A seller is not required to make an assessment payment based on its March or September report of condition (and if a seller does so anyway, the buyer is given credit for the payment). The final rule also eliminates an improper reference, and renumbers certain paragraphs.

The final rule clarifies and simplifies the terminology that was originally used in the proposed rule. The final rule makes it clear that the term "deposit-transfer transaction" refers to any deposit-transfer that occurs during a semiannual assessment period if the seller goes out of business (or otherwise ceases to be obligated to pay assessments) by the end of that assessment period. The final rule does not use or define the term "transfer period".

The final rule also clarifies the intent of the proposed rule, which spoke of applying the special rules when the seller's "status as an insured institution has terminated or is expected to terminate". A seller that transfers some of its deposits and then voluntarily terminates its insurance may still remain in business, however, and may still be obliged to pay assessments to the FDIC for some period after termination. The FDIC considers that in such a case the seller's regular June 30 (or December 30) payment will compensate the FDIC for the risk presented by the transferred deposits during the following semiannual period. Accordingly, the final rule specifies that § 327.6(a)'s special rules come into play when the seller goes out of business, or otherwise ceases to be obliged to pay subsequent assessments.

III. Deletion of References to Experience Factors

The FDIC's assessment regulations currently permit the use of "experience factors" in the computation of an institution's assessment base, for the purpose of quantifying unposted debits and credits. However, under the existing regulations, the use of experience factors will no longer be permitted for assessments due for assessment periods beginning after 1994. Accordingly, the FDIC proposed to delete all references to experience factors from the regulations. No comments were received on the proposal, and the Board is amending the regulations to delete experience factors.

IV. Paperwork Reduction Act

The final rule contains a revision to an existing collection of information. The revision has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) Comments regarding the accuracy of the burden estimate, and suggestions for reducing the burden, should be addressed to the Office of Management and Budget, Paperwork Reduction Project (3064–0057), Washington, D.C. 20503, with copies to Steven F. Hanft, Assistant Executive Secretary (Administration), Federal Deposit Insurance Corporation, Room F–400, 550 17th St, NW, Washington, D.C. 20429.

At present, each insured depository institution is required to compute its own semiannual assessment. Under the final rule, assessments will be computed by the FDIC using information reported by the institution in its quarterly reports of condition. The institution will be required to certify its agreement with the computation shown on the certified statement form as received from the FDIC or, alternatively, its agreement with that computation as amended in a manner specified by the institution. It is expected that, prior to certification, an institution will compare the information on the form with its own records—which it collects and maintains for purposes of filing its reports of condition—and, if necessary, indicate any amendments. This process should constitute a substantially smaller burden for the institution than preparing and reporting its own assessment computation. The requirements concerning the certified statement are found in § 327.2 of the final rule.

The annual reporting burden for the collection of information under the final rule, as approved by OMB on August 12, 1994, is estimated as follows:

Approximate number of respondents: 13,400
Number of responses per respondent: 2
Total approximate annual responses: 26,800
Average time per response: 30 minutes
Total average annual burden hours: 13,400

V. Regulatory Flexibility Act

The Board hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Under the rule, as adopted, the FDIC will compute the assessment payments due from each insured depository institution, a task currently required of the institution. Thus, the rule would reduce an existing burden. Moreover, to the extent any burden would remain, the FDIC believes that it would be proportionate to the size of the institution and, accordingly, that the proposal would not have a disparate impact of the nature contemplated by the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 304

Bank deposit insurance, Banks, banking, Freedom of information, Reporting and recordkeeping requirements.

12 CFR Part 327

Assessments, Bank deposit insurance, Financing Corporation, Savings associations.

For the reasons stated in the preamble, the Board amends 12 CFR parts 304 and 327 as follows:

PART 304—FORMS, INSTRUCTIONS AND REPORTS

1. The authority citation for part 304 continues to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 1817, 1818, 1819, 1820; Public Law 102–242, 105 Stat. 2251 (12 U.S.C. 1817 note).

2. Section 304.3 is revised to read as follows:

§ 304.3 Certified statements.

