regulation is reopened until March 13, 1997.

DATES: Comments must be received by March 13, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, Fax Number (202) 720–5698. All comments should reference the docket number and the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Tichenor, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456: telephone: (202) 720–6862. Small businesses may request information on compliance with this proposed regulation by contacting: Jay Guerber, Marketing Order Information Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491; Fax number: (202) 720–5698.

SUPPLEMENTARY INFORMATION: A proposed rule was issued on December 23, 1996, and published in the Federal Register (61 FR 67499). The proposed rule would: (1) Remove banana/fingerling potatoes from provisions of the potato import regulation (import regulation) and; (2) reclassify potatoes used to make fresh potato salad as potatoes for processing. The comment period ended January 22, 1997.

The National Potato Council (Council) requested that additional time be provided for interested persons to analyze the proposed rule. The Council stated that members of the industry need additional time to review all available information before making final comments on the proposed rule. Reopening the comment period to March 13, 1997, would allow the Council and other interested persons more time to review the proposed rule, perform a more complete analysis, and submit any written comments.

This delay should not substantially add to the time required to complete this rulemaking action. Accordingly, the period in which to file written comments is reopened until March 13, 1997. This notice is issued pursuant to the Agricultural Marketing Agreement Act of 1937.

Authority: 7 U.S.C. 601–674.

Dated: February 5, 1997.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 97–3285 Filed 2–10–97; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 312

RIN 3064–AC01

Prevention of Deposit Shifting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rule.

SUMMARY: The proposed rule would implement a new statute to prevent the shifting of deposits insured under the Savings Association Insurance Fund (SAIF) to deposits insured under the Bank Insurance Fund (BIF) for the purpose of evading the assessment rates applicable to SAIF deposits.

DATES: Written comments must be received by the FDIC on or before April 14, 1997.

ADDRESSES: Written comments are to be addressed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to Room F–402, 1776 F Street, NW., Washington, DC 20429, on business days between 8:30 a.m. and 5 p.m. (FAX number: (202) 898–3838; Internet address: comments@FDIC.gov). Comments will be available for inspection in the FDIC Public Information Center, room 100, 801 17th Street, NW., Washington, DC, between 9:00 a.m. and 5:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Joseph A. DiNuzzo, Counsel, (202) 898–7349; Richard J. Osterman, Senior Counsel, (202) 898–3523, Legal Division; or George Hanc, Associate Director, Division of Research and Statistics, (202) 898-8719, Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. The Proposed Rule

A. The Funds Act and the Deposit Shifting Statute

The Deposit Insurance Funds Act of 1996 (Funds Act) was enacted as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Public Law 104–208, 110 Stat. 3009 *et seq.*, sections 2701–2711, and became effective September 30, 1996. The Funds Act provides for the capitalization of the SAIF through a special assessment on all depository institutions that hold SAIF-assessable deposits. Pursuant to this requirement, the FDIC recently issued a final rule imposing a special assessment on institutions holding SAIF-assessable deposits in an amount sufficient to increase the SAIF reserve ratio (SAIF reserve ratio) to the designated reserve ratio (DRR) of 1.25 percent as of October 1, 1996. 61 *FR* 53834 (Oct. 16, 1996), to be codified at 12 CFR 327.41.

Another provision of the Funds Act, entitled ''Prohibition on Deposit Shifting'' (deposit shifting statute), requires the Comptroller of the Currency, the Board of Directors of the FDIC, the Board of Governors of the Federal Reserve System, and the Director of the Office of Thrift Supervision (federal banking agencies) to take ''appropriate actions'' to prevent insured depository institutions and holding companies from ''facilitating or encouraging'' the shifting of deposits from SAIF-assessable deposits to BIF-assessable deposits for the purpose of evading the assessments applicable to SAIF-assessable deposits.[1] Funds Act, section 2703(d). The ''appropriate actions'' suggested in the deposit shifting statute are: denial of applications, enforcement actions and the imposition of entrance and exit fees.

The statute also specifies that its provisions shall not be construed to prohibit conduct or activity by any insured depository institution that is undertaken in the ''ordinary course of business'' and is not directed towards depositors of an insured depository institution affiliate of the insured institution.

The statute authorizes the FDIC to issue regulations, including regulations defining terms used in the statute, to prevent the shifting of deposits. The deposit shifting statute terminates on the earlier of December 31, 1999, or the date on which the last savings association ceases to exist.

