FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AD26

Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule with request for comments.

SUMMARY: The FDIC is adopting an interim rule establishing the FDIC's practices for determining deposit and other liability account balances at a failed insured depository institution. Except as noted, the FDIC practices defined in the interim rule represent a continuation of long-standing FDIC procedures in processing such balances at a failed depository institution. The FDIC is adopting the interim rule concurrently with its adoption of a related final rule requiring the largest insured depository institutions to adopt mechanisms that would, in the event of the institution's failure: Provide the FDIC with standard deposit account and other customer information; and allow the placement and release of holds on liability accounts, including deposits. This interim rule applies to all insured depository institutions.

DATES: This interim rule is effective August 18, 2008, except for § 360.8(e), which will be effective July 1, 2009. Written comments must be received by the FDIC on or before September 15, 2008.

ADDRESSES: You may submit comments by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal*. Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov*. Include ''Processing of Deposit Accounts'' in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal* including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226, between 9 a.m. and 5 p.m. (EST) on business days. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: James Marino, Project Manager, Division of Resolutions and Receiverships, (202) 898–7151 or *jmarino@fdic.gov*; Joseph A. DiNuzzo, Counsel, Legal Division, (202) 898–7349 or *jdinuzzo@fdic.gov*; or Christopher L. Hencke, Counsel, Legal Division, (202) 898–8839 or *chencke@fdic.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

In January of this year the FDIC published a proposed rule composed of two parts (''proposed rule'').[1] The first part proposed FDIC practices for determining deposit and other liability account balances at a failed insured depository institution. The second part proposed requirements for the largest insured depository institutions to adopt mechanisms that would, in the event of the institution's failure: (1) Provide the FDIC with standard deposit account and other customer information; and (2) allow the placement and release of holds on liability accounts, including deposits.

The comment period for the proposed rule ended on April 14, 2008. The FDIC received twenty-one comment letters, all of which may be viewed on the FDIC's Web site at *http://www.fdic.gov/regulations/laws/federal/2008/08comAD26.html*.

Based in part on the comments received on the proposed rule, the FDIC has decided to finalize the proposed rule by issuing two separate rulemakings—(1) the interim rule, covering part one of the proposed rule and (2) a separate final rule, covering part two of the proposed rule (''Large Bank Modernization Final Rule'').

Throughout this preamble the terms ''deposit'' (or ''domestic deposit''), ''foreign deposit'' and ''international banking facility deposit'' identify liabilities having different meanings for deposit insurance purposes. A ''deposit'' is used as defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)) (''Section 3(l)''). A deposit includes only deposit liabilities payable in the United States, typically those deposits maintained in a domestic office of an insured depository institution. Only deposits meeting these criteria are eligible for insurance coverage. Insured depository institutions may maintain deposit liabilities in a foreign branch (''foreign deposits''), but these liabilities are not deposits in the statutory sense (for insurance or depositor preference purposes) for the time that they are payable solely at a foreign branch or branches. Insured depository institutions also may maintain liabilities in an international banking facility (''IBF''). An ''international banking facility deposit,'' as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), also is excluded from the definition of ''deposit'' in Section 3(l) and the depositor preference statute (12 U.S.C. 1821(d)(11)).

II. Background

Upon the failure of an FDIC-insured depository institution, the FDIC must determine the total insured amount for each depositor. 12 U.S.C. 1821(f). To make this determination, the FDIC must ascertain the balances of all deposit accounts owned by the same depositor in the same ownership capacity at a failed institution as of the day of failure.

The Large Bank Modernization Final Rule, among other things, requires certain large depository institutions to adopt mechanisms that will allow the FDIC, as receiver, to place holds on liability accounts, including deposits, in the event of failure. The amount held would vary depending on the account balance, the nature of the liability (whether or not it is a deposit for insurance purposes) and the expected losses resulting from the failure. In order to calculate these hold amounts, the rules used by the FDIC to determine account balances as of the day of failure must be clearly established.

A deposit account balance can be affected by transactions[2] presented during the day. A customer, a third party or the depository institution can initiate a deposit account transaction. All depository institutions process and post these deposit account transactions according to a predetermined set of rules to determine whether to include a deposit account transaction either in that day's end-of-day ledger balances or in a subsequent day's balances. These rules establish cutoff times that vary by institution and by type of deposit account transaction—for example, check

[1] 73 FR 2364 (Jan. 14, 2008).

[2] A deposit account transaction, such as deposits, withdrawals, transfers and payments, causes funds to be debited from or credited to the account.

clearing, Fedwire, ATM, and teller transactions. Institutions post transactions initiated before the respective cutoff time as part of that day's business and generally post transactions initiated after the cutoff time the following business day. Further, institutions automatically execute prearranged ''sweep'' instructions affecting deposit and other liability balances at various points throughout the day. The cutoff rules for posting deposit account transactions and the prearranged automated instructions define the end-of-day balance for each deposit account on any given business day.[3]

In the past, the FDIC usually took over an institution as receiver after it had closed on a Friday. For institutions with a few branches in one state, deposit account transactions for the day were completed and determining account balances on that day was relatively straightforward. The growth of interstate banking and branching over the past two decades and the increasing complexity of bank products and practices (such as sweep accounts) has made the determination of end-of-day account balances on the day of closing much more complicated.

III. The Proposed Rule

Overview

The proposed rule defined the deposit account balance used for deposit insurance determination purposes as the end-of-day *ledger* balance of the deposit account on the day of failure. Except as noted, the FDIC would use the cutoff times previously applied by the failed insured depository institution in establishing the end-of-day ledger balance for deposit insurance determination purposes. The use of end-of-day ledger balances and the institution's normal cutoff times for insurance determination purposes continues long-standing FDIC procedures in processing such balances at a failed depository institution. Whether a deposit account transaction would be included in the end-of-day ledger balance on the day of failure would depend generally upon how it normally would be treated using the institution's ordinary cutoff time on that day. Many institutions have different cutoff times for different kinds of transactions, such as check clearing, Fedwire, ATM and teller transactions.

The FDIC proposed establishing an FDIC Cutoff Point, defined as a point in time after it takes control of the failed institution as receiver, to allow the FDIC to make a final determination of the ledger balances of the deposit accounts if the institution's normal cutoff times for the accounts would impair the efficient winding up of the institution. If the institution's ordinary cutoff time on the day of failure *for any particular kind of transaction* preceded the FDIC Cutoff Point, the institution's ordinary cutoff time would be used. Otherwise, the institution's ordinary cutoff time for an individual kind of transaction would be replaced by the FDIC Cutoff Point. The ''Applicable Cutoff Time'' used for any kind of transaction thus would be the earlier of the institution's ordinary cutoff time or the FDIC Cutoff Point. In practice, there might be several Applicable Cutoff Times for a given failed institution, since different kinds of transactions could have different cutoff times. No Applicable Cutoff Time would be later than the FDIC Cutoff Point established by the FDIC, though some could be earlier.

