The FDIC received only a few comments on each of these areas. In general, commenters favored the option of using a separate mailing, the requirement that disclosures be ''prominent and conspicuous'', and the ability to include other related information in the disclosure—such as explaining why an institution had a capital deficiency. The respondents opposed requiring an institution to obtain a written acknowledgement from employee benefit plan depositors or requiring that the disclosures be part of the deposit agreement.

The FDIC has decided not to establish any specific forms or procedures on the required disclosures except for a general requirement that the required disclosures be ''clear and conspicuous.'' This phrase is believed to be more representative of the standard that disclosures must be in a reasonably understandable form. It does not require that disclosures be segregated from other material or located in any particular place or be in any particular type size.

Institutions may, at their discretion, use any of the above or other disclosure methods as long as it meets the ''clear-and-conspicuous'' standard and the time requirements. For example, an institution that is opening an employee benefit plan account may provide a separate written disclosure statement to the customer or reference the specific section of the deposit agreement that contains the disclosure information.

A reasonableness standard will be used when reviewing compliance with this section of the regulation. Institutions should consider the level of sophistication of a depositor when providing required disclosures to assure that they are communicated in a clear and understandable fashion. The FDIC believes that, in general, managers and administrators of employee benefit plans are more sophisticated financial persons than the average depositor.

F. Discussion of Sample Disclosures

The FDIC requested comment on whether the final rule should include a specific notice that institutions would have to provide to employee benefit plan depositors when an institution's PCA capital category changed from ''well capitalized'' to ''adequately capitalized'' or to a level below ''adequately capitalized.'' The majority of commenters specifically addressing this issue suggested that the FDIC provide sample language in the final rule but recommended that any sample disclosures be optional and that additional information be permitted to be disclosed to the employee benefit plan depositor—such as the reasons for an institution's capital deficiency. Other commenters expressed concern about the tone of the sample language included in the proposed rule while others suggested alternate language.

One commenter recommended that the FDIC also provide a sample disclosure when a depositor opens an employee benefit plan account. Other commenters suggested a disclosure that only informs the depositor whether employee benefit plan deposits would be eligible for ''pass-through'' coverage under the regulations.

Based on these comments, the FDIC has provided below two sample disclosure notices. One applies when a depositor opens an employee benefit plan account and includes a description of the requirements for ''pass-through'' insurance coverage. The other is when new, renewed or rolled-over employee benefit plan deposits would not be eligible for ''pass-through'' insurance coverage.

Additional information can be included with the disclosure as long as the overall disclosure statement meets the clear-and-conspicuous standard in the regulation. This may include, for example, additional information on an institution's capital deficiency and when, in the institution's opinion, the deficiency is expected to be corrected.

A few commenters noted that the sample disclosure statements indicate that the FDIC is not bound, in its insurance determinations, by information provided by insured institutions to depositors on the eligibility of the employee benefit plan deposits to ''pass-through'' insurance coverage. It is correct that the FDIC is not bound in its insurance determinations by information provided by an insured institution to its customers. The FDIC also is not responsible for or bound by a depository institution's failure to provide the required disclosure statements.

Although it may be helpful for an insured institution to inform employee benefit plan depositors that the FDIC is not bound by information provided by an insured institution to its customers, the Board believes the inclusion of that information in the required disclosure statements should be optional. The thrust of the disclosure requirements imposed by the final rule is to alert employee benefit plan depositors to the rules regarding ''pass-through'' insurance coverage and, in particular, to inform them when such coverage is no longer available. Requiring insured institutions to indicate whether the FDIC would be bound by incorrect information in the disclosure statements goes beyond the necessary scope of the required disclosure.

G. Separate Enforcement Provision

The FDIC requested comment on whether a free-standing enforcement and/or penalty provision should be included in the final rule. The few commenters that addressed this question requested that any sanctions imposed be limited to cases of intentional disregard or willful noncompliance and that civil money penalties should not be assessed. In the proposed rule, the FDIC indicated that violations of regulatory requirements would be subject to the full array of enforcement sanctions (including the imposition of civil monetary penalties) contained in section 8 of the FDI Act (12 U.S.C. 1818).

The FDIC has decided that separate enforcement provisions are not required to enforce the requirements of the final rule. The current provisions in section 8 of the FDI Act (12 U.S.C. 1818) are considered adequate and will be used to enforce compliance when deemed appropriate.

H. Inclusion of Information in Call Reports

The FDIC requested comment on whether the capital ratios and PCA category of an institution should be made a general disclosure requirement in, for example, quarterly Consolidated Reports of Condition and Income (Call Reports). In this way, existing and prospective employee benefit plan depositors and other interested parties would be able to obtain an official, publicly available statement of an institution which clearly indicates this important information.

Of the 15 commenters that addressed this issue, 12 favored adding the information to the Call Reports. Those in favor suggested that including this information would provide depositors with an efficient and independent means of obtaining relevant financial data on an insured institution. They also recognized that employee benefit plan administrators have a fiduciary obligation to determine the capital status of an insured institution. Two commenters also recommended that this information be disclosed on Thrift Financial Reports (TFRs). Two others suggested that this information be in lieu of the required disclosures in the proposed rule. One commenter specifically opposed any revision to the Call Report indicating that plan administrators had the sophistication to determine an institution's capital ratios and PCA capital category.