B. Need for a Regulation on Deposit Shifting

The issuance of a regulation would provide guidance to the industry on the meaning and impact of the deposit shifting statute. This is particularly important in light of the relationship of the deposit shifting statute to section

[1] Although currently the range of risk-based assessments for BIF-assessable and SAIF-assessable deposits is the same, a higher assessment payable to the Financing Corporation must be paid on SAIF-assessable deposits. Thus, the overall assessment is higher for SAIF-assessable deposits than for BIF-assessable deposits.

5(d)(2) of the FDI Act (12 U.S.C. 1815(d))(section 5(d)(2)).

Section 5(d)(2) applies to conversions of depository institutions from one deposit insurance fund to the other. In relevant part, it provides that: (1) Institutions may not engage in a ''conversion transaction'' without the FDIC's prior approval; and (2) institutions that engage in an insurance-fund conversion must pay prescribed entrance and exit fees. Until recently, with certain specified exceptions, depository institutions were prohibited by section 5(d)(2) from engaging in conversion transactions. 12 U.S.C. 1815(d)(2)(A)(ii). The statute specified, however, that the ''conversion moratorium'' would expire when SAIF reached or exceeded its DRR. Because SAIF recently reached its DRR, the conversion moratorium no longer applies; therefore, an institution may convert from one fund to another as long as the FDIC approves the conversion and the institution pays the prescribed entrance and exit fees.

The requirement in section 5(d)(2) that converting institutions pay entrance and exit fees underscores the need to impose entrance and exit fees under the deposit migration statute: If insured depository institutions were permitted to shift deposits from a SAIF-insured institution to a BIF-insured institution outside the scope of section 5(d)(2), then—but for the existence of the deposit shifting statute—they would be able to evade the entrance and exit fees imposed by section 5(d)(2) for such fund conversions. The FDIC interprets the deposit shifting statute, therefore, in part, to be intended to preserve the integrity of the fee-payment requirements in section 5(d)(2). Indeed, as indicated above, the deposit shifting statue specifies that one of the ''appropriate actions'' the agencies may take to prevent deposit shifting is the ''imposition of entrance and exit fees as if such transaction qualified as a conversion transaction pursuant to section 5(d).''

C. Explanation of the Proposed Rule

The proposed rule is intended to interpret and implement the deposit shifting statute. The proposed rule consists of two basic provisions. The first would reiterate the requirement in the deposit shifting statute that the federal banking agencies deny applications and object to notices filed with them by depository institutions or depository institution holding companies if the agency determines that the transaction for which the application or notice is filed is for the purpose of evading assessments imposed on insured depository institutions with respect to SAIF-assessable deposits. The second provision of the proposed rule would establish a presumption under which entrance and exit fees would be imposed upon depository institutions for deposits that are shifted from SAIF-assessable deposits to BIF-assessable deposits within the contemplation of the deposit shifting statute.

1. Applications

As noted, the proposed rule reiterates the statutory requirement that the federal banking agencies deny applications or object to notices if the transaction for which the application or notice is filed is for the purpose of evading SAIF assessments. The proposed regulation is drafted to encompass any type of application or notice that might involve deposit shifting. It is anticipated that the respective agency would determine the purpose of the application or notice from the materials submitted by the depository institution or holding company. For example, certain types of applications require the filing of a business plan which describes the corporate strategy for and objective of the proposed transaction. If the agency's review of the business plan indicates that the purpose of a proposed transaction is to shift deposits in order to evade SAIF assessments, then the agency would deny the application. If a business plan is not required to be filed with an application that might raise a concern about deposit shifting, then the reviewing agency would otherwise determine, based on a review of the materials provided with the application and other available information, whether the underlying purpose of the application is to shift deposits within the contemplation of the deposit shifting statute. All such application determinations would be made on a case-by-case basis within the agency's discretion. It is also likely that the agencies would condition application approvals on compliance with the requirements of the deposit shifting statute.