The certified statements required to be filed by insured depository institutions under the provisions of section 7 of the Federal Deposit Insurance Act as amended (12 U.S.C. 1817) shall be filed in accordance with part 327 of this chapter. The applicable forms are as follows:

(a) *Form 6420/07: Certified Statement.* Form 6420/07 shows the computation of the semiannual assessment due to the Corporation from an insured depository institution. As provided for in part 327 of this chapter, the form will be furnished to insured depository institutions by the Corporation twice each calendar year and the completed statement must be returned to the Corporation by each institution, except that newly insured institutions must submit their first certified statement on Form 6420/10.

(b) *Form 6420/10: First Certified Statement.* Form 6420/10 shows the computation of the semiannual assessment due to the Corporation from an institution in the first semiannual period after the semiannual period during which the institution becomes an insured depository institution, as provided for in part 327 of this chapter.

Appendix A to Part 304—[Amended]

3. Appendix A to part 304 is amended by removing the entries for FDIC 6400/01, Consolidated Statement Amending Certified Statements, and FDIC 6420/11, Final Certified Statement.

PART 327—ASSESSMENTS

1. The table of contents for part 327 is revised to read as follows:

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

Authority: 12 U.S.C. 1441, 1441b, 1817–1819.

3. Section 327.2 is revised to read as follows:

§ 327.2 Certified statements.

(a) *Required.* Each insured depository institution shall file a certified statement during each semiannual period.

(b) *Time of filing.* Certified statements for any semiannual period must be filed no later than the second-quarterly payment date specified in § 327.3(d)(2). Certified statements postmarked on or before such date are deemed to be timely filed.

(c) *Form.* The Corporation will provide to each insured depository institution a certified statement form showing the amount and computation of the institution's semiannual assessment. The president of the insured depository institution, or such other officer as the institution's board of directors or trustees may designate, shall review the information shown on the form.

(d) *Certification*—(1) *Form accepted.* If such officer agrees that to the best of his or her knowledge and belief the information shown on the certified statement form is true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder, the officer shall so certify.

(2) *Form amended*—(i) *In general.* If such officer determines that to the best of his or her knowledge and belief the information shown on the certified statement form is not true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder, the officer shall make such amendments to the information as he or she believes necessary. The officer shall certify that to the best of his or her knowledge and belief the information shown on the form, as so amended, is true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder.

(ii) *Request for revision.* The certification and filing of an amended form under paragraph (d)(2) of this section does not constitute a request for revision by the Corporation of the information shown on the form. Any such request to the Corporation for revision of the information shown on the form shall be submitted separately from the certified statement and in accordance with the provisions of § 327.3(h).

(iii) *Rate multiplier.* The rate multiplier shown on the certified statement form shall be amended only if it is inconsistent with the assessment risk classification assigned to the institution in writing by the Corporation for the current semiannual period pursuant to § 327.4(a). Agreement with the rate multiplier shall not be deemed to constitute agreement with the assessment risk classification assigned.

§ 327.5 [Removed]

4. Section 327.5 is removed.

§§ 327.3 and 327.4 [Redesignated as §§ 327.4 and 327.5]

5. Sections 327.3 and 327.4 are redesignated as §§ 327.4 and 327.5, respectively, and a new § 327.3 is added to read as follows:

§ 327.3 Payment of semiannual assessments.

(a) *Required*—(1) *In general.* Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation, in two quarterly payments, a semiannual assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account.* For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the Corporation. No later than 30 days prior to the next payment date specified in paragraphs (c)(2) and (d)(2) of this section, each institution shall provide written notice to the Corporation of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(b) *Newly insured institutions.* A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution. For the semiannual period following the period during which it becomes an insured institution, it shall pay its full semiannual assessment at the time and in the manner provided for in paragraph (d) of this section, in an amount that is the product of its assessment base for the prior semiannual period, as provided for in § 327.5(c), multiplied by one-half of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a). For the purpose of making such payment, the institution shall provide to the Corporation no later than the payment date specified in paragraph (d)(2) of this section the notice required by paragraph (a)(2) of this section.