Under the proposed rule, transactions occurring after the Applicable Cutoff Time would have been posted to the next day's business, if the operations of the failed institution were carried on by a successor institution. In a depository institution failure where deposit operations were not continued by a successor institution, account transactions on the day of failure would have been posted to the applicable deposit accounts until the FDIC Cutoff Point. This practice would have been consistent with the FDIC's current practice in handling deposit account transactions in deposit insurance *payout* situations.[4]

Upon taking control of a failed institution as receiver, as proposed, the FDIC would take steps necessary to limit additional transactions to ensure, to the extent practicable, that funds would not be received by or removed from the failed institution. These steps might include the suspension of wire activities and new deposit account transactions. For example, wire transactions not yet executed by the FDIC Cutoff Point would not be allowed to occur on the day of closing.

For a failed institution operating in several time zones, the FDIC Cutoff Point, which would have set the latest possible time for any particular transaction's Applicable Cutoff Time, would have been translated into local time. For example, a 6 p.m. Eastern Time FDIC Cutoff Point on the day an institution was closed would have meant a 5 p.m. FDIC Cutoff Point in the Central Time zone. As receiver, the FDIC would have attempted, as it has customarily done in the past, to close all offices of the failed institution as soon as practicable after taking over as receiver.

Treatment of Uncollected Deposited Checks

Under the proposed rule, in determining end-of-day deposit account balances at a failed insured depository institution, the FDIC would have deemed all checks deposited into and posted to a deposit account by the Applicable Cutoff Time as part of the end-of-day deposit account balance for insurance purposes. This approach means that the FDIC would have used the end-of-day ledger balance of the account for purposes of its deposit insurance determination, in contrast to using either end-of-day available or collected funds balances. The proposed rule differed from the FDIC's practices in an important way. In the past, for a check that was posted to an account but not yet collected at the time of failure—including a check already forwarded by the failed institution for collection but not yet collected—the FDIC acted as agent for the depositor and remitted or credited payments received on these checks to the depositor in full. These checks were not included in deposits on the day of failure for insurance purposes and were not subject to deposit insurance limits.[5] In contrast, under the proposed rule, when a check is posted to an account at the failed institution by the Applicable Cutoff Time, the check would have been included in the end-of-day balance and would have been subject to deposit insurance limits, even if uncollected.

Prearranged Instructions To ''Sweep'' Funds

The proposed rule attempted to distinguish between internal and external sweep accounts. Internal sweep arrangements—such as those applying

[3] Some depository institutions operate ''real-time'' deposit systems in which some deposit account transactions are posted throughout the business day. Most depository institutions, however, process at least some deposit account transactions in a ''batch mode,'' where deposit account transactions presented before the cutoff time are posted that evening or in the early morning hours of the following day. With either system—batch or real-time—the institution calculates a close-of-business deposit balance for each deposit account on each business day.

[4] This is when the FDIC handles the resolution of a failed depository institution by making payments to insured depositors. More commonly, the FDIC handles a failed institution by arranging a purchase-and-assumption transaction with a healthy depository institution. In those cases, insured depositors' funds are transferred to the assuming institution and available at that institution to depositors.

[5] FDIC Adv. Op. 95–2 (Jan. 23, 1995).

to *zero balance accounts*[6] or where the investment vehicle is a deposit in a foreign branch of the institution or its international banking facility—were characterized as arrangements that sweep funds only within the institution itself by accounting or bookkeeping entries. External sweep arrangements—such as those connected to investments in money market mutual funds—were characterized as arrangements that move funds (usually by wire transfer) outside the institution and, hence, off its books altogether.

Under the proposed rule, any automated internal sweep transaction from one account at the failed institution to another account at the failed institution would have been completed on the day of failure. The FDIC as receiver, in effect, would have recognized the transfer, pursuant to the account agreement, in determining the end-of-day balance for deposit insurance and depositor preference purposes. Under the proposed rule the FDIC as receiver would not, however, complete an external sweep—a sweep in which funds leave the institution and another entity assumes liability to the customer—if funds have not already left the failed institution by the FDIC Cutoff Point. An external sweep included, for example, an account where funds are swept from a deposit account at the institution and wired to a third party money market mutual fund every day. External sweeps also would have included an arrangement where funds are swept from a deposit account at a depository institution to an account or product at an affiliate of the institution, even if the transfer is accomplished through a book-entry at the depository institution. In some cases it would not be practicable to stop an external sweep from occurring after the FDIC general cutoff time. In these cases the FDIC proposed using the pre-sweep deposit balance for insurance purposes.

The proposed rule would have applied differently to sweep accounts involving the transfer of funds outside the depository institution. In those situations, the status of the funds as of the institution's day of failure would depend on whether the funds left the institution (via wire transfer or otherwise) before the FDIC Cutoff Point. Where funds subject to a prearranged, automated external sweep have been temporarily transferred to an intermediate deposit account (or omnibus account) at the failed institution awaiting transfer to an external source, but have not actually been transferred to the external source (for example, the mutual fund) by the FDIC Cutoff Point, those funds would still have been considered part of the customer's deposit account balance for deposit insurance and receivership purposes.

The completion of prearranged internal sweep transactions results in the calculation of end-of-day deposit balances for insurance proposes consistent with how such funds currently are reported on Call and Thrift Financial Reports and are treated for assessment purposes. As detailed in the proposed rule, the need for the FDIC to clarify the treatment of internal sweep arrangements was motivated, in part, by the decision in *Adagio Investment Holding Ltd.* v. *FDIC*, 338 F. Supp. 2d 71 (D.D.C. 2004) (''Adagio'').

In that case the FDIC had been appointed receiver of the failed Connecticut Bank of Commerce. On the night of the bank's failure, in accordance with its customary practice, the FDIC ''completed the day's business'' which involved processing pending transactions, including approximately $20.2 million which had been authorized to be swept from a demand deposit account in the bank to an account in the bank's IBF. Because an IBF account is not a deposit for purposes of section 3(l) of the FDI Act, the FDIC issued the holders of the IBF accounts receivership certificates as general creditors rather than according them priority status as depositors (pursuant to the national deposit preference statute, described below). The creditors, claiming that the receiver did not have authority to permit the sweeps, sued the FDIC. In the *Adagio* case, the court concluded that the sweep should not have been performed in light of the lack of ''any provision in either the statute or regulations that would permit the sweep that occurred. * * *'' 338 F. Supp. 2d at 81.

Post-Closing Adjustments

Under the proposed rule, the FDIC, as receiver, would have been able to correct errors and omissions after the day of failure and reflect them in the day-of-closing deposit account balances.

No New Requirements Would Have Been Imposed on Open and Operating Institutions

The proposed rule would not have required insured institutions to have in place computer systems capable of applying the FDIC Cutoff Point to determine deposit account balances upon an institution's day of failure. The FDIC, however, requested comments on whether such a requirement should be imposed for either all institutions or, alternatively, for ''Covered Institutions''—defined in the second part of the proposed rule as institutions having at least $2 billion in domestic deposits and either: More than 250,000 deposit accounts; or total assets over $20 billion, regardless of the number of deposit accounts.