2. Entrance and Exit Fees for Deposit Shifting

The proposed rule would establish a presumption under which entrance and exit fees would be imposed upon depository institutions that engage in deposit shifting for the purpose of evading SAIF assessments. The amounts of the entrance and exit fees would be those prescribed in part 312 of the FDIC's regulations (12 CFR part 312). Under the proposed rule the FDIC would use a rebuttable-presumption approach to determine whether depository institutions have engaged in deposit shifting and, therefore, must pay entrance and exit fees. To implement this approach the FDIC would identify all bank holding companies and savings and loan holding companies with both BIF- and SAIF-member subsidiaries and determine each holding company's aggregate average percentage of BIF and SAIF deposits for a period of time prior to the enactment of the deposit shifting statute on September 30, 1996. The FDIC would then compare that average to the percentage of each such holding company's BIF and SAIF deposits for each quarter subsequent to the enactment of the deposit shifting statute. The FDIC would determine whether any increase in the holding company's percentage of BIF deposits and decrease in its percentage of SAIF deposits exceeded a normal range relative to the holding company's historical average and industry averages.

If the FDIC determines, on a holding-company-by-holding-company basis, that a BIF-insured institution's increase in BIF-assessable deposits and decrease in SAIF-assessable deposits is above the normal range and is not attributable to factors other than deposit shifting, then, after consulting with each institution's primary federal regulator (where the FDIC is not the institution's primary federal regulator) the FDIC would apply the rebuttable presumption that the increase in BIF-assessable deposits resulted from deposit shifting encouraged or facilitated by the applicable depository institutions or their holding company for the purpose of evading SAIF assessments.[2]

[2] To determine whether a holding company should be subject to further scrutiny under the proposed rule, the FDIC would compute an average ratio of BIF-insured deposits to total deposits for all non-Oakar affiliates of the holding company as of the fourth quarter of 1994. This value would be computed as the average ratio of BIF-insured deposits for the period from the third quarter of 1989 to the fourth quarter of 1994, or the average ratio of BIF-insured deposits from the last quarter that the holding company acquired or sold a non-Oakar affiliate through the fourth quarter of 1994. The average ratio would then be subtracted from the ratio of BIF-insured deposits to total deposits in each quarter of 1995 and subsequent years to yield an adjusted BIF-insured deposit ratio. The adjusted ratio for each holding company would be divided by the standard deviation of adjusted ratios of BIF-insured deposits for all holding companies for the entire period beginning with the first quarter of 1995. The resulting value is compared with the value 1.65. If it exceeds 1.65, and assuming that the adjusted ratio is a normal random variable, there would be less than a 5 percent chance that the change in the BIF-insured deposit ratio is a random event. Holding companies for which the adjusted ratio of BIF-insured deposits divided by the standard deviation of adjusted ratios for all holding companies after 1994 exceeded 1.65 would be subject to further scrutiny under the proposed rule.

The FDIC would have 90 days after the report date (currently the end of a calendar quarter) as of which the applicable quarterly Consolidated Report of Condition and Income or Thrift Financial Report (financial reports) of affiliated BIF-member and SAIF-member depository institutions must be filed in which to notify the institutions of the FDIC's determination and the intended imposition of the entrance and exit fees. The depository institutions would then have 30 days from the date of the FDIC's notification to provide to the FDIC information and materials to demonstrate that the increase in BIF-assessable deposits was attributable to factors other than deposit shifting encouraged or facilitated by the depository institutions or their holding company. Mergers, acquisitions and changes in market conditions would be among the types of factors that may be sufficient to rebut the presumption of intentional deposit shifting.

The FDIC would review the materials and information submitted, consult with the institutions' primary federal regulator(s) (if other than the FDIC), determine whether the entrance and exit fees should be imposed and, within 60 days of receiving the institutions' materials and information, notify the institutions of the FDIC's determination. If the determination is that fees must be paid, then the institutions would be required to remit payment to the FDIC within 15 days of the notice. The institutions then would have 30 days after such payment is made to appeal the determination to the FDIC.

The details of the procedures for submitting materials and information to attempt to rebut the presumption of deposit shifting would be provided in writing to depository institutions when they are informed of the FDIC's intention to impose such fees.

D. Effective Date

The FDIC's review of financial reports for purposes of the possible imposition of entrance and exit fees under the proposed rule would begin with the reports filed as of the end of the first full quarter following the effective date of the final rule on deposit shifting. Concurrent with this rulemaking effort, the FDIC is considering what, if any, action it should take to impose the deposit shifting statute for the period between the enactment date of the deposit shifting statute (*i.e.*, September 30, 1996) and the effective date of the final rule on deposit shifting. Any such action would be on a case-by-case basis in consultation with the institutions' primary federal regulator(s), if other than the FDIC.