(c) *First-quarterly payment*—(1) *Invoice.* No later than 30 days prior to the payment date specified in paragraph (c)(2) of this section, the Corporation will provide to each insured depository institution an invoice showing the amount of the assessment payment due from the institution for the first quarter of the upcoming semiannual period, and the computation of that amount. Subject to paragraph (g) of this section and to subpart B of this part, the invoiced amount shall be the product of the following: The assessment base of the institution for the preceding September 30 (for the semiannual period beginning January 1) or March 31 (for the semiannual period beginning July 1) computed in accordance with § 327.5; multiplied by one-quarter of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a).

(2) *Payment date and manner.* On December 30 (for the semiannual period beginning the following January 1) and on June 30 (for the semiannual period beginning the following July 1), the Corporation will cause the amount stated in the applicable invoice to be directly debited from the deposit account designated by the insured depository institution for that purpose.

(d) *Second-quarterly payment*—(1) *Invoice.* No later than 30 days prior to the payment date specified in paragraph (d)(2) of this section, the Corporation will provide to each insured depository institution an invoice showing the amount of the assessment payment due from the institution for the second quarter of that semiannual period, and the computation of that amount. Subject to paragraph (g) of this section and to subpart B of this part, the invoiced amount shall be the product of the following: The assessment base of the institution for the preceding December 31 (for the semiannual period beginning January 1) or June 30 (for the semiannual period beginning July 1) computed in accordance with § 327.5; multiplied by one-quarter of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a).

(2) *Payment date and manner.* On March 30 (for the semiannual period beginning the preceding January 1) and on September 30 (for the semiannual period beginning the preceding July 1), the Corporation will cause the amount stated in the applicable invoice to be directly debited from the deposit account designated by the insured depository institution for that purpose.

(e) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the institution's designated deposit account and, prior to each payment date indicated in paragraphs (c)(2) and (d)(2) of this section, shall ensure that funds in an amount at least equal to the invoiced amount are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment.

(f) *Business days.* If a payment date specified in paragraph (c) or (d) of this section falls on a day that is not a business day, the applicable date shall be the previous business day.

(g) *Payment adjustments in succeeding quarters.* The quarterly assessment invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk classification, and revision of the Corporation's assessment computations for prior quarters.

(h) *Request for revision of computation of quarterly assessment payment*—(1) *In general.* An institution may submit a request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly invoice. Such revision may be requested in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the invoice;

(ii) The institution determines that the rate multiplier applied by the Corporation is inconsistent with the assessment risk classification assigned to the institution in writing by the Corporation for the semiannual period for which the payment is due; or

(iii) The institution believes that the invoice does not fully or accurately reflect adjustments provided for in paragraph (g) of this section.

(2) *Inapplicability.* This paragraph (h) is not applicable to requests for review of an institution's assessment risk classification, which are covered by § 327.4(d).

(3) *Requirements.* Any such request for revision must be submitted within 60 days of the date of the quarterly assessment invoice for which revision is requested, except that requests for revision resulting from detection by the institution of an error or omission for which the institution files an amendment to its quarterly report of condition must be submitted within 60 days of the filing date of the amendment to the quarterly report of condition. The request for revision shall be submitted to the Chief of the Assessment Operations Section and shall provide documentation sufficient to support the revision sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the Corporation's request for additional information. Any institution submitting a timely request for revision will receive written response from the Corporations's Chief Financial Officer (or his or her designee) within 60 days of receipt by the Corporation of the request for revision or, if additional information has been requested by the Corporation, within 60 days of receipt of the additional information. Whenever feasible, the response will notify the institution of the determination of the Chief Financial Officer (or designee) as to whether the requested revision is warranted. In all instances in which a timely request for revision is submitted, the Chief Financial Officer (or designee) will make a determination on the request as promptly as possible and notify the institution in writing of the determination.