Repo Sweep Arrangements

The preamble to the proposed rule noted that some repurchase sweep agreements provide for an actual sale of securities by the depository institution to a customer (followed by the institution's repurchase of the securities from the customer). Accordingly, when the customer uses funds in a deposit account to make the purchase, the bank's deposit liability to the customer is extinguished. There may be other so-called repurchase agreements that do not provide for the actual sale and repurchase of securities, but simply provide for the transfer of the customer's claim from a deposit account at the depository institution to another liability account, collateralized by either specific securities or a pool of securities, at the same institution. In the proposed rule, the FDIC posed the following questions:

- Do some or all repurchase arrangements as actually executed: (1) Pass title to the customer in a transaction that is enforceable against the FDIC? or (2) create perfected security interests that are enforceable against the FDIC?
- Does the nature of some or all repurchase sweep arrangements satisfy the definition of ''deposit'' in section 3(l) of the FDI Act?
- What arguments may be made that repurchase arrangements in which the institution collateralizes its liability are permissible, given restrictions on collateralizing private deposits? *See Texas & Pacific Railway Company* v. *Pottorff*, 291 U.S. 245 (1934).

Sweeps Alternative

Under the proposed rule, funds subject to an internal sweep that is to take place before end-of-day balances are calculated would not be accorded

[6] In the case of a zero balance account ordinarily a customer has a master account tied to one or more subsidiary accounts. The institution's agreement with the customer calls for the subsidiary account to have a zero balance at the end of each day. For example, if funds need to be transferred from the master account to cover checks presented against the subsidiary account, this will be done during the nightly processing cycle. Alternatively, if there are excess funds in the subsidiary account they will be transferred to the master account prior to the end of the day.

treatment as deposits if they were to be swept, within the depository institution, by prearrangement, before the institution's end-of-day balances are determined, from a deposit to a liability not recognized as a deposit for insurance purposes. The discussion noted that under such an arrangement, no deposit insurance premiums would have been assessed against these funds since they would not have been reported as deposits by the institution. The FDIC asked whether, if the swept funds in such arrangements were to be assessed insurance premiums, they also should be eligible to be treated as deposits for purposes of FDIC deposit insurance and depositor preference. The FDIC also asked whether or to what extent such an option would involve any operational or regulatory burden or other adverse regulatory consequences.

IV. Comments on the Proposed Rule

As noted, the FDIC received twenty-one comments on the proposed rule, the bulk of which addressed both parts of the proposed rule. Four of the comments were from banking industry trade associations (including one joint letter), two from bank regulatory authorities, ten from large insured depository institutions, one from a law firm representing broker-dealers who place brokered funds in insured depository institutions, one from a member-owned electronic funds transfer network and three from individuals. The following is a summary of the comments we received on part one of the proposed rule—determining deposit and other liability account balances at a failed insured depository institution.

Use of End-of-Day Ledger Balances

All of the bank trade association commenters and many of the large-bank commenters agreed with the FDIC's proposal to define the deposit account balance on the day of failure as the end-of-day ledger balance. Further, these commenters stated that, upon an institution's failure, the FDIC should use the end-of-day ledger balances normally calculated by the institution; thus, such balances should not be affected by the FDIC Cutoff Point.

FDIC Cutoff Point

The bank trade associations and large-bank commenters opposed the use of an FDIC Cutoff Point, proposing alternatively that the FDIC should always use the cutoff times normally established by the insured depository institution. They argued that introducing a new cutoff scheme would be unfair to customers. Many commenters expressed a belief that FDIC practices should not impinge upon the contractual arrangements or other understandings established between the insured depository institution and its customers. Further, it was argued that altering the customer's understanding of how deposit transactions will be posted would create uncertainty and may result in depositor flight.

Additionally, the implementation of an FDIC Cutoff Point was largely viewed as technically infeasible. It was noted that deposit systems are preprogrammed to implement cutoff times as established by the policies of the particular insured depository institution. Adapting these systems to accommodate an FDIC Cutoff Point would be costly, especially since the FDIC Cutoff Point would not be known until the day of failure.

Treatment of Sweep Account Arrangements

In general. Commenters supported at a very general level the establishment of a regulation intended to resolve the legal confusion brought about by the decision in *Adagio*. Commenters recommended that the FDIC limit any regulation to addressing only the legal confusion raised in *Adagio*. One banking trade group suggested this could be done by language to ''explicitly provide that all automated sweep arrangements that are codified in contract will be recognized as part of the day's business and reflected in end-of-day ledger balances, regardless of when the transactions are processed.'' Another banking trade association noted its ''greatest concerns relate to the FDIC's extensive new proposals relating to the treatment of sweep products. Sweep transactions have been an extensively used business practice for decades, enabling banks to secure substantial funding at reasonable costs and their customers to achieve their financial objectives. Any proposal that disrupts the existing treatment and expectations of institutions and their customers *vis-à-vis* sweeps would potentially impair the viability of sweeps with very serious and unpredictable consequences.''

Generally, commenters felt the FDIC should delay a final rule that would go beyond narrowly addressing the *Adagio* concerns. One large bank stated ''the issues raised and the potential impact to financial markets that could result from these proposals are very substantial. All of the proposals relating to sweeps warrant further study and consideration by the FDIC and should be removed from this rulemaking and should not be part of any final rule. The FDIC should consult further with other banking and financial regulatory agencies and with financial institutions that are key players in this market before finalizing a rule on sweeps.'' This commenter further stated ''the proposed regulation could have major ripple effects on other laws and regulations that ultimately rely upon the same legal definitions of a deposit as the Federal Deposit Insurance Act, including Regulation D, Regulation Q, deposit insurance assessments and the nationwide 10% deposit cap.''

Repo sweep arrangements. The FDIC's questions regarding the nature of funds swept through arrangements identified as repurchase agreement sweeps generally were not addressed, other than through the overall comment that the FDIC should only narrowly address *Adagio* in any final rule. One large bank stated that it ''believes the current sweep structures commonly used in the industry (including the structures of securities repos) are appropriately characterized as not being deposits under the FDIA. [The bank] further believes that any proposal to charge FDIC insurance premiums on the amounts swept would dramatically increase costs to banks relating to that product and could result in the product no longer being economically viable or able to be offered on terms that are competitive with other products offered by non-bank market participants.''

Sweeps alternative. In the proposed rule, the FDIC asked whether, if the funds involved in certain sweep arrangements were to be assessed insurance premiums, they also should be eligible to be treated as deposits for purposes of FDIC deposit insurance and depositor preference. No commenters addressed this question directly, although the tenor of the comments from the large banks and bank trade associations was that issues such as this should not be considered as part of this rulemaking.

Consistent treatment across sweep transactions. Several commenters argued that, if the FDIC proceeds with the rulemaking, it should treat each sweep transaction the same for claims purposes. One banking trade association argued that ''all these products have one common element—once swept from a deposit account, and until returned to the deposit account, none of the bank's obligations meets the definition of a 'deposit' under the Federal Deposit Insurance Act and are therefore not covered by deposit insurance in the event of the bank's insolvency. This characterization of sweeps is consistent with the long-standing practices of virtually every financial institution and has been the widely accepted practice by banking regulators for decades.'' In this regard, the commenter noted that, should the FDIC afford different

treatment across sweep products, it ''would therefore result in different (and, to a certain degree, arbitrary) treatment under the Proposal. Our members have great concern as to these potential disparities that could result, in some cases from nothing more than differences in the mechanisms used to execute and arrange sweep transactions.''