E. Rationale for the Proposed Rule

The FDIC believes, preliminarily, that the proposed rule is the most effective means of enforcing the requirements of the deposit shifting statute without imposing an undue burden on depository institutions. A regulation attempting to restrict and control depository institutions' conduct and activities, including advertising, would be difficult to design, implement and enforce. Moreover, such restrictions and controls might impose a significant regulatory burden on the industry. In addition, FDIC efforts to control and restrict advertising by depository institutions might raise First Amendment commercial free speech issues.

The FDIC believes, preliminarily, that the approach used in the proposed rule strikes the proper balance of enforcing the law and limiting the regulatory burden on depository institutions.

II. Request for Public Comment

The FDIC is hereby requesting comment during a 60-day comment period on all aspects of this proposed rule. Specifically, comments are requested on alternate means of implementing and enforcing the deposit shifting statute. For example, could and should the statute be applied on a case-by-case basis without an implementing regulation? And, if applied on a case-by-case basis, what factors should be considered in determining whether prohibited deposit shifting has occurred? More specifically, what depository institution conduct and activities should the FDIC interpret as encouraging or facilitating deposit shifting?

Comments also are specifically requested on the meaning of the rule of construction provided in the deposit shifting statute that the statute shall not be construed as prohibiting conduct or activity ''undertaken in the ordinary course of business * * * and * * * not directed towards the depositors of an insured depository institution affiliate * * *.'' The FDIC would have to interpret that rule of construction in considering whether to impose entrance and exit fees upon depository institutions.

III. Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) are contained in this proposed rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

IV. Regulatory Flexibility Act

The FDIC estimates that, currently, there are 135 bank holding companies and savings and loan holding companies that own both BIF-member and SAIF-member affiliates. Those holding companies, in turn, own approximately 870 banks and thrifts, of which about 250 have assets of $100 million or less. Based on the FDIC's calculations and projections, an insubstantial number of those 250 institutions would be subject to the rebuttable presumption and other provisions of this proposed rule. Thus, the Board hereby certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities [3] within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, the provisions of that Act regarding an initial and final regulatory flexibility analysis (*Id.* at 603 & 604) do not apply here.

List of Subjects in 12 CFR Part 312

Bank deposit insurance, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby proposes to amend part 312 of title 12 of the Code of Federal Regulations as follows:

PART 312—ASSESSMENT OF FEES UPON ENTRANCE TO OR EXIT FROM THE BANK INSURANCE FUND OR THE SAVINGS ASSOCIATION INSURANCE FUND AND TREATMENT OF APPLICATIONS AND NOTICES AND THE IMPOSITION OF ENTRANCE AND EXIT FEES IN CONNECTION WITH DEPOSIT SHIFTING

1. The part heading of Part 312 is revised to read as set forth above.

2. The authority citation for Part 312 is revised to read as follows:

Authority: 12 U.S.C. 1815(d), 1819.

3. Section 312.11 is added to read as follows:

§ 312.11 Deposit shifting.

(a) *Purpose and scope.* The purpose of this section is to implement section 2703(d) of Public Law 104–208 which became effective on September 30, 1996 (110 Stat. 3009 et seq.). This section applies to all insured depository

[3] The definition of ''small business entity'' derives from the definition of a ''small business concern.'' Part 121 of the Small Business Administration's rules and regulations (13 CFR part 121) provides that any national bank or commercial bank, savings association, or credit union with assets of $100 million or less qualifies as a small business concern.

institutions and depository institution holding companies.

(b) *Applications and notices.* Applications and notices filed by an insured depository institution, a proposed or newly organized insured depository institution or a depository institution holding company shall be denied or objected to, respectively, by the appropriate federal banking agency if the agency determines, in its discretion, that the proposed transaction for which the application or notice is filed is for the purpose of evading assessments imposed on the applicable insured depository institutions with respect to SAIF-assessable deposits under section 7(b) of the Act and section 21(f)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1441(f)(2)).

(c) *Imposition of entrance and exit fees.* (1) A depository institution that encourages or facilitates the shifting of deposits from SAIF-assessable deposits to BIF-assessable deposits (as defined in section 21(k) of the Federal Home Loan Bank Act (12 U.S.C. 1441(k)) for the purpose of evading SAIF assessments shall pay entrance and exit fees, as provided for in §§ 312.1 through 312.10, as if such deposit shifting constituted a ''conversion transaction'' under section 5(d) of the Act (12 U.S.C. 1815(d)).