(i) *Assessment notice not received.* Any institution that has not received an assessment invoice for any quarterly payment by the fifteenth day of the month in which the quarterly payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its assessment invoice for the preceding quarter, subject to subsequent correction.

6. Newly designated § 327.4 is revised to read as follows:

§ 327.4 Annual assessment rate.

(a) *Assessment risk classification.* For the purpose of determining the annual assessment rate for BIF members under § 327.9(a) and the annual assessment rate for SAIF members under § 327.9(c), each insured depository institution will be assigned an "assessment risk classification". Notice of the assessment risk classification applicable to a particular semiannual period will be provided to the institution with the first-quarterly invoice provided pursuant to § 327.3(c)(1). Each institution's assessment risk classification, which will be composed of a group and a subgroup assignment, will be based on the following capital and supervisory factors:

(1) *Capital factors.* Institutions will be assigned to one of the following three capital groups on the basis of data reported in the institution's Report of Income and Condition, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report containing the necessary capital data, for the report date that is closest to the last day of the seventh month preceding the current semiannual period.

(i) *Well capitalized.* For assessment risk classification purposes, the short-form designation for this group is "1".

(A) Except as provided in paragraph (a)(1)(i)(B) of this section, this group consists of institutions satisfying each of the following capital ratio standards: Total risk-based ratio, 10.0 percent or greater; Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 percent or greater. New insured depository institutions coming into existence after the report date specified in paragraph (a)(1) of this section will be included in this group for the first semiannual period for which they are required to pay assessments.

(B) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be "well capitalized" if the insured branch:

(*1*) Maintains the pledge of assets required under 12 CFR 346.19; and

(*2*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (a)(1) of this section.

(ii) *Adequately capitalized.* For assessment risk classification purposes, the short-form designation for this group is "2".

(A) Except as provided in paragraph (a)(1)(ii)(B) of this section, this group consists of institutions that do not satisfy the standards of "well capitalized" under this paragraph but which satisfy each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 leverage ratio, 4.0 percent or greater.

(B) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be "adequately capitalized" if the insured branch:

(*1*) Maintains the pledge of assets required under 12 CFR 346.19;

(*2*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (a)(1) of this section; and

(*3*) Does not meet the definition of a well capitalized insured branch of a foreign bank.

(iii) *Undercapitalized.* For assessment risk classification purposes, the short-form designation for this group is "3". This group consists of institutions that do not qualify as either "well capitalized" or "adequately capitalized" under paragraphs (a)(1) (i) and (ii) of this section.

(2) *Supervisory risk factors.* Within its capital group, each institution will be assigned to one of three subgroups based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be

relevant to the institution's financial condition and the risk posed to the BIF or SAIF. Authority to set dates applicable to the determination of supervisory subgroup assignments is delegated to the Corporation's Director of the Division of Supervision (or his or her designee). The three supervisory subgroups are:

(i) *Subgroup "A".* This subgroup consists of financially sound institutions with only a few minor weaknesses;

(ii) *Subgroup "B".* This subgroup consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the BIF or SAIF; and

(iii) *Subgroup "C".* This subgroup consists of institutions that pose a substantial probability of loss to the BIF or SAIF unless effective corrective action is taken.

(b) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk classification assigned in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (d) of this section. An institution for which the assessment risk classification cannot be determined prior to an invoice date specified in § 327.3(c)(1) or (d)(1) shall preliminarily pay on that invoice at the assessment rate applicable to the classification designated "2A" in the appropriate rate schedule set forth in § 327.9. If such institution is subsequently assigned for that semiannual period an assessment risk classification other than that designated as "2A", or if the classification assigned to an institution in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next quarterly assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Classification for certain types of institutions.* The annual assessment rate applicable to institutions that are bridge banks under 12 U.S.C. 1821(n) and to institutions for which either the Corporation or the Resolution Trust Corporation has been appointed conservator shall in all cases be the rate applicable to the classification designated as "2A" in the schedules set forth in §§ 327.9(a) and 327.9(c).