To provide consistent treatment among the various sweep products, several commenters suggested the FDIC should do away with the internal versus external distinction between sweep transactions as well as the Class A versus Class B distinction. ''We urge the FDIC to eliminate these unnecessary distinctions, to the extent that the FDIC proceeds with rulemaking around sweeps at all, and treat similar sweep products the same, despite different methods used by banks for processing the necessary transfers and posting the relevant accounts.''

V. Rationale for Interim Rulemaking

As noted above, the practices being adopted in the interim rule were proposed in part one of the proposed rule. Hence, the FDIC is adopting those practices through the usual public notice-and-comment procedures pursuant to requirements in the Administrative Procedure Act, 5 U.S.C. 553. Before adopting the interim rule as a permanent rule, however, the FDIC invites comment on all aspects of the interim rule, including an aspect of the proposed rule on which the FDIC had not requested specific comment.

The interim rule addresses how the FDIC will treat sweep accounts upon an insured institution failure. The result is that, in many cases, the swept funds will not be treated by the FDIC as deposit obligations of the failed institutions. As explained above, that means the swept funds will not be eligible for deposit insurance coverage and will not be afforded status as a deposit under the depositor preference statute. Commenters on the proposed rule indicated that sweep account customers are aware of this potential consequence if the institution were to fail. In order to ensure that sweep account customers are aware that their funds will not be treated as deposits if the insured institution fails, however, the FDIC will require institutions to prominently disclose to customers whether the swept funds are deposits and the status of the swept funds if the institution failed. The effective date of this requirement will be deferred until July 1, 2009 to allow the FDIC to consider specific comments on the disclosure requirement. (Further explanation of the disclosure requirement is provided below under ''Request for Comments.'')

VI. The Interim Rule

After fully considering the comments on the proposed rule, FDIC has adopted the interim rule substantially as proposed, with some modifications in connection with the treatment of ''internal and external'' sweep transactions, and in other limited areas. As noted, the interim rule requires institutions to disclose to customers whether the swept funds are deposits and the status of the swept funds if the institution failed, but the effective date of this requirement is deferred to allow for public comment. In addition, the FDIC will entertain comments on all other aspects of the interim rule.

Underlying Principles

The interim rule describes the method for determining the value and nature of claims against a failed insured depository institution to be used in the event of failure. Upon taking control of a failed insured depository institution it is the receiver's responsibility to construct an ending balance sheet for the depository institution (which becomes the beginning balance sheet for the receivership) and determine the value and nature of the claims against the failed institution, including claims to be made by depositors, general creditors, subordinated creditors, and shareholders. Such claims determinations will be made consistent with the principles described below, which for the most part reflect existing practices and procedures used to determine account balances in the event of failure.

- In making deposit insurance determinations and in determining the value and nature of claims against the receivership on the institution's date of failure the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly provided otherwise in the interim rule, the depository institution's normal posting procedures.
- In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the FDIC Cutoff Point, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution.[7]
- End-of-day ledger balances are subject to corrections for posted transactions that are inconsistent with the above principles.

End-of-Day Ledger Balances and Cutoff Points

As proposed, in the interim rule the deposit or liability account balance used for deposit insurance determination purposes is defined as the end-of-day *ledger* balance of the deposit or other liability on the day of failure. Except as noted, the FDIC will use the cutoff rules previously applied by the failed insured depository institution in establishing the end-of-day ledger balance for deposit insurance determination purposes. However, the interim rule allows the FDIC to establish an FDIC Cutoff Point, coinciding with the point in time at which the receiver acts to stop deposit transactions which might result in creating new liabilities or extinguishing existing liabilities. The FDIC Cutoff Point will facilitate the orderly winding up of the institution and the FDIC's final determination of the ledger balances of the deposit accounts in those cases where the institution's normal cutoff rules prevent or impair the FDIC's ability to promptly determine the end-of-day ledger balance of the deposit or other liability. The intention is to complete internal postings of transactions presented or authorized prior to the institution's normal cutoff rules or the FDIC Cutoff Point, as applicable, according to the depository institution's normal procedures—thus, as explained below, the nature of the liability may change after the FDIC Cutoff Point. Any transaction—including sweep arrangements—would be completed for that day according to normal procedures if it involves only the movement of funds between accounts within the confines of the depository institution. Some sweep arrangements shift funds within the depository institution from a

[7] This principle draws a sharp distinction between transactions involving the transfer of funds into or out of the failed institution and transactions intended to move funds between accounts or otherwise on the books and records of the failed institution. The receiver will act to stop the inflow and outflow of cash/assets at the point at which it takes control of the failed institution; thus transactions involving the transfer of assets into or out of the failed institution may be blocked or suspended. Transactions internal to the failed institution's operations initiated prior to the FDIC Cutoff Point—including those initiated through prearranged automated instructions—will still be conducted after the point of failure as part of a necessary process to arrive at the end-of-day ledger balances and to establish the nature of the claim recognized by the receiver.

deposit account to ownership in a sweep investment vehicle. The value and nature of these claims will be determined as they rest on the books and records of the depository institution as reflected in its end-of-day ledger balances.

If the institution's ordinary cutoff time for the day's business on the day of failure *for any particular kind of transaction* precedes the FDIC Cutoff Point, the institution's ordinary cutoff time will be used. Where the institution's ordinary cutoff time for an individual kind of transaction is later than the FDIC Cutoff Point, the institution's cutoff time will be replaced by the FDIC Cutoff Point. The ''Applicable Cutoff Time'' used for any kind of transaction thus will be the earlier of the institution's ordinary cutoff time or the FDIC Cutoff Point. Different kinds of transactions may have different Applicable Cutoff Times. Transactions occurring after the Applicable Cutoff Time will be posted a subsequent day's business, if the operations of the failed institution are carried on by a successor institution or by the FDIC as receiver or insurer.

The interim rule differs from the proposed rule in cases where deposit operations are not continued after failure in order to provide consistency in the determination of deposit balances regardless of whether the deposit operations were continued. In a depository institution failure where deposit operations are not continued by a successor institution, account transactions on the day of failure also will be posted to the applicable accounts as described above. Since there is no next business day in this case, rather than posting transactions occurring after the Applicable Cutoff Time as the next day's business, such transactions will be handled depending on the nature of the transaction. In the case of a cash or other deposit occurring after the Applicable Cutoff Time, such funds—which would not be included in the end-of-day ledger balance used for claims purposes—would be disbursed to the account owner. If a cash or other withdrawal is made after the Applicable Cutoff Time, such funds—again which would not be included in the end-of-day ledger balance used for claims purposes—could be used by the receiver to satisfy a claim against the receivership.[8]

[8] A deposit account withdrawal in the form of an official check drawn on the failed depository institution would not be used by the receiver to satisfy the insured deposit claim. Official items are considered to be deposits for deposit insurance purposes; therefore, such official withdrawals would be treated differently from cash withdrawals.

The interim rule does not establish any new operational requirements for insured institutions relative to the FDIC Cutoff Point. Also, the interim rule explicitly authorizes the FDIC, as receiver, to correct errors and omissions after the day of failure and reflect them in the end-of-day ledger balances.