(2) Subject to the FDIC's determination based on the methodology indicated in paragraph (c)(3) of this section, an abnormal increase in a depository institution's BIF-assessable deposits and a commensurate decrease in SAIF-assessable deposits of an affiliate of that depository institution within the same calendar quarter shall be presumed to be the result of deposit shifting for the purpose of evading SAIF assessments. The entrance and exit fees to be imposed under paragraph (c)(1) of this section shall apply to the dollar amount of the deposits shifted unless, pursuant to paragraph (c)(5) of this section, the affiliated depository institutions rebut the presumption that the increase in BIF-assessable deposits and the commensurate decrease in SAIF-assessable deposits resulted from deposit shifting between the affiliated institutions.

(3) For purposes of this section, the FDIC shall obtain deposit data from quarterly Consolidated Reports of Condition and Income filed by insured depository institutions with the FDIC and from Thrift Financial Reports filed by insured savings associations with the Office of Thrift Supervision, starting with the reports filed for the period ending [on the last day of the first full calendar quarter after the effective date of the final rule on deposit shifting].

(4) The FDIC, in its discretion, will determine whether to presume that the increase in an institution's BIF-assessable deposits and the commensurate decrease in the affiliated institution's SAIF-assessable deposits resulted from deposit shifting intended to evade SAIF assessments by using statistical averages and trends for the applicable affiliated depository institutions and industry averages and trends, and other information available to the FDIC. In determining whether to apply the rebuttable presumption, the FDIC will consult with the appropriate federal banking agency(ies) in cases where the FDIC is not the appropriate federal banking agency.

(5) A depository institution will be deemed to have rebutted the presumption of deposit shifting if it provides to the FDIC information and materials that the FDIC, in its discretion, determines demonstrate that the increase in BIF-assessable deposits and the commensurate decrease in SAIF-assessable deposits resulted from factors other than efforts by the depository institutions or their holding company to encourage or facilitate the shifting of deposits for the purpose of evading SAIF assessments.

(6) The FDIC shall notify, in writing, the applicable depository institutions of the intended imposition of entrance and exit fees within 90 days after the report date of the Consolidated Reports of Condition and Thrift Financial Reports from which the FDIC determines to apply the rebuttable presumption under paragraph (c)(4) of this section. The depository institutions shall have 30 days from the date of issuance of such notification to provide materials and information to the FDIC to rebut the aforementioned presumption. The FDIC shall within 60 days of the receipt of the materials and information consult with the appropriate federal banking agency(ies), if the FDIC is not the appropriate federal banking agency, and determine and notify the depository institutions whether they must pay entrance and exit fees for deposit shifting. If the FDIC indicates in such notice that the depository institutions must pay entrance and exit fees, those fees shall be paid within 15 days of the receipt of such notice. Within 30 days of the payment of the fees to the FDIC, the depository institution(s) may request a review of the determination by the FDIC. The details of the procedures for submitting materials and information to attempt to rebut the presumption of deposit shifting will be provided in writing to the depository institutions as part of the initial notice of the intended imposition of entrance and exit fees.

(d) *Termination date.* The provisions of this section shall terminate on the earlier of December 31, 1999 or the date as of which the last savings association ceases to exist.

By the order of the Board of Directors.

Dated at Washington, D.C., this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 97–3306 Filed 2–10–97; 8:45 am]

BILLING CODE 6714–01–P

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12 CFR Part 328

RIN 3064–AB99

Advertisement of Membership

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is proposing to amend its regulation entitled ''Advertisement of Membership''. The proposed rule would: Consolidate the provisions that require insured institutions to display official signs; extend the official advertising statement that is currently required for insured banks to all insured depository institutions; streamline the exceptions to the required use of the official advertising statement; prohibit the use of the official advertising statement in advertisements concerning nondeposit investment products or similar nondeposit products; and specifically delegate authority to approve the translation of the official advertising statement to certain FDIC officials. The FDIC is inviting comment on all aspects of its proposal as well as certain alternatives to its proposal as discussed herein. In addition, the FDIC is soliciting comment with respect to issues raised regarding the applicability of this regulation to insured depository institutions that are transmitting information to, or conducting business with, existing or potential customers, over a computer network, such as the Internet.

DATES: Written comments must be received by the FDIC on or before April 14, 1997.

ADDRESSES: Written comments shall be addressed to Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to Room F–402, 1776 F Street, N.W., Washington, D.C., 20429, on business days between 8:30