(d) *Requests for review.* An institution may submit a written request for review of its assessment risk classification. Any such request must be submitted within 30 days of the date of the assessment risk classification notice provided by the Corporation pursuant to paragraph (a) of this section. The request shall be submitted to the Corporation's Director of the Division of Supervision in Washington, DC, and shall include documentation sufficient to support the reclassification sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for the additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the Director of the Division of Supervision (or his or her designee) shall promptly notify the institution in writing of the FDIC's determination of whether reclassification is warranted. Notice of the procedures applicable to reviews will be included with the assessment risk classification notice to be provided pursuant to paragraph (a) of this section.

(e) *Disclosure restrictions.* The supervisory subgroup to which an institution is assigned by the Corporation pursuant to paragraph (a) of this section is deemed to be exempt information within the scope of § 309.5(c)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(f) *Limited use of assessment risk classification.* The assignment of a particular assessment risk classification to a depository institution under this part 327 is for purposes of implementing and operating a risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material the assessment risk classification assigned to it pursuant to this part.

(g) *Lifeline accounts.* Notwithstanding any other provision of this part 327, the portion of an institution's assessment base that is attributable to deposits in lifeline accounts pursuant to the Bank Enterprise Act, 12 U.S.C. 1834, will be assessed at such rate as may be established by the Corporation pursuant to 12 U.S.C. 1834 and section 7(b)(2)(H) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(b)(2)(H).

7. Newly designated § 327.5 is revised to read as follows:

§ 327.5 Assessment base.

(a) *Computation of assessment base.* Except as provided in paragraph (c) of this section, the assessment base of an insured depository institution for any date on which the institution is required to file a quarterly report of condition shall be computed by:

(1) Adding—

(i) All demand deposits—

(A) That the institution reported as such in the quarterly report of condition for that date;

(B) That belong to subsidiaries of the institution and were eliminated in consolidation;

(C) That are held in any insured branches of the institution that are located in the territories and possessions of the United States;

(D) That represent any uninvested trust funds required to be separately stated in the quarterly report for that date;

(E) That represent any unposted credits to demand deposits, as determined in accordance with the provisions of paragraph (b)(1) of this section; and

(ii) All time and savings deposits, together with all interest accrued and unpaid thereon—

(A) That the institution reported as such in the quarterly report of condition for that date;

(B) That belong to subsidiaries of the institution and were eliminated in consolidation;

(C) That are held in any insured branches of the institution that are located in the territories and possessions of the United States;

(D) That represent any unposted credits to time and savings deposits, as determined in accordance with the provisions of paragraph (b)(1) of this section; then

(2) Subtracting, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any unposted debits;

(ii) Any pass-through reserve balances;

(iii) 16⅔ percent of the amount computed by subtracting, from the amount specified in paragraph (a)(1)(i) of this section, the sum of:

(A) Unposted debits allocated to demand deposits pursuant to the provisions of paragraph (b)(2) of this section; plus

(B) Pass-through reserve balances representing demand deposits;

(iv) 1 percent of the amount computed by subtracting, from the amount specified in paragraph (a)(1)(ii) of this section, the sum of:

(A) Unposted debits allocated to time and savings deposits pursuant to the provisions of paragraph (b)(2) of this section; plus

(B) Pass-through reserve balances representing time and savings deposits;

(v) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(8)).

(b) *Methods of reporting unposted credits and unposted debits*—(1) *Unposted credits.* Each insured depository institution shall report unposted credits in quarterly reports of condition for addition to the assessment base in the following manner:

(i) If the institution's records show the total actual amount of unposted credits segregated into demand deposits and time and savings deposits, the institution must report the segregated amounts for addition to demand deposits and time and savings deposits, respectively.

(ii) If the institution's records show the total actual amount of unposted credits but do not segregate the amount as stated in paragraph (b)(1)(i) of this section, the institution must report the total actual amount of the unposted credits for addition to time and savings deposits.

(2) *Unposted debits.* Unposted debits may be reported in the same manner as stated in paragraph (b)(1) of this section for deduction from the assessment base, except that unsegregated amounts may be reported for deduction only from demand deposits.

