reduce the BIF reserve ratio to the DRR; or (2) 100 percent of the net assessment income to be received in that following year. *Id.*

In sections 2002 and 2003 of the Assessment Rate Act, Congress provided the FDIC with greater flexibility in both the timing and amount of assessment rates. It also eliminated the requirement that the investment income on the supplemental reserves be distributed annually to BIF members. Assessment Rate Act, section 2004. Because the Board did not increase the DRR above 1.25%, the provision authorizing Earnings Participation Accounts and supplemental reserves never became effective.

In FDICIA, Congress provided for establishment of a risk-based assessment system that, after the DRR was achieved, would provide the FDIC with much greater flexibility to set assessment rates. In 1990, Congress had already provided the FDIC with the authority to adjust assessment rates upward to ensure that the BIF received sufficient revenue. In FDICIA, Congress intended that same rate adjustment authority to operate in lieu of providing assessment credits in the event that the established rates resulted in collection of excess assessment revenue. Therefore, Congress eliminated the assessment credit provisions of section 7(d) in their entirety as being obsolete because the ability to adjust rates would take the place of a rebate mechanism.

The discussion of section 212(e)(3) in the Senate Report on S. 543 (which became the language of section 302(a) of FDICIA) describes Congress' intent:

> Section 212(e)(3) replaces current section 7(d) with a new section 7(d) recodifying current section 7(b)(9). The deleted text, providing for assessment credits to insured depository institutions when deposit insurance fund reserve ratios exceed designated reserve ratios, is obsolete in light of the standards for establishing assessments set forth in new section 7(b)(2)(A)(i) [setting rates to maintain at the DRR]. Under section 7(b)(2)(A)(i), funds that, under current section 7(d), would have been rebated to insured depository institutions through assessment credits will now be rebated through reduced assessments.

138 *Cong. Rec.* S2073 (daily ed. Feb. 21, 1992).

This position finds further support in the language of section 104 of FDICIA (in effect December 19, 1991 through December 31, 1993) which required the Board to set rates to maintain the reserve ratio at the DRR when the reserve ratio equals or exceeds 1.25%. FDICIA, section 104(a) amending section 7(b)(1)(C) of the FDI Act. Clearly, Congress contemplated a situation in which the reserve ratio would rise above the DRR, but nonetheless eliminated rebate authority. Thus, Congress appears to have intended the rate setting process to be the appropriate mechanism for adjustment.

2. Section 7(e) Does Not Provide Rebate Authority

An argument has been raised that section 7(e), 12 U.S.C. 1817(e), authorizes the FDIC to provide rebates of fund assets to keep the reserve ratio at 1.25%. Section 7(e) was enacted in 1950 in the Federal Deposit Insurance Act, along with section 7(d), assessment credits. Section 7(e) has been amended only once—in FIRREA, by changing ''insured bank'' to ''insured depository institution''.

Section 7(e) provides that the FDIC:

> (1) may refund to an insured depository institution any payment of assessment in excess of the amount due to the Corporation or (2) may credit such excess toward the payment of the assessment next becoming due from such bank and upon succeeding assessments until the credit is exhausted.

By its terms, the statutory language contemplates that such refunds or credits are to be made in respect of overpayments. The report accompanying the legislation describes section 7(e) as ''expressly authoriz[ing] the Corporation to refund any overpayments of assessments or to credit such overpayments on future assessments''. H. Rep. No. 2564, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S.C.C.S. 3771. Because section 7(d) contained express authority to provide rebates, Congress appears to have intended in section 7(e) to provide the FDIC with alternative methods (refunds or credits) to correct computational errors or other forms of overpayments outside of the rebate context so that the FDIC could return funds which clearly did not belong to it.

Because section 7(d) providing assessment credits was adopted as part of the same legislation, an interpretation that section 7(e) also provides the same authority would mean that the provisions were redundant. Rather, each provision has independent meaning and purpose if section 7(d) is interpreted to provide the substantive authority to provide rebates, while section 7(e) grants the FDIC the discretion to choose the method of refunding overpayments, i.e., by either providing an assessment credit or a refund check. Moreover, section 7(e) has never been interpreted as providing rebate authority precisely because until January 1, 1994 when the statutory risk-based assessment system became effective, that authority existed in section 7(d). Given the intent of the drafters as expressed in the section-by-section analysis of S. 543, that rebates will be provided through reduced assessment rates, an interpretation that section 7(e) provides rebate authority outside its historical context would seem to be contrary to Congressional intent.

In sum, the Board believes that the better interpretation of the statute is that the FDIC has no authority to grant rebates and that to do so would be in violation of the statute and contrary to the legislative history. As discussed above, this position is based on:

(1) the statutory history of sections 7(d) and (e); 2) the fact that Congress deleted the rebate authority in section 7(d); and (3) the legislative history indicating that Congress intended that lower rates would be the substitute for rebates.

III. Proposed Assessment Rate Schedule

The Board proposes to set a new assessment rate schedule with a spread of 4 to 31 basis points (see Table 1). The Board further proposes to make adjustments to this schedule by an adjustment factor not to exceed 5 basis points.

The following definitions are used in the proposal:

Assessment Schedule: A set of rates based on the risk classification matrix with a spread of 27 basis points between the minimum rate which would apply to institutions classified as 1A and the maximum rate which would apply to institutions classified as 3C.

Spread: The difference between the minimum and maximum rate in any given assessment schedule.

Adjustment Factor: The maximum number of basis points or a fraction thereof by which the Board would be authorized to increase or decrease the proposed 4–31 basis point assessment schedule without going through the rulemaking process.

A. Statutory Factors

As discussed in Section II, pursuant to sections 7(b)(1) and 7(b)(2)(A)(ii), the Board is required to take into consideration the following factors when setting risk-based assessments: the probability of loss, the amount of such loss, expected operating expenses, case resolution expenditures and income, the effect of assessments on members' earnings and capital, and any other factors that the Board may deem appropriate. These factors are discussed below.