Several commenters argued against the establishment of an FDIC Cutoff Point and recommended that the FDIC use end-of-day balances as normally calculated by the insured depository institution. As noted above, the FDIC will apply the institution's normal cutoff times in most cases, but establishing an FDIC Cutoff Point is essential to the efficient finalization of end-of-day ledger balances in some situations. Strictly applying a depository institution's pre-established cutoff times in all circumstances is inconsistent with the duties and responsibilities of the receiver—as articulated in the principle indicated above. In the event of failure the receiver will take control of the failed institutions and simultaneously will act to stop deposit or other transactions involving creating new liabilities or extinguishing existing liabilities. In many cases, this can be done consistent with the institution's normal cutoff times, but in others it cannot and the FDIC will establish an FDIC Cutoff Point. If the receiver is successful in stopping these external transactions after it takes control there will be no new transactions to be posted affected by an FDIC Cutoff Point. In this case, the end-of-day ledger balances on the day of failure will be calculated using the failed institution's pre-established cutoff points. If the receiver is unsuccessful in stopping the external transactions, the FDIC Cutoff Point establishes a basis for posting these inadvertent transactions the following day, if that is the course of action selected by the receiver.

Treatment of Uncollected Deposited Checks

As proposed, in determining deposit account balances at a failed insured depository institution, the FDIC will deem all checks deposited into and posted to a deposit account by the Applicable Cutoff Time as part of the end-of-day ledger balance for insurance purposes. As detailed in the proposed rule, this treatment of uncollected deposited checks is warranted because: Depository institutions use and calculate the ledger balance in a more consistent way than other balances; it is consistent with the way that depository institutions report deposits on Call Reports and Thrift Financial Reports; it is the balance the FDIC uses to determine an institution's assessment base for calculating the institution's deposit insurance assessments;[9] it is the easiest balance for depositors to understand; and it is the most frequently used balance on financial statements provided to customers. Using ledger balances also is consistent with the definition of a deposit in the Federal Deposit Insurance Act (''FDI Act''), which includes balances both ''conditionally'' or ''unconditionally'' credited to a deposit account. 12 U.S.C. 1813(l).

Further, especially in a large depository institution failure, using end-of-day ledger balances may be the only operationally feasible means for the FDIC to make deposit insurance determinations timely and expeditiously. As discussed in more detail in the Large Bank Modernization Final Rule, the FDIC is statutorily obligated to pay insured deposits ''as soon as possible'' after an insured depository institution fails. 12 U.S.C. 1821(f)(1). The FDIC places a high priority on providing access to insured deposits promptly and, in the past, has usually been able to allow most depositors access to their deposits on the business day following closing. The largest insured institutions today are much bigger than any institution has been in the past and are growing increasingly complex. Providing prompt access to depositors if one of these institutions were to fail would prove difficult if adjustments for uncollected funds were necessary.

This treatment of uncollected deposited checks, however, will differ from the FDIC's past practice in an important way. In the past, for a check that was posted to an account but not yet collected at the time of failure—including a check already forwarded by the failed institution for collection but not yet collected—the FDIC acted as agent for the depositor and remitted or credited payments received on these checks to the depositor in full. These checks were not included in deposits on the day of failure for insurance purposes and were not subject to deposit

[9] The FDIC's recent revisions to the FDIC's risk-based assessment system have made an institution's assessment base, which is used to determine its deposit insurance assessment, virtually identical with an institution's deposits as defined in the Federal Deposit Insurance Act. The revisions eliminated the ''float'' deductions previously used to compute an institution's assessment base; hence, deposits posted to a deposit account but not yet collected are now part of the assessment base. The stated rationale for eliminating the float deduction from the calculation of an institution's assessment base was that such deductions were small and decreasing as a result of legal, technological and system payment changes. 71 Fed. Reg. 69720 (Nov. 30, 2006).

insurance limits.[10] In contrast, under the interim rule, when a check is posted to an account at the failed institution as provided by the Applicable Cutoff Time, the check will be included in the end-of-day ledger balance and will be subject to deposit insurance limits, even if uncollected.[11]

Some depositors may receive less favorable treatment under the interim rule than if the FDIC were to continue to use its past approach to handling uncollected deposited checks. The increasing speed with which checks are processed as a result of electronic check processing, the use of checking account debit cards and other developments, however, should limit the effect of the final rule in this regard. Moreover, the past approach would not be feasible in a larger bank failure, and the FDIC must plan for all contingencies.

Prearranged Instructions To ''Sweep'' Funds

The proposed rule distinguished between internal and external sweep accounts. This distinction was created to recognize the receiver's responsibility, upon taking control of the failed institution, to stop the generation of new deposit or other transactions which might result in creating new liabilities or extinguishing existing liabilities for the depository institution or its customers to protect the appropriate distribution to claimants.

Under the interim rule, any automated sweep transaction transferring funds internally from one deposit account at the failed institution to a sweep investment vehicle at the failed institution will be completed on the day of failure. In the case of sweeps out of the failed institution into external investment vehicles, the swept funds will be treated consistent with their status in the end-of-day ledger balances. If an expected transfer to the external sweep investment vehicle is not completed prior to the FDIC Cutoff Point, the external investment will not be purchased and the funds will remain in the account identified on the end-of-day ledger balance.

Where funds are swept internally to an investment vehicle at the failed institution, the FDIC will recognize the transfer, pursuant to the account agreement, in determining the end-of-day ledger balance for deposit insurance and depositor preference purposes. This approach is consistent with the principle articulated in the interim rule that the FDIC will treat deposits and other liabilities of the failed institution on the date of failure based on the ownership and the nature of the underlying obligations as reflected in the end-of-day ledger balance. The completion of prearranged internal sweep transactions in the calculation of end-of-day deposit and other balances for insurance proposes also is consistent with how such funds currently are reported on Call and Thrift Financial Reports and are treated for assessment purposes.

Eurodollar and IBF accounts are two examples of internal sweep investment vehicles. Accounts that include a Eurodollar or IBF sweep arrangement typically begin each business day with balances only in a domestic deposit account. At the end of the business day, the customer's end-of-day ledger balance is reported as a Eurodollar account (typically associated with the bank's branch in the Cayman Islands or Bahamas) or an IBF account. At the start of the next business day, the depository institution will report the balance as being back in the domestic deposit account. The cycle typically repeats itself daily.

Usually the underlying contract for a Eurodollar sweep specifies that the obligation at the foreign branch is not payable in the United States and, hence, is not a *deposit*,[12] for deposit insurance and depositor preference purposes. Upon an institution's failure, amounts in a Eurodollar account in a foreign branch of the failed institution are treated as unsecured, non-deposit liabilities and are not eligible for insurance or depositor preference status. The same treatment will apply to sweeps to IBFs, which by statutory definition are not deposits. Eurodollar and IBF accountholders will thus be accorded general creditor status in the receivership estate.