(c) *Newly insured institutions.* In the case of a newly insured institution, the assessment base for the last date for which insured depository institutions are required to file quarterly reports of condition within the semiannual period in which the newly insured institution became an insured institution shall be deemed to be its assessment base for that semiannual period. If the institution has not filed such a report by the due date for such reports from insured depository institutions, it shall promptly provide to the Corporation such information as the Corporation may require to prepare the certified statement form for the institution for the current semiannual period.

8. Section 327.6 is amended by revising the section heading and paragraph (a) to read as follows:

§ 327.6 Deposit-transfer transactions; other terminations of insurance.

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

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

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

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

* * * * *

9. Section 327.7 is amended by revising the section heading and paragraph (a), to read as follows:

§ 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest*—(1) *Payment by institutions.* Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation.* The Corporation will pay interest to an insured depository institution on any overpayment by the institution of its assessment.

(3) *Accrual of interest.* Interest shall accrue under this section from the day following the due date, as provided for in § 327.3 (c) and (d), of the quarterly assessment amount that was overpaid or underpaid, through the payment date applicable to the quarterly assessment invoice on which adjustment is made by the Corporation for the underpayment or overpayment, *provided,* however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation.

* * * * *

10. Section 327.8 is amended by revising paragraph (d)(2) and by adding a new paragraph (h), to read as follows:

§ 327.8 Definitions.

* * * * *

(d) * * *

(2) *Current semiannual period.* The term *current semiannual period* means, with respect to a certified statement or an assessment, the semiannual period within which such certified statement is required to be filed or for which such assessment is required to be paid.

* * * * *

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

(1) *Acquiring institution.* The term *acquiring institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a deposit-transfer transaction.

(2) *Transferring institution.* The term *transferring institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a deposit-transfer transaction.

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

(4) *First half; second half*—(i) *First half.* The term *first half* of a semiannual period means the months of January, February, and March in the case of a semiannual period that begins in January, and means the months of July, August, and September in the case of a semiannual period that begins in July.

(ii) *Second half.* The term *second half* of a semiannual period means the months of April, May, and June in the case of a semiannual period that begins in January, and means the months of

October, November, and December in the case of a semiannual period that begins in July.

§ 327.13 [Redesignated as § 327.9]

11. Section 327.13 is redesignated as § 327.9, transferred to subpart A, and amended by revising the section heading, removing paragraphs (a) and (b), redesignating paragraphs (c) and (d) as new paragraphs (a) and (b), respectively, revising newly designated paragraph (a), amending newly designated paragraph (b) by revising the paragraph heading to read "*BIF recapitalization schedule*" and removing the word "assessment" in the first sentence, and adding a new paragraph (c) to read as follows:

§ 327.9 Assessment rate schedules.

(a) *BIF members.* Subject to § 327.4(c), the annual assessment rate for each BIF member other than a bank specified in § 327.31(a) shall be the rate designated in the following rate schedule applicable to the assessment risk classification assigned by the Corporation under § 327.4(a) to that BIF member (the schedule utilizes the group and subgroup designations specified in § 327.4(a)):

SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	23	26	29
2	26	29	30
3	29	30	31

* * * * *

(c) *SAIF members.* (1) Subject to § 327.4(c), the annual assessment rate for each SAIF member shall be the rate designated in the following schedule applicable to the assessment risk classification assigned by the Corporation under § 327.4(a) to that SAIF member (the schedule utilizes the group and subgroup designations specified in § 327.4(a)):

SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	23	26	29
2	26	29	30
3	29	30	31

(2) *Collection agent.* The amounts required to be paid by SAIF members pursuant to this part 327 shall be paid through a collection agent, which shall be any person, corporation, governmental entity, or any other entity that has been authorized by the Corporation to act as its agent for collecting assessments.

12. Part 327 is amended by removing subparts B and C and redesignating subpart D as new subpart B.

§ 327.31 [Amended]

13. Section 327.31 is amended by removing the reference "subpart D" and replacing it with "subpart B" each place it appears.

