FDIC to establish by January 1, 1994, a risk-based assessment system based on:

(i) the probability that the deposit insurance fund will incur a loss with respect to the institution, taking into consideration the risks attributable to—

(I) different categories and concentrations of assets;

(II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent;

(III) any other factors the Corporation determines are relevant to assessing such probability;

(ii) the likely amount of any such loss; and

(iii) the revenue needs of the deposit insurance fund.

Within the scope of these broad factors, FDIC was granted complete discretion to design a risk-based assessment system. *See, i.e.,* S. Rep. No. 167, 102d Cong., 1st Sess., 57 (1991). One statutory restraint, however, is that the system must be designed so that as long as the BIF reserve ratio *remains* below the DRR, the total amount raised by semiannual assessments on members cannot be less than the total amount resulting from a flat rate of 23 basis points. FDI Act, section 7(b)(2)(E). This provision currently applies, but will cease to be operative when the BIF meets the DRR. This provision may again become operative if the reserve ratio *remains* below the DRR at some future time. The Board interprets the minimum assessment provision of section 7(b)(2)(E), which requires weighted average assessments of 23 basis points, as applying only when the reserve ratio *remains* below the DRR for at least a year.

Any time the reserve ratio goes below the DRR, the Board must either set rates 1) to restore the reserve ratio within one year or 2) in accordance with a recapitalization schedule not to exceed fifteen years. FDI Act, section 7(b)(3)(A). Because the Board has the discretion to determine the rate necessary to restore the reserve ratio to the DRR within one year, it is reasonable to conclude that the minimum assessment provision (which mandates the Board to set rates sufficient to provide revenue equivalent to that generated by an annual flat rate of .0023) would not apply until the reserve ratio stays below the DRR for at least one year. Moreover, it is unlikely that Congress intended such a drastic result if the DRR falls slightly below the target DRR, when a small adjustment in the assessment schedule for the following semiannual period could bring the fund back up to the DRR. In such a case, if the minimum assessment provision applied, the result would be an enormous overcollection of assessment revenue which, as explained below, the FDIC lacks the authority to rebate.

*D. Rebates*

It appears, based on the statutory framework and legislative history of section 7 of the FDI Act, that the FDIC has not had authority to provide rebates since the permanent risk-based assessment system took effect on January 1, 1994. Prior to FDICIA, two provisions of section 7 expressly addressed rebates or assessment credits, section 7(d), Assessment Credits, and section 7(e), Refunds to Insured Depository Institutions.

In section 302(e)(3) of FDICIA, Congress removed the assessment credit provisions of section 7(d) of the FDI Act and at the same time established a rate-setting scheme requiring the Board to set rates to maintain the reserve ratio at the DRR. Pub. L. 102–242, 105 Stat. 2236, 2349. As is clear from the statutory history of assessment credits, such credits were intended as a means to provide flexibility to keep the fund balance from growing too large at a time when assessment rates were set in the statute and all institutions paid the same flat rate. See generally, S. Rep. No. 1269, 81st Cong., 2nd Sess. 1–2 (1950); *Cong. Rec.* H10648 *et seq.* (daily ed. July 19, 1950) (statement of Mr. McCormack); Federal Deposit Insurance Corporation, The First Fifty Years at 58–60, Wash., D.C. 1984. Because of the large number of bank failures in the mid-to-late 1980s, Congress gradually provided the FDIC with greater flexibility to determine the timing and amount of assessment rates. This culminated in the requirement in FDICIA that the FDIC implement a risk-based assessment system. FDICIA also provided the FDIC with the flexibility, after the DRR was reached, to set assessment rates to maintain the DRR.

1. Statutory History of Section 7(d)

Section 7(d), 12 U.S.C. 1817(d), was enacted in the FDI Act in 1950. Public Law 797, Ch. 967, 64 Stat. 873. At that time all banks paid a flat assessment rate of 0.83 percent. Due to favorable economic circumstances, the fund had built up excess reserves, but the FDIC lacked the authority to return the excess funds to the industry. Congress adopted an assessment credit formula to credit to insured banks 60 percent of the fund's net assessment income and to transfer the remaining 40 percent to the Corporation's surplus (Permanent Insurance Fund). ''The committee desires to emphasize that the formula thus provides a flexible method for granting a reduction in the assessments paid by banks in normal years, and in bad years provides for payment of the full assessment if needed. This should reasonably protect the insurance fund in years of extraordinary losses.'' H. Rep. No. 2564, 81st Cong. 2nd Sess. (1950) reprinted in 1950 U.S.C.C.S. 3770. This formula returned net assessment revenues only; it did not extend to investment income.

The percentage of net assessment income rebated to insured banks was modified from time to time as warranted given the constraints of a statutory flat assessment rate system. In the Consumer Checking Account Equity Act of 1980, enacted as part of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 132, Congress tied the amount of the rebate to the status of the reserve ratio. If the reserve ratio was less than 1.10%, the amount transferred to the Corporation's capital account was required to be increased to an amount (not to exceed 50% of net assessment income) that would restore the ratio to at least 1.10%. If the reserve ratio exceeded 1.25%, the amount transferred to the capital account could be reduced by such amount that would keep the reserve ratio at not less than 1.25%; finally, if the reserve ratio exceeded 1.40%, the amount transferred to the capital account was required to be increased such that the reserve ratio would be not more than 1.40%. *Id.* at section 308(d).

In section 208 of FIRREA, Congress specified certain flat annual assessment rates to be in effect through 1991, but provided the FDIC with authority to increase those rates as needed to protect the BIF and to raise the DRR from 1.25% to a maximum of 1.50% as justified by circumstances raising a significant risk of substantial future losses. In the event the Board increased the DRR above 1.25%, it was required to establish supplemental reserves for that increased revenue, the income from which was to be distributed annually to BIF members through an Earnings Participation Account. (This was the first time Congress provided any mechanism for returning to the industry any investment income.) In addition, to the extent the supplemental reserves were not needed to satisfy the next year's projected DRR, those amounts were to be rebated. FIRREA, section 208(4). Congress also barred any assessment credits until the DRR was achieved. When forecasts indicated the DRR would be achieved in the following year, the Board was required to provide assessment credits for that following year equal to the lesser of: (1) the amount necessary to