It is important for customers to be aware that whether an account has deposit status—versus general creditor status—can be far more important for large depositors than the question of whether the account is fully insured. To illustrate, assume that $5.1 million is swept from a customer's checking account into a Eurodollar account. Further, assume that the failed institution's assets would be worth approximately eighty percent of its total deposit liabilities. In this illustration, if the funds had remained deposits the customer would have received approximately $4.1 million ($100,000 in deposit insurance plus an eighty percent dividend on the uninsured portion of the deposit), thus losing $1 million. However, since Eurodollar accounts are not deposits for purposes of either FDIC insurance or depositor preference, in this situation the customer would lose the entire $5.1 million upon the institution's failure.

Institutions do not pay deposit insurance assessments on liabilities denominated, as of an institution's end-of-day ledger balance, as foreign deposits or IBF deposits. Some of the commenters who addressed sweep account issues raised in the proposed rule acknowledged that sweep products (particularly those involving the transfer of funds from deposit accounts to non-U.S. deposits, securities repos, fed funds and money market mutual funds) result in obligations of the insured institution that would not be eligible for insurance and do not have deposit preference status. One commenter stated that, ''[m]ost of these products are designed for and used by corporate and institutional customers who are sophisticated enough to understand the business terms,'' thus suggesting that such customers are aware of the potential consequences in the event of failure of the institution.

Under the interim rule, the sweep to an IBF (for example, as described in the *Adagio* decision) will be completed for that day by the receiver on the day of failure and the account holders, who hold end-of-day ledger IBF accounts after the sweep, will be deemed to be general creditors of the receivership, rather than depositors, under the deposit preference statute.[13]

[10] FDIC Adv. Op. 95–2 (Jan. 23, 1995).

[11] The FDIC's treatment of uncollected checks is subject to the FDIC's rights and obligations under the FDI Act. *See, e.g.*, 12 U.S.C. 1822(d); *FDIC* v. *McKnight*, 769 F.2d 658 (10th Cir. 1985); *cert. denied sub nom., All Souls Episcopal Church* v. *FDIC*, 475 U.S. 1010 (1986). Although the FDIC will immediately honor uncollected checks through the payment of deposit insurance and the issuance of receivership certificates, if a check is ultimately uncollectible, the ledger balance of the depositor will be adjusted accordingly, and the FDIC will seek reimbursement from the depositor and adjust the depositor's receivership claim (if any) as necessary.

[12] The definition of ''deposit'' in the FDI Act expressly excludes: ''Any obligation of a depository institution which is carried on the books and records of an office of such bank or savings association located outside of any State, unless (i) such obligation would be a deposit if it were carried on the books and records of the depository institution, and would be payable at an office located in any State; and (ii) the contract evidencing the obligation provides by express terms, and not by implication, for payment at an office of the depository institution located in any State.'' 12 U.S.C. 1813(l)(5)(A). Also, the FDI Act defines IBF obligations as non-deposits, which are not eligible for deposit insurance or deposit preference status. 12 U.S.C. 1813(l)(5)(B).

[13] Rights are fixed as reflected in the depository institution's end-of-day ledger balances. Those rights would not be changed if, for example, it was impractical to reprogram the bank's computers before a liability swept to a foreign branch of an insured institution as of the day of the institution's failure and was treated by the computer as having

Repo sweep arrangements are another example of sweep arrangements that are generally conducted via internal transfers on the institution's books. Repo sweeps can differ considerably in documentation, actual execution, and timing. The FDIC, to the extent consistent with the principles articulated in the interim rule, will carry out repo sweeps in reaching end-of-day ledger balances. If as of the end-of-day ledger balance the repo sweep customer is the legal owner of identified securities subject to a repurchase agreement, the FDIC will acknowledge that ownership interest.

Based on industry information, as reflected in some comment letters, money market mutual fund sweeps may be structured in a variety of ways. In some cases the money market mutual funds shares are held directly in the name of the sweep account holder, but in other cases the money market mutual fund account is either in the name of the depository institution or in the name of the transfer agent for the mutual fund. Shares are sold or allocated to the individual sweep customer depending on the particulars of the sweep arrangement. Further, some money market mutual fund sweep arrangements result in a ''same-day'' purchase of fund shares while ''next-day'' sweeps delay the purchase of fund shares by the customer until the day following the investment decision.

Regardless of the internal mechanics of the money market mutual fund sweep arrangement, under the interim rule the FDIC will treat funds swept in connection with a money market mutual fund sweep arrangement consistent with the account where the funds are reported as reflected in the end-of-day ledger balances. The results of this determination may be affected by whether the sweep arrangement contemplated the movement of funds outside the institution. If an expected transfer is not completed on the day of failure due to the application of the second principle discussed above (that the receiver will stop the generation of new deposit or other transactions which might result in creating new liabilities or extinguishing existing liabilities for the depository institution or its customers), the account holder's rights will be fixed based on where the funds actually reside as of the end-of-day ledger balance. As with the treatment of other sweep products, this treatment is consistent with the principle that the FDIC will treat deposits and other liabilities of the failed institution on the date of failure based on the ownership and the nature of the underlying obligations as reflected in the end-of-day ledger balance.

Money market mutual fund sweeps are the most prevalent case involving a sweep investment vehicle designed to move outside of the depository institution, and have them come to rest in a separate legal entity. Another example is where funds are swept from a deposit account at a depository institution to an account or product at an affiliate of the institution, even if the transfer is accomplished through a book-entry at the depository institution. When the sweep investment vehicle rests outside the depository institution, under the interim rule the status of the funds as of the institution's day of failure will depend on whether the funds have been used to purchase the sweep investment vehicle prior to the FDIC Cutoff Point. For some sweep arrangements the purchase may not be completed for that day prior to the FDIC Cutoff Point. For example, an institution could have an arrangement to transfer funds from a customer's demand deposit account into an account at an affiliated depository institution, to be conducted each day late in the evening. In this case, under the interim rule if the funds had not been transferred to the sweep investment vehicle as of the FDIC Cutoff Point, they still will be considered to be a deposit for insurance purposes. This treatment is in furtherance of the FDIC's obligation as receiver to stop the generation of new deposit or other transactions that might result in creating new liabilities or extinguishing existing liabilities for the depository institution after the institution has failed.

In some cases it will not be practicable to stop automatically generated sweeps from occurring after the FDIC Cutoff Point, requiring the necessary adjustments post closing.

Sweeps Alternative

Under the interim rule, the receiver will establish the value and nature of claims based on the end-of-day ledger balance for each account. In the proposed rule the FDIC asked whether certain swept funds, if assessed insurance premiums, also should be eligible to be treated as deposits for purposes of FDIC deposit insurance and depositor preference. Based in part on the comments received on this issue, the FDIC has decided not to change current practices.

VII. Request for Comments

The FDIC invites interested parties to submit comments during a 60-day comment period on all aspects of the interim rule, including whether insured depository institutions should be required to disclose to sweep account customers that swept funds will not be treated as deposits if the institution were to fail. More specifically, comments are requested on § 360.8(e) of the interim rule which, as indicated above, is subject to an extended delayed effective date:

> In all sweep account contracts and account statements reflecting sweep account balances, institutions must prominently disclose whether swept funds are deposits within the meaning of 12 U.S.C. 1813(l). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its Call Reports or Thrift Financial Reports.