§ 327.32 [Amended]

14. Section 327.32 is revised to read as follows:

§ 327.32 Computation and payment of assessment.

(a) *Rate of assessment*—(1) *BIF and SAIF member rates.* (i) Except as provided in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, and consistent with the provisions of § 327.4, the assessment to be paid by a BIF member subject to this subpart B shall be computed at the rate applicable to BIF members and the assessment to be paid by a SAIF member subject to this subpart B shall be computed at the rate applicable to SAIF members.

(ii) Such applicable rate shall be applied to the insured depository institution's assessment base less that portion of the assessment base which is equal to the institution's adjusted attributable deposit amount.

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

(A) Be subject to assessment at the assessment rate applicable to SAIF members pursuant to subpart A of this part; and

(B) Not be taken into account in computing the amount of any assessment to be allocated to BIF.

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

(A) Be subject to assessment at the assessment rate applicable to BIF members pursuant to subpart A of this part; and

(B) Not be taken into account in computing the amount of any assessment to be allocated to SAIF.

(3) *Adjusted attributable deposit amount.* An insured depository institution's "adjusted attributable deposit amount" for any semiannual period is equal to the sum of:

(i) The amount of any deposits acquired by the institution in connection with the transaction (as determined at the time of such transaction) described in § 327.31(a);

(ii) The total of the amounts determined under paragraph (a)(3)(iii) of this section for semiannual periods preceding the semiannual period for which the determination is being made under this section; and

(iii) The amount by which the sum of the amounts described in paragraphs (a)(3)(i) and (a)(3)(ii) of this section would have increased during the preceding semiannual period (other than any semiannual period beginning before the date of such transaction) if such increase occurred at a rate equal to the annual rate of growth of deposits of the acquiring, assuming, or resulting depository institution minus the amount of any deposits acquired through the acquisition, in whole or in part, of another insured depository institution.

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

(i) Does not include any deposit held in the acquired institution on the date of such transaction which the acquired institution has obtained, directly or indirectly, by or through any deposit broker;

(ii) Does not include that part of any remaining deposit held in the acquired institution on the date of such transaction that is in excess of $80,000; and

(iii) Is limited to 80 per centum of the remaining portion of the aggregate of the deposits specified in paragraph (a)(4)(ii) of this section.

(5) *Deposit broker.* As used in paragraph (a)(4) of this section, the term "deposit broker" has the meaning specified in section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f).

(b) *Procedures for computation and payment.* An insured depository institution subject to this subpart B shall follow the payment procedure that is set forth in subpart A of this part.

§ 327.33 [Removed]

15. § 327.33 is removed.

By order of the Board of Directors.

Dated at Washington, D.C., this 20th day of Dec., 1994.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 94–31662 Filed 12–28–94; 8:45 am]

BILLING CODE 6714–01–P

---

12 CFR Part 335

RIN 3064–AB32

Securities of Nonmember Insured Banks

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its securities disclosure regulations. The amendments relate to registration and reporting requirements for non-member insured banks with securities registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act or Act).

Section 12(i) of the Exchange Act requires that the FDIC issue regulations substantially similar to those of the Securities and Exchange Commission (SEC) or publish its reasons for not doing so. These amendments are intended to comply with section 12(i) and to update the regulations. The SEC has amended its Exchange Act regulations, relating to Small Business Initiatives, Executive Compensation Disclosure, and Regulation of Communications Among Shareholders. The FDIC is amending its Exchange Act regulations to incorporate, in substance, the SEC changes noted above.

DATES: Effective Date. These amendments are effective on July 1, 1995.

Early Compliance. These amendments may be immediately followed by the affected party.