As noted above, several commenters stated that sweep customers generally are aware of how the swept funds would be treated in the event of failure. Over the past year, FDIC staff held meetings with groups of corporate treasurers to discuss the potential implications of the proposed rule. During these meetings, corporate treasurers stated that many institutions provided some disclosure to sweep customers about the potential consequences of these transactions. However, it was evident those disclosures did not result in a consistent understanding of how these funds would be treated in the event of failure.

This interim rule clearly states the FDIC's intent to use for claims purposes end-of-day ledger balances as normally reflected on the books and records of the insured depository institution. Prior to this end-of-day ledger balance calculation, funds could have been swept from a deposit account into a sweep investment vehicle. The movement of funds from a deposit account into a sweep investment vehicle not considered to be a deposit for insurance purposes can have significant implications for the sweep customers. In the case of a Eurodollar sweep, for example, the swept funds would have general creditor standing with a considerably higher loss exposure relative to an uninsured deposit claim.

The FDIC is concerned that the treatment of swept funds in the event of failure is not clearly understood by sweep customers. A better understanding of this treatment by sweep customers is important to avoid

been swept back to a deposit account at a bridge bank or assuming bank serving as the successor to the failed institution.

misconceptions which may arise in the event of failure. While many institutions currently provide some disclosures to sweep customers, the FDIC believes the significance of the consequences to depositors of some sweep transactions necessitates consistent disclosures by institutions providing sweep services. In this context, it is particularly important for institutions to disclose to sweep customers that the completion of some sweep transactions may result in their funds being subject to treatment as general creditor claims.

In the Large Bank Modernization Final Rule—the companion to this interim rule—the FDIC discusses several important objectives including: (1) Providing liquidity to depositors, (2) enhancement of market discipline, (3) equity in the treatment of depositors of insured institutions and (4) preservation of franchise value in the event of failure. These objectives can be undermined if sweep customers do not have a clear understanding of the treatment of swept funds in the event of failure.

Specifically the FDIC is interested in responses to the following questions:

- What disclosures are currently being made in connection with sweep account arrangements which allow the sweep customer to ascertain the treatment of such funds in the event of failure?
- What form do these disclosures take, when are they provided, and what is their frequency?
- Are the disclosures consistent with how such funds are reported on Call or Thrift Financial Reports?

VIII. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. No commenters suggested that the proposed rule was unclear, and the interim rule is substantively similar to the proposed rule.

IX. Paperwork Reduction Act

OMB Number: New Collection.

Frequency of Response: On occasion.

Affected Public: Insured depository institutions offering sweep account products.

Estimated Number of Respondents: 1,170 to 1,970.

Estimated Time per Response: 25–49 hours per respondent.

Estimated Total Annual Burden: 28,870–84,400 hours.

Background/General Description of Collection: The interim rule contains collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (''PRA''). In particular, the interim rule requires, subject to an extended delayed effective date, depository institutions offering sweep products to disclose whether the swept funds are deposits for insurance purposes and, if not, how these funds would be treated in the event of failure. The collections of information contained in this section of the interim rule have been submitted to OMB for review.

Estimated costs: Compliance with the disclosure requirement will require insured depository institutions offering sweep products, which do not currently provide adequate disclosures, to modify their sweep account documentation, including customer account statements, to include new language indicating whether swept funds are a deposit for insurance purposes and, if not, how such funds would be treated in the event of failure. Further, additional documentation may be provided to sweep customers as part of a statement mailing on a one-time basis. Implementation cost will be mitigated by the delayed effective date of this requirement. Sweep account documents must be reprinted periodically in any case, and the cost of including the disclosure requirement should be minimal. Further, most insured depository institutions already make certain disclosures to customers, and the new requirements would simply replace these disclosures. After implementation, on-going cost should be negligible. Future printings of sweep account documentation will have to be conducted in any case to replenish stock, and the disclosure requirement should not add to the cost of such printings given its brief nature. Customer account statements would continue to be provided according to normal business practices. Further, staff training must be conducted periodically, and the disclosure requirement should not materially add to the length or complexity of this training.

The exact number of insured depository institutions offering sweep products is unknown. It is the FDIC's experience that the vast majority of large institutions offer some sweep arrangement as part of their cash management services. The prevalence of sweep offerings among smaller community banks is far less prevalent. This analysis assumes that all insured depository institutions with total assets of at least $2 billion offer at least one sweep product (370 institutions). It is further assumed that between 10 and 20 percent of the remaining 8,000 insured institutions also offer a sweep product (800 to 1,600 institutions). The total number of respondents is estimated to be between 1,170 and 1,970.

Implementation costs will vary based on the size, nature and scope of the depository institutions sweep programs. It is estimated that compliance costs for the very largest and super-regional banking organizations are between $25,000 and $50,000 while smaller regional organizations were placed at $10,000 to $20,000. Other large organizations (those with at least $2 billion in total assets) were assigned a cost estimate of $1,500 to $3,000. Costs for community banks were estimated to be between $1,000 and $2,000. Under these assumptions, the overall disclosure costs are estimated to be between $1.73 million and $3.46 million at the lower end of the number of institutions believed to be engaging in sweep operations (1,170). If as many as 1,970 depository institutions maintain sweep operations the total costs are estimated to range between $2.53 million and $5.06 million.

Based on the above cost estimates the number of hours needed to meet the disclosure requirements per institution is calculated as follows. $1.73 million ÷ 1,170 institutions = $1,480 per institution. Assuming an hourly cost of $60 for employee time generates the minimum time estimate of 25 hours per institution. The upper range of the cost estimate is $2,960 which is equivalent to 49 hours ($3.46 million ÷ 1,170 institutions ÷ $60 hourly employee cost = 49 hours). Total hours are estimated at a minimum as: ($1.73 million ÷ $60 hourly employee cost = 28,870 hours) and at the upper range as: ($5.06 million ÷ $60 hourly employee cost = 84,400 hours).

Comments: In addition to the questions raised elsewhere in this Preamble, comment is solicited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) the quality, utility, and clarity of the information to be collected; (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses; and (5) estimates of capital or start-up costs

and costs of operation, maintenance, and purchases of services to provide information.

Addresses: Interested parties are invited to submit written comments to the FDIC concerning the Paperwork Reduction Act implications of this proposal. Such comments should refer to ''Processing of Deposit Accounts, 3064–AD26.'' Comments may be submitted by any of the following methods:

- *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: comments@FDIC.gov.* Include ''Processing of Deposit Accounts, 3064–AD26'' in the subject line of the message.
- *Mail:* Executive Secretary, Attention: Comments, FDIC, 550 17th St., NW., Room F–1066, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (EST).
- A copy of the comments may also be submitted to the OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal* including any personal information provided. In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

X. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires a federal agency publishing a notice of proposed rulemaking to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. 5 U.S.C. 603(a). As defined in regulations issued by the Small Business Administration (13 CFR 121.201), a ''small entity'' includes a bank holding company, commercial bank or savings association with assets of $165 million or less (collectively, small banking organizations). The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the proposed rule would not have a significant impact on a substantial number of small entities. 5 U.S.C. 605(b).

In publishing the proposed rule the FDIC certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The rationale for this certification was that the proposed rule would establish the FDIC's practice for determining deposit account balances at a failed insured depository institution and would impose no requirements on insured depository institutions.