FOR FURTHER INFORMATION CONTACT: M. Eric Dohm, Staff Accountant, Division of Supervision (202–898–8921) or Gerald J. Gervino, Senior Attorney, Legal Division (202–898–3723), Federal Deposit Insurance Corporation, 550 17th Street N.W., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background

Section 12(i) of the Exchange Act grants authority to the FDIC to promulgate regulations applicable to the securities of insured banks (including foreign banks having an insured branch) which are neither members of the Federal Reserve System nor District banks (Nonmember Banks). These regulations must be substantially similar to the SEC's regulations under sections 12 (securities registration), 13 (periodic reporting), 14(a) (proxies and proxy solicitation), 14(c) (information statements), 14(d) (tender offers), 14(f) (arrangements for changes in directors), and 16 (beneficial ownership and reporting) of the Exchange Act. Section 12(i) does not require the FDIC to promulgate substantially similar regulations in the event that the FDIC finds that implementation of such regulation is not necessary or appropriate in the public interest or for protection of investors and the FDIC publishes such findings with detailed reasons therefor in the **Federal Register**. This amendment is intended to satisfy that requirement.

Amendments to Part 335

A. Small Business Initiatives

Recognizing that smaller banks are disproportionately affected by complexities in the disclosure requirements of banks registered under section 12 of the Exchange Act, the FDIC is revising its regulations by permitting "small business issuers" (as defined under the SEC's Exchange Act rules) to provide financial and other item disclosure in conformance with Regulation S-B of the Securities and Exchange Commission (17 CFR Part 228) in lieu of certain disclosure requirements in FDIC Forms F–1, F–2, F–4, F–5, F–5A and the annual report to security holders. The definition of "small business issuer", generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

For additional information and discussion, reference is made to the preamble contained in "Small Business Initiatives", SEC Release No. 34–30968, 57 FR 36442 (August 13, 1992); and in "Additional Small Business Initiatives", SEC Release No. 34–32231, 58 FR 26509 (May 4, 1993).

B. Executive Compensation Disclosure

The SEC's regulations, as referenced by these amended Exchange Act rules, require disclosure of the compensation of the chief executive officer (CEO) regardless of the amount of compensation, and the four most highly compensated senior executive officers, excluding the CEO, who earn more than $100,000 per year in salary and bonus. Additionally, the regulations require a comprehensive three year compensation table, a table which discloses awards granted pursuant to long term incentive plans, and two disclosure tables relative to options and stock appreciation rights. The SEC's regulations also require:

(a) Disclosure of all forms of director compensation, employment contracts and termination agreements which require payments in excess of $100,000;

(b) A compensation committee report to shareholders which details compensation policies and the basis for the CEO's compensation for the last fiscal year;

(c) Proxy statement disclosure of the existence of certain relationships between directors and the bank if specific circumstances exist; and

(d) A graphical chart, which illustrates for the previous five years, the cumulative total return to shareholders, of stock appreciation and dividends.

For additional information and discussion, reference is made to the preamble contained in "Executive Compensation Disclosure", SEC Release No. 34–31327, 57 FR 48125 (October 21, 1992); in "Executive Compensation Disclosure", SEC Release No. 34–32723, 58 FR 42882 (August 12, 1993); and in "Executive Compensation Disclosure", SEC Release No. 34–33229, 58 FR 63010 (November 29, 1993).

C. Regulation of Communications Among Shareholders

These amendments to the proxy rules and other related provisions will improve the effectiveness of the proxy-voting process and its effect on corporate governance of nonmember insured banks subject to Part 335. These amendments are the result of an effort to eliminate from the FDIC proxy rules, any unnecessary regulatory impediments to communication among shareholders and others and to the effective use of shareholder voting rights. Accordingly, the FDIC is revising its rules relative to the solicitation of proxy authority to allow management and other persons seeking proxy authority to get their case to the shareholders in a more efficient and effective manner. The FDIC has determined that modifications in the current rules are desirable to achieve the purposes set forth in the Exchange Act.

The revisions eliminate Form F–6—Form for Statement in Election Contests (§ 335.221) and also adopt new Form F–6A—Notice of Exempt Solicitation (§ 335.222). Disclosures relative to each participant in an election contest, which were previously provided on Forms F–6, are now required to be included on Form F–5—Form for Proxy Statement (§ 335.212). Form F–6A requirements apply to large shareholders who are disinterested in the subject matter of a shareholder vote and who are engaging