The interim rule imposes a disclosure requirement on all insured depository institutions offering one or more sweep account products. This requirement is subject to an extended delayed effective date to allow the FDIC to consider specific comments on the disclosure requirement before insured depository institutions must comply with it. Preliminarily, the FDIC believes the disclosure requirement in the interim rule will not have a substantial impact on a substantial number of small banking organizations, mainly because such entities are much less likely than larger insured depository institutions to offer sweep-account products. Such products are typically offered by insured depository institutions serving large commercial and institutional customers. The FDIC welcomes comments on whether and, if so, to what extent small banking organizations will be affected by the disclosure requirement in the interim rule.

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

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

List of Subjects in 12 CFR Part 360

Banks, Banking, Savings associations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby amends part 360 of title 12 of the Code of Federal Regulations as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

■ 1. The authority citation for part 360 continues to read as follows:

Authority: 12 U.S.C. 1819(a) Tenth, 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

■ 2. Add new § 360.8 to read as follows:

§ 360.8. Method for determining deposit and other liability account balances at a failed insured depository institution.

(a) *Purpose.* The purpose of this section is to describe the process the FDIC will use to determine deposit and other liability account balances for insurance coverage and receivership purposes at a failed insured depository institution.

(b) *Definitions.*—(1) The *FDIC cutoff point* means the point in time established by the FDIC after it has been appointed receiver of a failed insured depository institution and takes control of the failed institution.

(2) The *applicable cutoff time* for a specific type of deposit account transaction means the earlier of either the failed institution's normal cutoff time for that specific type of transaction or the FDIC cutoff point.

(3) *Close-of-business account balance* means the closing end-of-day ledger balance of a deposit or other liability account on the day of failure of an insured depository institution determined by using the applicable cutoff times. This balance may be adjusted to reflect steps taken by the receiver to ensure that funds are not received by or removed from the institution after the FDIC cutoff point.

(c) *Principles.*—(1) In making deposit insurance determinations and in determining the value and nature of claims against the receivership on the institution's date of failure the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly provided otherwise in this section, the depository institution's normal posting procedures.

(2) In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the FDIC Cutoff Point, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution.

(3) End-of-day ledger balances are subject to corrections for posted

transactions that are inconsistent with the above principles.

(d) *Determining closing day balances.*—(1) In determining account balances for insurance coverage and receivership purposes at a failed insured depository institution, the FDIC will use close-of-business account balances as may be adjusted for funds that are received by or removed from the institution after the FDIC cutoff point.

(2) A check posted to the close-of-business account balance but not collected by the depository institution will be included as part of the balance, subject to the correction of errors and omissions and adjustments for uncollectible items that the FDIC may make in its role as receiver of the failed depository institution.

(3) In determining close-of-business account balances, the FDIC will recognize contractual, automated transfers (or sweeps) of funds from a deposit account to a non-deposit account or investment vehicle at the institution scheduled to take place before the final calculation of the institution's end-of-day ledger balances for that day.

(4) For deposit insurance and receivership purposes in connection with the failure of an insured depository institution, a depositor's and other liability-holder's rights will be determined as of the point the close-of-business account balance is calculated. These rights may be adjusted as necessary to account for funds that are received by or removed from the institution after the FDIC cutoff point.

(e) Effective July 1, 2009, in all sweep account contracts and account statements reflecting sweep account balances, institutions must prominently disclose whether swept funds are deposits within the meaning of 12 U.S.C. 1813(l). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its Call Reports or Thrift Financial Reports.

By order of the Board of Directors.

Dated at Washington, DC, this 17th day of June, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–15493 Filed 7–16–08; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AD26

Large-Bank Deposit Insurance Determination Modernization

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

ACTION: Final rule.

SUMMARY: The FDIC is adopting a final rule requiring the largest insured depository institutions to adopt mechanisms that would, in the event of the institution's failure: provide the FDIC with standard deposit account and other customer information; and allow the placement and release of holds on liability accounts, including deposits. The final rule applies only to insured depository institutions having at least $2 billion in domestic deposits and either: more than 250,000 deposit accounts (currently estimated to be 152 institutions); or total assets over $20 billion, regardless of the number of deposit accounts (currently estimated to be 7 institutions).

The FDIC is adopting the final rule concurrently with its adoption of an interim rule establishing practices for determining deposit and other liability account balances at a failed insured depository institution. With exceptions indicated in the final rule, institutions subject to this final rule will have eighteen months from the effective date of the final rule to implement its requirements.

EFFECTIVE DATE: August 18, 2008.

FOR FURTHER INFORMATION CONTACT: James Marino, Project Manager, Division of Resolutions and Receiverships, (202) 898–7151 or *jmarino@fdic.gov,* Joseph A. DiNuzzo, Counsel, Legal Division, (202) 898–7349 or *jdinuzzo@fdic.gov;* or Christopher L. Hencke, Counsel, Legal Division, (202) 898–8839 or *chencke@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The final rule requires the largest insured depository institutions to adopt mechanisms that would, in the event of the institution's failure: (1) Provide the FDIC with standard deposit account and other customer information; and (2) allow the placement and release of holds on liability accounts, including deposits. These requirements were addressed in two advance notices of proposed rulemaking issued in 2005 and 2006, respectively the ''2005 ANPR'' and the ''2006 ANPR''.[1] Also, in January of this year the FDIC published a proposed rule composed of two parts, addressing in part two the issues involved in the final rule and addressing in part one issues involving the FDIC's practices for determining deposit and other liability account balances at a failed insured depository institution (''proposed rule'').[2]

The FDIC received twenty-one comments on the proposed rule. (The comment letters may be viewed on the FDIC's Web site at *http://www.fdic.gov/regulations/laws/federal/2008/08comAD26.html.*)

Based in part on those comments, the FDIC has decided to finalize the proposed rule by issuing two separate rulemakings—(1) the final rule, covering part two of the proposed rule and (2) a separate interim rule, covering part one of the proposed rule (''Interim Rule on Processing Deposit Accounts'').

Throughout the preamble the terms ''deposit'' (or ''domestic deposit''), ''foreign deposit'' and ''international banking facility deposit'' identify liabilities having different meanings for deposit insurance purposes. A ''deposit'' is used as defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)) (''Section 3(l)''). A deposit includes only deposit liabilities payable in the United States, typically those deposits maintained in a domestic office of an insured depository institution. Only deposits meeting these criteria are eligible for insurance coverage. Insured depository institutions may maintain deposit liabilities in a foreign branch (''foreign deposits''), but these liabilities are not deposits in the statutory sense (for insurance or depositor preference purposes) for the time that they are payable solely at a foreign branch or branches. Insured depository institutions also may maintain liabilities in an international banking facility (IBF). An ''international banking facility deposit,'' as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), also is excluded from the definition of ''deposit'' in Section 3(l) and the depositor preference statute (12 U.S.C. 1821(d)(11)).

The FDIC anticipates questions regarding implementation of the functionality required by this rule. Questions and requests for telephonic meetings may be submitted via e-mail to *depositclaims@fdic.gov.*

[1] 70 FR 73652 (Dec. 13, 2005) and 71 FR 74857 (Dec. 13, 2006).

[2] 73 FR 2364 (January 14, 2008).